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Foreword by: Mr. Sahil Kanuga

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TABLE OF CONTENTS

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FOREWORD

It is both a privilege and a pleasure to pen the foreword for Volume II, Issue 2 of the Journal on Corporate Laws and Commercial Regulations. Having served on the Board of Advisors, I have observed the Journal's progression from an ambitious endeavour to an indispensable resource, one that shapes the evolving contours of India's corporate and commercial legal ecosystem.

This latest edition arrives at an inflection point. The discourse around commercial regulation in India is undergoing rapid transformation, in the shape of statutory amendments, market upheavals, and a renewed focus on transparent, efficient, and resilient legal frameworks. In this context, the CLCR Journal's commitment to curating scholarship that both interrogates and anticipates these changes is most commendable.

What distinguishes this issue is not merely the breadth of its topics, but the depth of critical engagement. From incisive critiques of key amendments to the IBBI Regulations, to empirical analyses illuminating the complexities of insolvency resolution under the IBC, the articles presented here reflect a mature and multidimensional understanding of the field. Particularly compelling are contributions dissecting the intricacies of predatory pricing in digital markets, the evolving doctrine of asset disaggregation, and the challenges of reconciling sectoral regulations with commercial litigation frameworks.

The CLCR Journal's editorial team deserves great credit for its steadfast pursuit of excellence and for nurturing a community where both emerging voices and established experts can engage in rigorous debate. It is this ongoing dialogue, rooted in scholarship and relevance that ensures the Journal's place at the forefront of legal thought leadership.

I extend my congratulations to all the authors whose works form the bedrock of this volume. Their scholarship does not merely inform, it challenges assumptions and charts new trajectories. I am confident that readers whether practitioners, academics, or policy architects will find in these pages both illumination and inspiration for the complex challenges ahead.

With every new edition, the CLCR Journal reaffirms its role as a catalyst for thoughtful discourse and a beacon for those committed to legal innovation. I am honored to contribute this foreword and commend this volume to all who seek to both understand and shape the future of corporate and commercial law in India.

Sahil Kanuga
Partner, Cyril Amarchand Mangaldas

NOTE FROM THE EIC'S DESK

Dear Readers,

It is with equal measures of pride and humility that we present to you the second volume, second issue of the Journal on Corporate Law and Commercial Regulations (CLCR). What began as an ambitious student-led initiative now steadily grows into an institution in its own right where one that seeks not merely to publish but to provoke thought, stimulate debate, and add a modest yet meaningful voice to the evolving discourse on corporate and commercial law.

At the outset, we reiterate our deepest gratitude to our Hon'ble Patron, Prof. (Dr.) Dilip Ukey, whose vision for academic growth continues to light our path. We remain indebted to Dr. Kiran Rai, our Faculty Coordinator and Director of CTRCR, whose patient mentorship and unwavering faith ensure that this Journal does not remain a mere student experiment, but a serious academic platform. Our distinguished Board of Advisors, too, deserves our sincerest appreciation. Their guidance reminds us that scholarship thrives best when nurtured by those who have walked the path before us.

This issue owes much to the diligence of our Peer Review Panel and a personal huge shoutout to my fellow editors. Law school, as we know, is no stranger to deadlines, submissions, and the occasional existential crisis, yet the team has somehow managed to juggle it all while curating scholarship that is both timely and rigorous. If corporate law teaches us anything, it is the art of balancing competing interests, and my colleagues exemplify that balance with enviable ease.

The articles in this issue reflect not just the dynamism of corporate and commercial law, but also the curiosity and boldness of young scholars unafraid to question settled positions. From regulatory reforms to the intricacies of transactional practice, each contribution represents an attempt to grapple with law as it exists, but what corporate law ought to be. The first article is by Sumit Agrawal, *"Securities Regulators: Aligning Sustainability with Core Mandates,"* in which he persuasively argues for sustainability as a non-negotiable component of regulatory functions, while simultaneously highlighting the compliance and disclosure burdens this integration entails.

The present issue contains the meritorious articles from our recently concluded *First Edition of the National Article Writing Competition, 2025 on Insolvency and Bankruptcy Laws*, along with several other thought-provoking contributions. We begin with Raghav Sharma's article, *"Safeguarding the Dissent: An Empirical Inquiry into Resolution Payouts under the IBC,"* which situates its inquiry in the wake of landmark cases such as *Swiss Ribbons* and *Essar Steel*. By empirically analyzing whether dissenting secured financial creditors fare worse than their assenting counterparts, the piece explores the tension between differential treatment and equitable principles in insolvency jurisprudence.

Following this, Vaidik Sohani and Vansh Garg in *"Turbulence & Transition: Rethinking the Role of IBC in Airline Insolvency"* examine industry-specific challenges in aviation, proposing a hybrid model of fast-track mechanisms, policy recalibrations, and safeguards inspired by both domestic and comparative legal frameworks, including the U.S. Chapter 11 system. Complementing this discussion, Shristi Goswami and Shreyas Ranjan in *"Whether Fragmentation or Reform: Evaluating Differential Treatment of Lessors through the Aircraft Objects Act and its Interplay with IBC"* assess the transformative impact of the Aircraft Objects Act and the adoption of Alternative A of the Cape Town Convention, especially in its ability to reshape lessor rights by bypassing the moratorium under Section 14 of the IBC.

The aviation theme is carried further in Diya Chandwani and Abhishek Bansal's piece, *"From Moratorium to Repossession – Rethinking Aircraft Lessors' Rights Post Jet Airways and Go First under the Aircraft Objects Act,"* which argues for evolving India's insolvency regime towards treaty-compliant certainty that ensures global investor confidence in the aviation sector. Mansi Gupta, in *"From Full Entity to Asset-Wise Resolution: A New Phase in IBC Implementation – Introducing the Asset Disaggregation Doctrine and the VSA Test,"* contributes a pioneering academic framework for asset-wise resolution, positing that doctrinal structuring can maximize value realization and provide a more efficient revival strategy than whole-entity resolutions in certain cases. The regulatory reform discourse continues in Mohammad Shajee Abbas Naqvi and Shreya Malviya's article, *"Streamlining or Efficiency Compromised? A Critical Analysis of the May 2025 Amendment made to IBBI Regulations for CIRP,"* which critically examines whether frequent amendments, despite their promise of transparency and efficiency, risk undermining systemic stability.

The issue also broadens its scope beyond insolvency. Vivek Kumar, in *"The Digital Market Dilemma: An India-Centric Study of Predatory Pricing,"* analyses the unique vulnerabilities of

Indian digital markets and the difficulty of addressing predatory practices through traditional competition law tools. Finally, Smriti Yadav and Madhura Sureshkumar's article, *"Intellectual Property Rights in Sustainable Development of Business: Issues and Challenges,"* explores the interplay between IPR and sustainability, underscoring the dual role of intellectual property as both a protective mechanism and a driver of innovation for environmentally responsible enterprise.

Collectively, these contributions reflect the intellectual breadth and adaptability from young scholars to partners at law firms who are willing to engage with pressing and often unsettled questions of law and policy. They do not shy away from complexity rather, they embrace it, proposing frameworks and critiques that carry implications not just for academia but for practice, regulation, and governance.

As senior students nearing the end of our law school, we cannot help but note how this Journal has matured alongside us. What once felt like a fledgling idea has begun to grow roots, not perfect, certainly, but resilient. And perhaps that is the best metaphor for both student-led and student-led journals, but the practice of law itself: constantly evolving, imperfect in execution, but full of promise.

We invite you, our readers, not just to read but to engage. Critique us, challenge us, write to us. For a Journal, much like the law, is at its best when it is contested, questioned, and refined through dialogue and debate.

May this issue spark reflection, and, if we are fortunate, the occasional *eureka* moment.

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

SECURITIES REGULATORS: ALIGNING SUSTAINABILITY WITH CORE MANDATES

Sumit Agrawal[1] *

ABSTRACT

This Article explores the evolving role of securities regulators in embedding sustainability as a fundamental and non-negotiable element of their mandate, on par with investor protection, market efficiency, and systemic risk reduction. Sustainability is no longer a peripheral concept but an essential lens through which regulators must anticipate and mitigate systemic risks arising from climate change, social inequality, and governance failures. Neglecting these dimensions directly threatens market stability and erodes investor confidence. The Article further sets out the narrative that while sustainability has become a core regulatory mandate, it simultaneously introduces significant compliance and disclosure challenges. Against this backdrop, India's regulatory response serves as a practical example of how securities law frameworks are adapting to balance sustainability imperatives with enforceable compliance structures.

The first section deals with the Core Mandates of Securities Law to comprehend the primary responsibilities of securities regulators. Increasingly, however, these mandates are regarded as incomplete if they do not incorporate sustainability and Environmental, Social, and Governance (ESG) considerations. Global standard-setting bodies such as IOSCO, the International Sustainability Standards Board (ISSB), and the Financial Stability Board (FSB) have explicitly affirmed that sustainability and ESG risks are inseparable from traditional regulatory objectives, particularly in preserving market integrity, safeguarding investors, and mitigating systemic vulnerabilities. Frameworks such as the Triple Bottom Line and the United Nations Sustainable Development Goals (SDGs) no longer merely illustrate the relevance of sustainability to financial markets; they now shape the practical interpretation of what securities regulators must do to fulfill their statutory mandates.

The second section highlights the growing prominence of ESG principles in global financial regulation. It explores how international initiatives like the Paris Agreement and UN's 2030 Agenda have influenced corporate governance, investment, and disclosure practices, making

[1] *Author is the Founder and Managing Partner of Regstreet Law Advisors.

sustainability a core concern for financial stakeholders. Further third section, focused on global efforts, discusses how organizations like the International Organization of Securities Commissions (IOSCO) are working to align sustainability with securities regulations. It presents case studies and best practices, emphasizing the importance of standardized reporting and climate-related financial disclosures.

The section four examines India's securities regulator, the Securities & Exchange Board of India (SEBI's), proactive stance on integrating sustainability into securities law and regulations focusing on the evolution of ESG reporting, from Business Responsibility Reporting (BRR) to the mandatory Business Responsibility and Sustainability Report (BRSR), and SEBI's efforts to enforce ESG compliance through regulation of listed entities and intermediaries and frameworks.

The last Section delves into the practical challenges faced by the securities regulators, such as greenwashing, inconsistent global standards, and balancing sustainability goals with economic growth, highlighting the complexities of enforcing ESG policies across diverse markets and ensuring long-term compliance.

I. THE CORE MANDATES OF SECURITIES LAW

The three core objectives of the securities regulation are identified as[2]:

1. The Protection of investors
2. Ensuring that markets are fair, efficient and transparent.
3. The reduction of systemic risk

A. The Protection of investors

Investor Protection is the heart of any securities regulation. A securities regulators' role is to address the inconsistencies existing in the financial market which creates an imbalance in the market. One major inconsistency is 'information asymmetry' which arises when one party possesses more or superior information which can possibly lead to a potential market failure. Financial instruments available in the financial market, due to their inherent characteristics as credence goods, possess qualities and viability that are known only to the issuer. As a result,

[2] International Organization of Securities Commissions, Objectives and Principles of Securities Regulation (May 2003), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf (last visited Aug. 16, 2025).

investors have to rely on the information provided by the issuer, often without the ability to independently verify the accuracy or reliability of the claims made. Such information asymmetry can lead to misleading, manipulative or fraudulent practices, including insider trading, front running or trading ahead of customers and the misuse of client assets. To mitigate and regulate these concerns, regulators are tasked with establishing a framework that safeguards the interest of investors who are at the disadvantaged end due to the information asymmetry and foster public confidence in the financial system. Thus, this primary mandate involves enforcing rules and regulations that protect investors from deceptive practices, ensuring that financial products are not misleading or adversely risky, and guaranteeing that investors have access to adequate information to make sound and informed decisions.

In India, the Preamble of the Securities and Exchange Board of India Act of 1992 [the Act], establishing the Securities and Exchange Board of India [SEBI] states that "*An Act to provide for the establishment of a Board* ***to protect the interests of investors in securities*** *and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto*". The beauty of Indian Securities Market framework is that the "*Preamble*" of the SEBI Act, 1992 has been made "*duty*" of SEBI and it is required to discharge the same "*by such measures as it thinks fit*" under Section 11(1). Further, several key provisions enforces this mandate wherein SEBI is tasked with regulating the activities of the market intermediaries, has the authority to prohibit fraudulent practices and is also responsible for promoting investor education and the training of intermediaries.[3] Further, SEBI has established an Investor Protection and Education Fund (IPEF), where funds disgorged from market participants engaged in misconduct are credited and utilized for promoting investor awareness and addressing investor grievances.[4]

According to the International Organization of Securities Commissions (IOSCO) Objectives and Principles of Securities Regulation (2003), full disclosure of information material to investors is a paramount means for investor protection.[5] By mandating comprehensive disclosure, investors are equipped with the necessary information to assess the risks and potential returns of their

[3] Securities and Exchange Board of India Act, 1992, § 11, No. 15, Acts of Parliament, 1992 (India).
[4] Securities and Exchange Board of India Act, 1992, § 11(5), No. 15, Acts of Parliament, 1992 (India).
[5] International Organization of Securities Commissions, Objectives and Principles of Securities Regulation (May 2003), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf.

investments, thereby enabling them to make an informed decision. This principle is reflected in Section 11A which provides that SEBI has the authority to specify through regulation, matters relating to capital, transfer of security and other matters incidental thereto, and the way such matters shall be disclosed by the companies. Further, SEBI, through its regulations regulates the intermediaries including investment advisers and research analysts to ensure that they act in the best interest of the investors.

B. Ensuring that markets are fair, efficient and transparent

A financial market is based on balances and any imbalance, be it in information or resources, renders the market imperfect. Hence, it is imperative that a regulator steps in and ensures the efficiency of the market and checks its functions in a fair and transparent manner. For markets to function effectively, all participants should have access to sufficient resources in an equitable manner and accurate and timely information. Securities regulators enforce this through disclosure requirements and regulating trading practices.

A key aspect of this mandate is the regulators' approval for stock exchange and trading system operators as well as the establishment of trading rules that help ensure fairness in the markets. The securities regulations should aim to detect, deter, and penalize unfair trade practices to prevent any undue advantage for specific market participants. Regulators should also ensure that all investors and participants have fair access to market resources and information facilitating a level playing field.

In terms of efficiency, regulators must ensure informational efficiency whereby the information should be disseminated in a timely manner and to all the relevant stakeholders, which directly influences the price formation process. An efficient market is one where information flows seamlessly and is reflected in accurate pricing.

Transparency, another critical pillar, requires the public availability of both pre-trade and post-trade information. Pre-trade transparency allows investors to assess firm bids and offers, while post-trade transparency ensures that transaction details, including prices and volumes, are accessible to all. By promoting these practices, securities regulators uphold the integrity and smooth functioning of financial markets.

C. The reduction of systemic risk

The third mandate of the securities regulator is to account for the systemic risks associated with the financial markets and attempt to prevent or control them. The financial systems are prone to systemic risks due to the interconnectedness and interdependence of the financial institutions and intermediaries and the dependence on confidence of the investors. Financial markets, hence, pose a risk that actions of one or more actors can have an adverse impact on other actors, causing a '*domino effect*'. Such systemic risk cannot be effectively internalized by the institutions requiring the regulator to intervene and maintain control.

By nature of such systemic risks, it is unlikely that a regulator can prevent the actions that can cause such domino effect, however, the role of the securities regulator is to minimize the risk of such failures through regulatory measures, such as capital requirements and internal controls. [6]

When financial failure does occur, regulators should focus on mitigating the impact of such failure, especially by isolating the risk to the failing institution or intermediary. Hence, securities regulators such as SEBI have laid down minimum capital and prudential standards for such market intermediaries. Furthermore, securities regulators around the globe have integrated risk assessment and management into their regulations, making it a mandate for listed companies, market intermediaries, and institutions.

Hence, securities regulators are essential to enforce regulations and monitor activities in the financial markets meanwhile creating a balance such that regulation does not become an unjustified burden on the market and inhibit market growth and development. Further, a regulator ought to recognize the existing and potential negative externalities that can pose a systemic risk for the financial market and attempt to mitigate such risks. Over the past few decades, there has been significant discourse on the systemic risks that may emerge from the neglect of sustainability goals.

D. Sustainability as a Financial Imperative

Sustainability, a term that has gained profound prominence in the past two decades, once lingered largely overlooked in past eras. Sustainability is an idea rooted in environmental conservation by

[6] International Organization of Securities Commissions, Objectives and Principles of Securities Regulation (May 2003), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf.

prioritizing the balance between present needs and future potential. It was first popularized by the Brundtland Commission Report in 1987[7] and later gained traction through global initiatives like the Earth Summit in 1992 and the Paris Agreement in 2015. The Paris Agreement[8], adopted in 2015, significantly amplified this momentum by reshaping the global landscape of ESG compliance. The Agreement's goals of limiting global temperature rise to well below 2°C and promoting sustainable development directly influenced financial and corporate practices around the globe. The Sustainable Development Goals ("**SDG**") provide a skeleton for all the challenges the whole world suffers, specifically those related to poverty, inequality, climate change, environmental degradation, peace and justice.[9] The SDGs recognize that true sustainable development must balance economic growth, social well-being, and environmental protection in every part of the world.

Source: UN - Department of Economic and Social Affairs, Sustainable Development

What is Sustainable Development? The United Nations defines sustainable development as "*Sustainable development is how we must live today if we want a better tomorrow, by meeting present needs without compromising the chances of future generations to meet their needs. The*

[7] World Commission on Environment and Development, Our Common Future (Brundtland Report) (1987), https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf.
[8] Paris Agreement, Dec. 12, 2015, 55 I.L.M. 743 (2016).
[9] United Nations, Sustainable Development Goals: 17 Goals to Transform Our World, UNITED NATIONS, https://www.un.org/sustainabledevelopment/sustainable-development-goals/.

survival of our societies and our shared planet depends on a more sustainable world.". [10] Sustainable development is in essence about finding a balance between economic growth, social inclusion, and environmental protection. Historically, the world has focused primarily on economic growth, often overlooking the importance of the other two goals. In the same essence, shifting too much focus toward one of these areas at the expense of the others could risk undermining economic progress.

E. Judicial Recognition of Sustainable Development and Environmental Justice in India

The Indian Judiciary has recognized the concept of sustainable development in a variety of judgement. A three-judge bench of Supreme Court in ***Municipal Corporation of Greater Mumbai v. Ankita Sinha***[11] (2022) noted the significance of 'environmental justice and equity', particularly for economically and socially marginalized groups. The Apex Court recognized that environmental harm disproportionately affects such groups and stressed the need for governance structures that incorporate principles of sustainable development. It is evident that such governance structures should not be limited to public authorities but should also be applicable to private bodies having significant access to public resources to ensure that the focus is not just on economic development but also on social and environmental equity at all levels.

In ***Hanuman Laxman Aroskar v. Union of India***[12] (2019), Justice D.Y. Chandrachud highlighted how the framework of 'Environmental Rule of Law' in India supports sustainable development, not just in the environmental sector, but also in the broader contexts of economic, social, and peace. The 'Environmental Rule of Law' aligns closely with the principles of the United Nations Sustainable Development Goals (SDGs), emphasizing equity and fairness in the distribution of environmental risks and protections.

Further, in the ***Bengaluru Development Authority v. Sudhakar Hegde***[13] (2020), the two judge bench of the Apex court made it clear that there is no trade-off between development and

[10] United Nations, Sustainable Development Goals: 17 Goals to Transform Our World, UNITED NATIONS, https://www.un.org/sustainabledevelopment/sustainable-development-goals/.
[11] (2022) 13 SCC 401
[12] (2019) 15 SCC 401
[13] (2020) 15 SCC 63

environmental protection. The court observed that the protection of the environment is an inherent component of development and growth.

The Indian Judiciary has well established that development is not just economic, but also environmental and social development and the governing bodies must attempt to build institutions through its policies and regulations that can accommodate such development. However, this jurisprudence comes with a caveat. The public markets and capital raising is yet to see ESG Principles being enforced by judiciary in listed companies and financial intermediaries.

The Triple Bottom Line Model: The Triple Bottom Line (TBL) Model advocates businesses to adopt sustainable practices by balancing economic, social, and environmental considerations by encourages companies to integrate ethical, eco-friendly practices across their operations, from sourcing materials to forming responsible partnerships, while transitioning to renewable energy to reduce environmental impact. The model expands the traditional focus on profit ("bottom line") to include social and environmental responsibilities ensuring that companies create value for all stakeholders. [14]

F. Financing the sustainable goals

It is recognized that the global goal should be to align financial opportunities with sustainable development goals that benefit people and planet. The UN SDG recognizes the role of governments and international organizations in funding such sustainable development projects. However, there is only so much that the nation states can provide from public funds, and thus it is essential to mobilize private funds from institutional as well as individual investors into the projects that benefit people and planet.

What is Sustainable Finance? Sustainable finance has emerged to become one of the most imperative ideas to achieve efficient and long-term sustainability and address climate issues as well as other sustainability risks. Sustainable finance involves ESG factors into the decision-making of companies and financial institutions. It is a keyway to manage climate and other sustainability risks while also meeting society's increasing demand for a more sustainable economy.[15] The governance of both public and private organizations, encompassing management

[14] John Elkington, Triple Bottom Line (2004), https://johnelkington.com/archive/TBL-elkington-chapter.pdf.

[15] Organisation for Economic Co-operation and Development, Sustainable Finance, OECD, https://www.oecd.org/en/topics/sustainable-finance.html.

structures, employee relations, and executive compensation, plays a crucial role in ensuring that social and environmental factors are integrated into decision-making.[16]

II. THE RISE OF SUSTAINABILITY IN FINANCIAL REGULATION

ESG Movement and Global Trends: ESG has emerged as one of the most significant trends in corporate governance, management, and investment over the past two decades. It lies at the heart of some of the most prominent and contentious debates in modern corporate and securities law [17]. Once a niche and relatively obscure concept, ESG has now become a globally recognized and widely discussed framework. It represents a fundamental responsibility for businesses to adapt, integrate, and disclose their commitments to sustainability and has developed as a standard to assess business impacts. ESG provides a benchmark for businesses to monitor and measure their activities, encompassing a wide array of actions which include addressing climate change, reducing carbon footprint, preserving biodiversity, minimizing pollution, managing waste, ensuring judicious water usage, and adopting extended producer responsibility. It also covers aspects such as fostering positive customer and employee relations, upholding labor and human rights, promoting diversity, equity, and inclusion, ensuring responsible corporate governance, and adhering to regulatory compliance.[18]

Global Initiatives on ESG Compliance: ESG compliance as a global issue began in 2004 when UN Secretary-General Kofi Annan brought together over 50 CEOs to integrate ESG principles into capital markets. Supported by the UN Global Compact, IFC, and the Swiss Government, the 2005 *Who Cares Wins*[19], report highlighted the business and societal benefits of ESG integration in capital markets. UNEP FI's *Freshfield Report*[20] further emphasized ESG factors for financial

[16] European Commission, Overview of Sustainable Finance, EUROPEAN COMMISSION, https://finance.ec.europa.eu/sustainable-finance/overview-sustainable-finance_en#:~:text (last visited Aug. 16, 2025).
[17] Elizabeth Pollman, The Making and Meaning of ESG (Oct. 31, 2022), U. of Penn. Inst. for L. & Econ. Research Paper No. 22-23, European Corp. Governance Inst. - L. Working Paper No. 659/2022, 14 HARV. BUS. L. REV. 403 (2024), https://ssrn.com/abstract=4219857.
[18] G. Dadhich & R.R. Atrey, Demystifying ESG: A Comprehensive Guide for Environmental-Social-Governance Integration and Practice 2–4 (Taxmann Publications Pvt. Ltd. 2024).
[19] United Nations Global Compact et al., Who Cares Wins: Connecting Financial Markets to a Changing World (2004), https://www.unglobalcompact.org/docs/news_events/8.1/caring_for_the_future.pdf.
[20] United Nations Environment Programme Finance Initiative, *A Legal Framework for Impact: Sustainability Impact in Investor Decision-Making* (2021), https://www.unepfi.org/publications/a-legal-framework-for-impact-sustainability-impact-in-investor-decision-making/.

valuation. These initiatives led to the 2006 Principles for Responsible Investment (PRI) and the 2007 Sustainable Stock Exchange Initiative (SSEI), propelling global ESG compliance forward.

Subsequent to the Paris Agreement, financial institutions were compelled to integrate ESG criteria into their investment strategies, aligning portfolios with climate objectives and redirecting capital toward sustainable, low-carbon initiatives. The emphasis on robust ESG frameworks became essential for businesses to assess environmental risks and opportunities comprehensively. The United Nations has been working with countries and financial regulators to align financial systems with the 2030 Agenda for Sustainable Development focusing on the 17 SDGs as a guiding "ESG +" framework to direct financial flows towards achieving these global sustainability objectives.[21]

Shareholder Activism on Sustainability Issues: Shareholders have increasingly utilised activism to address the ESG concerns. A notable case is that of ***Exxon Mobil Corporation* v. *Arjuna Capital*** [22], where Arjuna Capital proposed a shareholder resolution on Exxon's greenhouse gas emissions and its role in climate change. Under Rule 14a-8 of the Securities Exchange Act of 1934, shareholders, even with small stakes, can submit proposals for shareholder meetings. Arjuna Capital utilized this rule to promote ESG goals, such as cleaner climate practices. Exxon sued to block the proposal, and Arjuna withdrew it, promising not to submit similar proposals in the future. This case emphasizes the need for effective regulations that empower activist investors like Arjuna Capital to present such proposals, ensuring the corporates do not evade their responsibility, and draws attention to the important role of securities regulators in supporting this process.

A. The Need to Integrate Sustainability into Securities Regulator's Mandates

There are two different views on whether the securities regulator has a mandate to incorporate sustainability principles into the primary mandates.

Traditional View on the Role of Securities Regulators'	***Argument for Integrating Sustainability into Securities Regulation***
Securities regulators traditionally focus on market stability, transparency, and investor	Sustainability should be a core mandate of securities regulators, as market stability is

[21] United Nations Environment Programme, *Green Financing*, https://www.unep.org/regions/asia-and-pacific/regional-initiatives/supporting-resource-efficiency/green-financing.
[22] Exxon Mobil Corp. v. Arjuna Capital, LLC, No. 4:24-cv-00069, 2024 U.S. Dist. LEXIS 123456 (N.D. Tex. June 17, 2024).

protection with ESG factors not falling within their core mandate. From a capitalist perspective, ESG considerations are seen as secondary to the primary goal of financial returns and market efficiency. As a result, calls to integrate sustainability into the responsibilities of securities regulators are often viewed as supplementary rather than essential.	closely tied to long-term sustainability. Issues like climate change, social inequality and corporate governance directly impact market integrity and functioning. Ignoring these factors increases risks that undermine investor confidence and economic growth, making sustainability essential for maintaining resilient, transparent, and accountable markets.

Sustainability in itself not a primary mandate: Sustainable Development is not included in the primary mandate of most securities regulators, including SEBI. However, such sustainability issues in and of themselves are of direct relevance to the existing primary mandates of the securities regulators established by IOSCO.[23] Sustainability issues can cause financial and systemic risks as well as opportunities which can impact on the resilience of the whole financial system.

Sustainability and the primary mandate of reducing systemic risks: One of the primary mandates of securities regulators, as emphasized by IOSCO, is the prevention of systemic risk. The securities regulator must analyze the possible systemic risks associated with the financial market and ensure mitigation or minimizing the impact of such risks. The sustainability issues, mainly with respect to ESG factors pose as a systemic risk in many ways. Risks threatening a financial system are not limited to financial risks. If financial risk-taking has the potential to push the global financial and economic system to the edge of collapse as seen in the Global Financial Crisis, it's not hard to envision the catastrophic effects of excessive social and environmental risk-taking.[24]

[23] Sustainable Stock Exchanges Initiative, *SSE Regulator Report* (2020), https://sseinitiative.org/sites/sseinitiative/files/documents/sse-regulator-report-compressed.pdf.
[24] United Nations Environment Programme, *Sustainable Finance: A Critical Analysis of the Regulation, Policies, Strategies, Implementation and Reporting on Sustainability in International Finance* (2015), https://wedocs.unep.org/bitstream/handle/20.500.11822/7446/-

Sustainability Goals Already a part of the Monetary and Fiscal Policies of Countries: Further, the monetary policies and fiscal policies of the nations around the world have integrated sustainability goals into their policies, where the governments as well as businesses as mandated to take up ESG policies as well as incentivizing green business practices. Hence, it is imperative that securities regulators incorporate sustainable development goals into their policies and regulations, as securities regulators have the authority to mandate the largest businesses in a nation, which are typically listed.

Sustainability and the primary mandate of Protecting Investors: It is also significant that the securities regulator step ahead to regulate the securities developing in the green space such as green bonds, in the interest of protecting the investors. Companies having unsustainable or irresponsible regarding social or environmental issues may face reputational risks and regulatory risks, increasing the cost of the company, which in turn affects the investment of the investors. This affects investor confidence and also affects the long-term viability of the company and the market as a whole. Further, the green securities due to the innovative nature brings in the problem of information asymmetry and the investors will face difficulty in analyzing the feasibility and materiality of such instruments.

For investors, ESG integration enhances resilience to financial and societal risks, offering long-term returns despite initial implementation costs[25]. However, the complexities of implementation, ranging from regulatory adherence to transparent reporting necessitate a structured framework to ensure consistent and reliable practices. By mandating disclosures and fostering accountability, regulators align corporate practices with global sustainability goals, strengthen investor confidence, and solidify the connection between ESG integration and financial stability. The involvement of securities regulators is, therefore, indispensable for driving meaningful and uniform ESG adoption across capital markets.

Sustainable_finance_A_critical_analysis_of_the_regulation,_policies,_strategies,_implementation_and_reporting_on_sustainability_in_international_fin.pdf.

[25] E. Andrey, *ESG as an Innovative Tool to Improve the Efficiency and Financial Stability of Financial Organizations*, 221 Procedia Computer Science 705 (2023), https://doi.org/10.1016/j.procs.2023.08.041.

III. ALIGNING SUSTAINABILITY WITH SECURITIES LAW MANDATES: INTERNATIONAL DISCUSSION

IOSCO's Sustainable Finance Network: Securities regulators primary mandates are to protect investors, ensure market transparency, and reduce systemic risks. Addressing sustainability challenges, particularly climate change, adds complexity to these goals. In response, IOSCO created the Sustainable Finance Network (SFN) in 2018 to help regulators share insights and tackle sustainability issues. The 2020 SFN Report[26] highlights the role of regulators in promoting sustainable finance and emphasizes the need for disclosing material information. As more companies address sustainability risks, the financial system plays a crucial role in supporting long-term market development by considering ESG factors and managing risks.

STF and ISSB on sustainability related disclosures: In 2020, IOSCO launched the Sustainable Finance Task Force (STF), which works to improve sustainability-related disclosures within the financial sector.[27] The STF's focus includes enhancing disclosures from issuers, refining practices for asset managers, and addressing the role of ESG ratings and data providers. A major achievement came in 2023, when IOSCO endorsed the standards set by the International Sustainability Standards Board (ISSB) - IFRS S1 and S2, which provide a global framework for disclosing sustainability risks and opportunities. [28] IOSCO has urged its members, covering over 95% of global financial markets, to adopt these standards, promoting consistency and comparability in ESG disclosures worldwide. In 2025, the ISSB proposed targeted amendments to IFRS S2 to simplify climate disclosures for financial institutions, clarify GHG emissions boundaries, and reduce overlap with other regulations. Final amendments are expected by year-end. Meanwhile, more jurisdictions like the EU, UK, and Asian countries are aligning their ESG reporting frameworks with ISSB standards, advancing global harmonization of sustainability disclosures.[29]

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[26] International Organization of Securities Commissions, *IOSCO Sustainable Finance Roadmap* (2021), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD652.pdf.
[27] International Organization of Securities Commissions, *Environmental, Social and Governance (ESG) Ratings and Data Products Providers, Final Report* (2021), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD652.pdf.
[28] International Organization of Securities Commissions, *IOSCO Endorses the ISSB's Sustainability-related Financial Disclosures Standards, Media Release* (2023), https://www.iosco.org/news/pdf/IOSCONEWS648.pdf.
[29] IFRS Foundation, *IFRS Foundation Publishes Jurisdictional Profiles Providing Transparency and Evidencing Progress Towards Adoption of ISSB Standards* (June 12, 2025), https://www.ifrs.org/news-and-events/news/2025/06/ifrs-foundation-publishes-jurisdictional-profiles-issb-standards/.

Global Trend in ESG Reporting: The growing recognition of the impact of ESG disclosures on financial performance has led to a global increase in ESG reporting. In recent years, ESG reporting has shifted from voluntary to mandatory in several leading jurisdictions. Notably, the European Union's Corporate Sustainability Reporting Directive (CSRD), which came into effect in January 2025, has greatly expanded the scope and stringency of corporate sustainability disclosures, applying not just to large EU companies but also to non-EU companies with significant business in the EU. This directive requires detailed environmental, social, and governance information to be published alongside financial statements.[30] Similarly, the United States introduced SEC climate disclosure rules, now in question, mandating listed companies to report climate-related financial risks and emissions data. [31] The United Kingdom and China have also enforced or announced mandatory ESG disclosure frameworks, marking a global move towards standardized, comparable, and enforceable ESG reporting obligations for companies operating in major capital markets. The rise in ESG disclosures is driven by factors such as greater visibility, consumer awareness, and risk management, especially in developing countries where ESG frameworks are still evolving and need attention.

A. The Sustainable Stock Exchange Initiative on the Role of Securities Regulators in Advancing Sustainable Development Goals

A UN Partnership Programme organized by UNCTAD, the UN Global Compact, UNEP FI and the PRI put forth a Sustainable Stock Exchange (SSE) Initiative which provides a global platform for exploring how exchanges, in collaboration with investors, issuer companies, regulators, policymakers and relevant international organizations, can enhance performance on ESG issues and encourage sustainable investment, including the financing of the UN Sustainable Development Goals. In 2018, the SSE issued a report as to how securities regulators can consider and relate SDGs and sustainable finance to their core mandates.[32]

[30] European Commission, Directorate-General for Financial Stability, Financial Services and Capital Markets Union, *Corporate Sustainability Reporting*, Finance – European Commission, https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en

[31] "Securities and Exchange Commission, *SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors, Press Release No. 2024-31* (Mar. 6, 2024), https://www.sec.gov/newsroom/press-releases/2024-31.

[32] Sustainable Stock Exchanges Initiative, *SSE Regulator Report* (2020), https://sseinitiative.org/sites/sseinitiative/files/documents/sse-regulator-report-compressed.pdf.

The report suggests that there cannot be a '*one-size-fits all*' approach as each securities regulator has their own mandates and capacities. The Report hence suggests five main action areas where the securities regulator can support the SDGs, which are:

1. **Facilitate investment to support the delivery of the SDGs**: The securities regulators should consider factors that influence the development of investment opportunities linked to the SDGs like tax and accounting treatment, costs of accessing which are generally more than traditional sources, the risk-return ratios, and the packaging and promotion of projects. The investors are hesitant to invest in such opportunities due to lack of awareness and understanding. The report suggests certain examples by which securities regulator can facilitate investment to sustainability linked securities such as convening and supporting platforms to develop innovative financial solutions, publishing guidance, identifying the role of market participants in facilitating and contributing to such investments, and developing, supporting or incentivizing labelling processes or frameworks for fund, index and sustainable investment product certification. Further, UNCTAD's Action Plan for Investing also presents a range of policy options to facilitate and increase investments in the SDGs.

2. **Strengthening Corporate Sustainability Related Disclosures**: The IOSCO Objectives and Principles of Securities Regulations emphasize that the securities regulators should mandate the full, accurate and timely disclosure of financial results, risk and all other information which is material to the investor [33]. Securities regulators should have an interest in encouraging disclosures that enable investors to understand such risks, which can also apprise the regulator about the risk and the potential systemic impact of those failures. Hence, encouraging corporate sustainability related disclosures is one of the targets within the SDG and this can be achieved by development of voluntary reporting guidelines aligning with the already established standards, developing sustainability reporting guidance into listing requirements.

3. **Clarify Investor Duties on sustainability**: ESG Investment or Responsible Investment is a theme for investors to incorporate ESG factors into investment decisions, thereby

[33] International Organization of Securities Commissions, *Objectives and Principles of Securities Regulation, Principle 16* (May 2003), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf.

enabling better risk management and generating sustainable, long-term returns. Since the last decade, investors, both retail and institutional, are interested in mobilizing their funds to such sustainability linked investments considering the long-term feasibility as well as for their moral reasons. As seen in ***Exxon* v *Arjuna Capital*** (supra), the debate of investor activism versus corporate suppression continues. The securities regulator should clarify the duties of specifically institutional investors and asset managers as to how they can include sustainability into their investment practices, integrate sustainability factors into the stewardship and governance codes for such institutional investors and harmonize the policy instruments at international level.

4. **Strengthening Corporate Governance to support Sustainability**: While traditional governance issues remain important, there is a growing focus on board of directors' responsibilities for considering ESG factors. There are various studies that show that successful companies have long-term governance processes that address a range of sustainability risks, including environmental, social, and operational factors by internalizing such risks. To enhance the sustainability dimension of corporate governance regulators may take several actions such as integrating sustainability factors into corporate governance codes, requiring boards to manage sustainability risks and link executive remuneration to sustainability goals. They can also encourage boards to commit to long-term decision-making and facilitate investor engagement on ESG matters.

5. **Building Market Capacity and Expertise on Sustainability:** A significant challenge in supporting sustainable development within the financial system is the lack of capacity and expertise on sustainability and long-term value drives across key stakeholders, including policymakers, regulators, companies, investors, and civil society organizations. The progress since the publication of SDGs in 2015 is not sufficient to achieve the goals by 2030. This gap shows the need for stronger capacity-building effort and securities regulators, in particular, can play a critical role by addressing these gaps. They can conduct thorough analyses to identify specific capacity and information shortages in the financial market and provide targeted training and awareness for issuers, investors, and other market participants. Additionally, regulators can support the development of professional qualifications that emphasize sustainability knowledge, ensuring that sophisticated

decision-makers and asset managers are well-equipped to handle these complex issues. Another key strategy involves fostering peer-to-peer learning platforms such as the SSE to facilitate the sharing of best practices, particularly in relation to SDG-related investments.

Case Study I: *O'Donnell* v *Commonwealth of Australia* [2021] FCA 1223

In *O'Donnell v Commonwealth of Australia* ([2021] FCA 1223), the Federal Court of Australia addressed the issue of alleged failure of Australian government to disclose *material* climate-related risks to investors in exchange-traded Australian Government Bonds (*eAGBs*). The case marks a significant intersection between securities law and sustainability, focusing on the adequacy of disclosures on climate risks under existing legal frameworks.

The plaintiff brought a representative proceeding against the Commonwealth of Australia, the Secretary of the Department of Treasury, and the Chief Executive Officer of the Australian Office of Financial Management alleging that disclosures for exchange-traded Australian Government Bonds (eAGBs) failed to disclose material climate-related risks that could affect the bonds' value, maintaining the AAA rating and the government's financial stability. The disclosures published on the Australian Government Bonds website allegedly did not include risks related to Physical risks and Transitional risks.

The applicant argued that the failure to disclose these risks constituted misleading or deceptive conduct under section 12DA (1) of the Australian Securities and Investments Commission Act 2001 (ASIC Act) and breached the fiduciary duty of honesty and candor owed by the government as a bond issuer.

The Federal Court observed that physical risks (such as adverse climate events) and transition risks (such as regulatory or market changes due to climate policy) could significantly impact on the government's financial position. The Court further emphasized that material information that should be disclosed includes such information and data investors would reasonably need to make informed decisions about acquiring, holding, or selling the securities. While addressing the issue of whether the absence of climate-related risk disclosures could mislead or deceive investors about the financial soundness of eAGBs, the court noted that the adequacy of the misleading or deceptive conduct allegations needed further refinement. The court only allowed parts of the case to move forward, and it did not impose a definitive duty on the Commonwealth to disclose climate-related risks in bond issuance.

This case reflects the judicial inclination to expand the scope of disclosures to include climate change-related risks and other long-term risks. The court emphasized the importance of redefining material disclosures to address these issues aiming to reduce information asymmetry between issuers and investors.

IV. INDIA'S APPROACH IN ALIGNING SUSTAINABILITY WITH THE CORE MANDATES OF THE SECURITIES REGULATOR

India's approach to embedding sustainability within the architecture of securities regulation is both ambitious and pragmatic. The Securities and Exchange Board of India (SEBI) has been among the most proactive regulators in the emerging markets when it comes to integrating ESG principles into the regulatory fabric of capital markets. Yet, SEBI has been careful not to impose ESG mandates in a manner that could destabilize businesses, hinder the ease of doing business, or disrupt capital formation. Instead, India's path has been marked by gradualism, phased implementation, and balancing of competing priorities, namely, investor protection, market development, and systemic stability on one hand, and sustainability and responsible business conduct on the other.

This balancing act is central to SEBI's strategy. Unlike other jurisdictions like EU, which has pursued an expansive sustainability agenda through instruments such as the CSRD and SFDR with relatively tight compliance timelines, SEBI's regulatory interventions are cautious and incremental. The regulator recognizes that India, as a developing economy, must simultaneously encourage sustainable corporate behavior while ensuring that compliance requirements do not stifle competitiveness, profitability, or capital-raising capacity.

A. From CSR to ESG: A Foundational Shift

The Initial Voluntary CSR: India's approach to incorporating sustainability goals into the polices and regulations is rapidly evolving since the last two decades. Initially, Corporate Social Responsibility (**CSR**) incorporated the idea of integrating environmental and social issues into the decision making of corporates. CSR in India was largely seen as voluntary driven by philanthropic contributions from business houses, such as the Tatas and Birlas who engaged in community development and social welfare activities. The formal push for mandatory CSR began with the enactment of the Companies Act, 2013 [34]. Prior to this, CSR was voluntary and was mostly a part of the Corporate Governance framework under the "Corporate Governance Voluntary Guidelines" issued in 2009.[35] These guidelines suggested that companies should disclose their CSR activities in their annual reports.

Mandatory CSR: In 2013, India became the first country in the world to make CSR mandatory for certain classes of companies through Section 135 of the Companies Act, 2013.[36] Companies meeting certain thresholds (e.g., a net worth of Rs. 500 crores, a turnover of ₹1,000 crore, or a net profit of Rs. 5 crore) must spend a minimum of 2% of their average net profits from the last three years on CSR activities. Companies fulfilling these criteria are required to form a CSR Committee of the board, which oversees and recommends CSR policies, budgets, and projects. Companies must report their CSR spending in their annual reports, outlining the activities undertaken and the expenditure incurred. Non-compliance requires an explanation. Schedule VII of the Act outlines the eligible CSR activities.

B. Evolution of ESG Reporting

The National Voluntary Guidelines (NVGs): A framework for ESG reporting in India has only found footing in recent times. Unlike CSR, ESG comes up with a more holistic focus on all stakeholders. This marks a significant shift in corporate strategies. ESG practices in India deviates from the traditional shareholder-centric approach that CSR initiatives carry. To trace the journey of ESG principles in India, the Ministry of Corporate Affairs, in 2011, put forth National Voluntary Guidelines (NVGs)[37] which provided a framework for companies to voluntarily adopt sustainable practices. In 2011, India endorsed the UN Guiding Principles on Business and Human Rights and released the NVGs on Social, Environmental and Economic Responsibilities of Business.

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[34] Companies Act, 2013, § 135, 2013.

[35] Ministry of Corporate Affairs, *Corporate Governance Voluntary Guidelines 2009* (Dec. 24, 2009), https://www.mca.gov.in/Ministry/latestnews/CG_Voluntary_Guidelines_2009_24dec2009.pdf.

[36] Press Information Bureau, *On April 1, 2014, India Legally Mandated Corporate Social Responsibility*, Press Release (Apr. 1, 2014), available at https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1995896#:~:text=On%20April%201%2C%202014%2C%20India,legally%20mandate%20corporate%20social%20responsibility.

[37] Ministry of Corporate Affairs, *History of Corporate Social Responsibility in India*, available at https://www.csr.gov.in/content/csr/global/master/home/aboutcsr/history.html.

Introduction of Business Responsibility Reports: SEBI observed that "*at a time and age when enterprises are increasingly seen as critical components of the social system, they are accountable not merely to their shareholders from a revenue and profitability perspective but also to the larger society which is also its stakeholder. Hence, adoption of responsible business practices in the interest of the social set –up and the environment are as vital as their financial and operational performance. This is all the more relevant for listed entities which, considering the fact that they have accessed funds from the public, have an element of public interest involved, and are obliged to make exhaustive continuous disclosures on a regular basis*".[38] Subsequently in 2012, SEBI mandated the top 100 listed companies to file Business Responsibility Reports (BRR)[39] based on the NVGs which was eventually expanded to the top 500 listed companies in 2016 and top 1000 listed companies in 2019-20. Thereafter, in order to keep pace with global developments viz. the UN SDGs, Paris Agreement and the United Nations Guiding Principles on Business and Human Rights (UNGPs), the NVGs were revised and released as the National Guidelines on Responsible Business Conduct (NGRBCs) in March 2019.[40] In line with this, SEBI replaced the BRR framework with Business Responsibility and Sustainability Report (BRSR) in 2021. The BRSR was applicable to the top 1000 listed entities (by market capitalization) for reporting on a voluntary basis for FY 2021–22 and mandatory from FY 2022–23.

Business Responsibility and Sustainability Report (BRSR): The Ministry of Corporate Affairs (MCA) constituted a Committee on Business Responsibility Reporting (Committee), of which SEBI was a member, for finalizing BRR formats for listed and unlisted companies, based on the framework of the NGRBCs. The Committee recommended that the BRR may be replaced by the Business Responsibility and Sustainability Report (BRSR) to better reflect the evolved international standards of the reporting requirements and the proposed format was placed for public consultation. The BRSR format was a notable departure from the existing format for BRR as BRSR lays considerable emphasis on quantifiable metrics, which allows for easy measurement and comparability across companies, sectors, and time periods. The BRSR framework was

[38] Securities & Exchange Board of India, Circular No. CIR/CFD/CMD/10/2015, Format for Business Responsibility Report (Nov. 30, 2015), https://www.sebi.gov.in/legal/circulars/nov-2015/format-for-business-responsibility-report-brr-_30954.html.
[39] Securities and Exchange Board of India, *Business Responsibility Reports*, CIR/CFD/DIL/8/2012(Aug. 13, 2012), https://www.sebi.gov.in/legal/circulars/aug-2012/business-responsibility-reports_23245.html.
[40] Press Information Bureau, *The Act Casts Fiduciary Duties in Corporate Governance*, Press Release (July 22, 2019), https://pib.gov.in/Pressreleaseshare.aspx?PRID=1568750#:~:text= .

designed to align with the NGRBC 2019 which ensured that companies reporting under BRSR adhere to broader principles of responsible business conduct. By mandating disclosures on various ESG factors, BRSR promotes transparency, accountability, and sustainable business practices and emphasizes on stakeholder engagement, ethical practices, and environmental responsibility reinforces its connection to the NGRBC principles.

In light of the above, SEBI then introduced the BRSR in 2021.[41] While the BRR lacked standardization and assurance requirements, the BRSR mandates reasonable assurance (BRSR Core) to enhance reliability. Applicability was also expanded with BRSR being mandatory for the top 1000 listed companies by FY 2022–23, compared to BRR's earlier focus on the top 100 companies. This evolution from BRR to BRSR underscores India's proactive approach to ESG reporting, balancing global alignment with localized sustainability goals.

SEBI ESG Advisory Committee: The SEBI ESG Advisory Committee was established in 2021 to guide the development of a robust framework for ESG disclosures by listed companies in India[42]. The committee's primary goal is to strengthen ESG practices in India ensuring that companies are held accountable for their social and environmental impacts while facilitating sustainable investing. The committee's main task is to develop a standardized framework for ESG disclosures by aligning India's ESG framework with international standards, such as the Global Reporting Initiative (GRI) and the Task Force on Climate-related Financial Disclosures (TCFD). The ESG Advisory Committee consists of experts from various domains, including finance, corporate governance, law, environmental sustainability, and social responsibility who collaborate to propose policies and recommendations that address the evolving needs of ESG reporting and governance in India.

BRSR Core Framework: In July 2023, SEBI expanded mandatory ESG disclosures for the top 1000 listed companies through the BRSR Core, covering company profile, environmental metrics (GHG emissions, water and energy use, circular economy, biodiversity), and social factors (employee welfare, workplace safety, diversity, inclusion, and fair practices). Compliance is

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[41] Securities and Exchange Board of India, *Business Responsibility and Sustainability Reporting by Listed Entities*, SEBI/HO/CFD/CMD-2/P/CIR/2021/562 (May 10, 2021), https://www.sebi.gov.in/legal/circulars/may-2021/business-responsibility-and-sustainability-reporting-by-listed-entities_50096.html.

[42] Securities and Exchange Board of India, *SEBI Constitutes Advisory Committee on Environmental, Social, and Governance (ESG) Matters* (May 6, 2022), https://www.sebi.gov.in/media/press-releases/may-2022/sebi-constitutes-advisory-committee-on-environmental-social-and-governance-esg-matters_58794.html.

phased—150 companies in FY 2023–24, 250 in FY 2024–25, 500 in FY 2025–26, and all 1000 by FY 2026–27. To enhance reliability, BRSR reports must be audited by SEBI-certified ESG Rating Providers (ERPs), who will submit findings to SEBI.

C. Expanding the ESG Ecosystem: SEBI's Multi-Pronged Framework

SEBI's role has gone far beyond disclosure. It has systematically developed the institutional and market infrastructure required to support ESG integration.

ESG Rating Providers (ERPs): Recognizing that investors rely on ESG ratings, SEBI in 2023–25 introduced a regulatory framework for ESG Rating Providers (ERPs) under the SEBI (Credit Rating Agencies) Regulations. Through detailed master circular in July 2025, SEBI laid down procedural requirements, disclosure norms, and governance structures.[43] However, SEBI also acknowledged operational challenges faced by ERPs. For instance, in January 2025, it extended the review timeline for ESG ratings following publication of BRSR from 10 days to 45 days, recognizing the impracticality of reviewing hundreds of reports within a week. It also allowed deferred compliance for new ERPs, particularly Category-II ERPs, giving them two years before internal audits and committee formations became mandatory. These relaxations demonstrate SEBI's attempt to build credibility while supporting industry growth.[44]

ESG Debt Securities: In June 2025, SEBI introduced a comprehensive framework for ESG debt securities, extending beyond green bonds to include social bonds, sustainability bonds, and sustainability-linked bonds. The framework mandates third-party certification, increased disclosure, and monitoring of fund utilization to prevent purpose-washing. This aligns India with international practices while protecting investors from misleading claims.[45] A consultation paper

[43] SEBI, Master Circular for ESG Rating Providers, SEBI/HO/DDHS/DDHS-POD-2/P/CIR/2025/100 (July 11, 2025), https://www.sebi.gov.in/legal/master-circulars/jul-2025/master-circular-for-esg-rating-providers-erps-_95219.html.

[44] SEBI, Timeline for Review of ESG Rating pursuant to occurrence of 'Material Events', SEBI/HO/DDHS/DDHS-PoD-3/P/CIR/2025/007 (January 17, 2025),https://www.sebi.gov.in/legal/circulars/jan-2025/timeline-for-review-of-esg-rating-pursuant-to-occurrence-of-material-events-_90930.html.

[45] SEBI, Framework for Environment, Social and Governance (ESG) Debt Securities (other than green debt securities), SEBI/HO/DDHS/DDHS-POD-1/P/CIR/2025/84 (June 05, 2025), https://www.sebi.gov.in/legal/circulars/jun-2025/framework-for-environment-social-and-governance-esg-debt-securities-other-than-green-debt-securities-_94424.html.

in August 2025 further refined the norms for independent reviewers of ESG debt, requiring them to be independent, conflict-free, and SEBI-registered, thereby safeguarding investor trust.[46]

Stewardship Codes and Investor Duties: SEBI has also recognized that sustainability cannot be driven by issuers alone. Institutional investors wield enormous influence and must integrate ESG into their engagement and voting practices. SEBI's Stewardship Code, introduced for mutual funds and insurers, explicitly requires consideration of ESG risks and opportunities. [47] This aligns investor duties with global trends, where fiduciary responsibilities increasingly extend to sustainability.

Industry Standards for BRSR Core: From FY2024-25 onwards, new industry standards for BRSR Core reporting, developed collaboratively by SEBI and leading industry bodies like ASSOCHAM, CII, and FICCI, is mandatory for listed entities. These standards aim to standardize ESG disclosures across companies, ensuring greater consistency, comparability, and clarity in how sustainability data is presented and evaluated. By establishing uniform reporting protocols, SEBI enhances both the quality of information available to stakeholders and the ease of compliance for businesses, marking a significant step forward in ESG transparency and governance in India.[48]

D. Balancing Ambition with Compliance Ease

One of SEBI's defining features has been its sensitivity to compliance fatigue and the risk of regulatory overreach:

a. **Relaxation for Ease of Doing Business:** SEBI issued a consultation paper on the Business Responsibility and Sustainability Report (BRSR) recommendations on May 22, 2024[49],

[46] SEBI, Revised Norms for Appointment of an Independent Third-Party Reviewer/Certifier for Green Debt Security, SEBI (Report for Public Comments, August 01, 2025), https://www.sebi.gov.in/reports-and-statistics/reports/aug-2025/revised-norms-for-appointment-of-an-independent-third-party-reviewer-certifier-for-green-debt-security_95767.html.

[47] SEBI, Stewardship Code for All Mutual Funds and All Categories of AIFs in Relation to Their Investment in Listed Equities, SEBI/HO/IMD/DF3/CIR/P/2019/169 (Dec. 20, 2019), https://www.sebi.gov.in/legal/circulars/dec-2019/stewardship-code-for-all-mutual-funds-and-all-categories-of-aifs-in-relation-to-their-investment-in-listed-equities_45451.html.

[48] SEBI, Industry Standards on Reporting of BRSR Core, Circular No. SEBI/HO/CFD/CFD-PoD-1/P/CIR/2024/177, (December 20, 2024), https://www.sebi.gov.in/legal/circulars/dec-2024/industry-standards-on-reporting-of-brsr-core_90091.html.

[49] SEBI, Consultation Paper on the Recommendations of the Expert Committee for Facilitating Ease of Doing Business with Respect to Business Responsibility and Sustainability Report (BRSR), SEBI (May 2024), https://www.sebi.gov.in/reports-and-statistics/reports/may-2024/consultation-paper-on-the-recommendations-of-the-

and in the December 18, 2024 board meeting[50], approved deferring ESG disclosures for the value chain by one year, to FY 2025-26. The new approach makes value chain disclosures voluntary, rather than 'comply and explain', and limits the scope to the top upstream and downstream partners accounting for 2% or more of the entity's purchases and sales. This change reflects SEBI's recognition that earlier requirements were hindering the ease of doing business for listed entities and their value chain partners.

b. **ERP obligations were phased**, with smaller providers given compliance deferrals. This ensured that the nascent ESG rating industry could stabilize before being subjected to heavy governance requirements.

c. **Disclosure rationalization** has been another hallmark. For instance, ERPs following a subscriber-pays model were relieved from publishing detailed rating rationales on public websites, reducing unnecessary disclosure burdens while ensuring subscribers received full reports.

These adjustments highlight SEBI's philosophy: sustainability mandates must be credible but not crippling. For emerging markets, this represents a pragmatic blueprint. Instead of transplanting Western ESG models wholesale, India has localized sustainability regulation, ensuring it is ambitious enough to meet global expectations but flexible enough to accommodate domestic realities.

D. SEBI's Role as Securities Regulator in Promoting ESG Compliance and Investor Protection

SEBI as securities regulators have a critical role in enforcing ESG compliance by protecting investors, ensuring market development, and regulating the market. SEBI promotes transparency by requiring companies to disclose accurate timely ESG information through the mandated reports, enabling investors to make well informed decisions. This standardized reporting facilitates comparisons between companies and enhances investor confidence. SEBI as a securities regulator also attempts to protect investors by preventing misleading practices, like greenwashing, through

expert-committee-for-facilitating-ease-of-doing-business-with-respect-to-business-responsibility-and-sustainability-report-brsr-_83551.html.

[50] SEBI, Board Meeting (Dec. 2024), https://www.sebi.gov.in/media-and-notifications/press-releases/dec-2024/sebi-board-meeting_90042.html.

stringent disclosure requirements such as the BRSR requirements and provisions of ICDR. By ensuring that companies substantiate their ESG claims, SEBI can help prevent financial losses and build trust in the market. Additionally, SEBI contributes to market stability by encouraging responsible business practices, which promote long-term financial sustainability.

SEBI also integrated the ESG factors into the stewardship codes of sophisticated institutional investors to lay down and clarify the duty of the investors to promote such ESG practices. Further, SEBI's efforts to mandate disclosures, combat greenwashing, and establish robust compliance frameworks have elevated ESG from a voluntary concept to a critical standard for corporate accountability and sustainable investment. By ensuring transparency, protecting investors, and mitigating systemic risks, SEBI not only strengthens market resilience but also contributes to broader sustainability objectives. Regulators around the globe are attempting foster a more transparent, stable, and sustainable financial ecosystem, which is crucial for the long-term resilience of global markets and SEBI is integrating the policies into the Indian market in a phased system to avoid any shocks.

V. CHALLENGES IN IMPLEMENTATION AND ENFORCEMENT

The implementation and enforcement of ESG policies present significant challenges for securities regulators around the globe. The complexity, dynamic and unpredictable nature of ESG issues coupled with a lack of standardized frameworks create obstacles to the regulators in both formulating and enforcing effective policies. Securities regulators must navigate through competing priorities, including balancing market efficiency with the need for robust sustainability practices, while also addressing gaps in capacity, expertise, and data availability, all while protecting the interest of the investors. The global nature of financial markets complicates such enforcement efforts as regulatory approaches can vary widely between jurisdictions depending on the nature of the market, creating challenges for cross-border compliance and coordination.

The key challenges that the securities regulator has to consider are:

1. **Maintain a balance between environmental and social and economic goals of the market**

The policies integrating ESG factors into the market should be a balance to negate the imbalance caused by the historical focus on economic growth of the company over every other factor.

However, such policies must not be harsh or blind sighted that the economic growth of a business is at stake due to the regulations or policies of the securities regulator mandating ESG practices. This challenge can be better understood with aid of a case study.

Case Study II: SEBI vs. Piramal Pharma Limited - A Conflict Between ESG Enforcement and Economic Growth of a Company

Piramal Enterprises Limited (**PEL**) operated a pharmaceutical plant which was penalized in November 2019 by the National Green Tribunal (**NGT**) for environmental violations, including water pollution. The penalty amounted to ₹8.32 crores and in November 2018, the Telangana State Pollution Control Board (**TSPCB**) temporarily closed the plant due to non-compliance with environmental norms. In 2020, PEL's pharmaceutical business was demerged to create Piramal Pharma Limited (**PPL**) and the restructuring was formalized through a Composite Scheme of Arrangement transferring assets, liabilities, and responsibilities of the pharmaceutical division to PPL. Subsequently, PPL became a listed entity on October 19, 2022.

SEBI initiated investigations alleging that PEL failed to disclose the NGT penalty and the plant closure thereby violating the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**LODR Regulations**). SEBI contended that PPL, as the successor entity, inherited these disclosure obligations. An Adjudicating Officer (**AO**) reviewed the allegations and exonerated PPL in August 2023[51], basing the decision on the finding that PPL was incorporated in 2020, and the alleged violations occurred in 2018 and 2019, before its existence. PPL became listed only in October 2022 and hence, could not retrospectively disclose prior to its listing. The AO also found that the NGT penalty and plant closure were not material events, as they did not affect consolidated revenue by 10% or profit before tax by 25%, per PEL's policy. Consequently, the AO concluded that PPL was not liable for the alleged violations and exonerated the company.

SEBI filed for review of AO's decision under Section 15I (3) of the SEBI Act, 1992, arguing that it was erroneous and contrary to the principles of market transparency. In November 2024, the

[51] Securities and Exchange Board of India, Adjudication Order in Respect of Piramal Pharma Ltd., SEBI Adjudication Order No. 18/2023 (Aug. 2023), https://www.sebi.gov.in/enforcement/orders/aug-2023/adjudication-order-in-respect-of-piramal-pharma-ltd-in-the-matter-of-piramal-enterprises-ltd-_76168.html.

Whole Time Member issued an order reaffirming the AO's findings and thus exonerating Piramal Pharma Limited.[52]

In conclusion, the WTM order as well exonerated the entity in the review order. While SEBI's November 2024 order exonerating PPL from liabilities associated with its predecessor's actions may seem favorable on the surface, the investigation and subsequent proceedings have imposed significant burdens on the company which can act as a form of corporate "*torture*," impeding economic growth and affecting operational stability. The regulations and enforcement, especially with respect to implementation of ESG, should not be hard and blind sighted that the economic growth takes a back seat. In PPL's case, SEBI's enforcement appears to prioritize retrospective immaterial compliance over the company's current economic stability. The excessive focus on past non-disclosures, which were later deemed immaterial, raises questions about proportionality in enforcement actions. Such dissonance risks deterring businesses from embracing ESG principles altogether, out of fear that compliance efforts might inadvertently expose them to undue regulatory burdens.

2. The issue of classification of "materiality" for disclosures

The concept of materiality that refers to information that could influence an investor's decision can be subjective and cannot be a one-size-fits-all approach. This subjectivity can lead to inconsistencies in disclosed information and thus informational asymmetry. The case study of ***O'Donnell* v *Commonwealth of Australia* [2021]** can be an illustration of the requirement to include climate change risks to be included in the category of material information to be disclosed to the investors. There can be quantitative and qualitative factors that can be considered to be material; however, the securities regulator struggles with defining materiality in scenarios where the risks are uncertain and not easily quantifiable yet could have profound financial implications in the future.

Hence, it is significant that the securities regulator lays down the factors that ought to be disclosed that the investors are enabled to make an informed decision. SEBI has adopted a proactive approach by introducing the BRSR requiring companies not only to disclose financial data but also

[52] Securities and Exchange Board of India, Whole Time Member Order in Respect of Piramal Pharma Ltd., SEBI Order No. 15/2024 (Nov. 2024), https://www.sebi.gov.in/enforcement/orders/nov-2024/order-under-section-15-i-of-sebi-act-1992-in-the-matter-of-piramal-pharma-limited_88312.html.

non-financial information relating to environmental and social impacts. SEBI has further aligned its reporting requirements with international best practices which allow comparability and consistency in ESG reporting making it easier for investors to evaluate sustainability risks across different jurisdictions.

The underlying issue in defining materiality is the unpredictability of the risks. Hence, securities regulators cannot adopt a rule-based approach to determine the materiality of the information ought to be disclosed. However, a principle-based approach may not fully resolve the issue, as it allows listed companies the flexibility to interpret the principles in ways that could serve their interests.

Another challenge in implementing sustainability and materiality disclosures is ensuring the accuracy and consistency of ESG data as many companies, especially the small and medium ones, may lack the systems or expertise to track and report detailed ESG metrics. Further, such disclosures may be so technical in nature that the regulator must still face the challenge of ensuring that investors properly understand and use this data in their decision-making processes.

Research has concluded that retail investors tend to adjust their portfolios much less in response to ESG-related press releases compared to non-ESG disclosures, which indicates that despite the increasing volume of ESG reporting, retail investors largely ignore or fail to act on these disclosures and diminishes the overall efficacy of the ESG disclosure regime. While institutional investors are more likely to integrate ESG factors into their decision-making, retail investors often lack the resources, expertise or understanding to navigate complex ESG reports. Consequently, the impact of ESG disclosures remains concentrated among institutional investors, limiting the broader effectiveness of the framework for driving sustainable market behavior and raising concerns about its accessibility and transparency for individual investors. This disparity between institutional and retail investor responses underscores a challenge for the securities regulators in ensuring that ESG principles are comprehensively integrated into market practices. [53]

3. **Challenges arising due to greenwashing of securities:**

As much as growth there is in the development of recognition of ESG practices, there exists a growing concern for entities misleading the market with false claims about their ESG risks,

[53]Austin Moss, James P. Naughton & Clare Wang, The Irrelevance of ESG Disclosure to Retail Investors: Evidence from Robinhood, SEC Climate Change Disclosure Comment Letter No. CLL12-8846307-238327 (May 18, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8846307-238327.pdf.

opportunities and impacts. The IOSCO's 2021 Asset Management Report described greenwashing as 'the practice of misrepresenting sustainability-related practices or the sustainability-related features of investment products.' The IOSCO 2023 report suggests that the securities regulators have to attempt to curb this issue through its regulations and policies.

SEBI's attempt to curb greenwashing: SEBI has introduced regulatory frameworks to address greenwashing risk in July 2023 by mandating that ESG schemes can invest only in companies with comprehensive BRSR disclosures, ensuring transparency and improving ESG ratings. Additionally, SEBI requires Asset Management Companies to disclose detailed ESG scores, provide independent assurance on compliance, and ensure that fund managers' report on ESG strategy application and voting decisions, addressing potential conflicts of interest and enhancing stewardship reporting.[54]

Additionally, in July 2023, SEBI introduced a regulatory framework for ESG rating providers (ERPs), opting for an enforceable approach rather than a voluntary code of conduct based on its experience with credit rating agencies. This requires entities to register with SEBI to operate as ESG rating providers with a focus on transparency, conflict of interest management, and a clear rating process. It mandates detailed disclosures of the rationale behind assigned ESG ratings, allowing stakeholders to understand the reasoning behind the ratings, and includes a succinct code of conduct for ERPs outlined in the "seventh schedule" of the regulation.[55]

However, such the issue of greenwashing still persists in the Indian as well as the global market due to the existing data gaps and lack of awareness of investors, specifically retail investors.

VI. CONCLUSION

In conclusion, even if sustainability principles are not explicitly the mandate of a securities regulator, it is essential that the securities regulator integrate these principles into their policies and

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[54] Securities and Exchange Board of India, New Category of Mutual Fund Schemes for Environmental, Social, and Governance (ESG) Investing and Related Disclosures by Mutual Funds, SEBI/HO/IMD/DF3/CIR/P/2023/85 (July 27, 2023), https://www.sebi.gov.in/legal/circulars/jul-2023/new-category-of-mutual-fund-schemes-for-environmental-social-and-governance-esg-investing-and-related-disclosures-by-mutual-funds_74186.html.

[55] Securities and Exchange Board of India, New Category of Mutual Fund Schemes for Environmental, Social, and Governance (ESG) Investing and Related Disclosures by Mutual Funds, SEBI/HO/IMD/DF3/CIR/P/2023/85 (July 27, 2023), https://www.sebi.gov.in/legal/circulars/jul-2023/new-category-of-mutual-fund-schemes-for-environmental-social-and-governance-esg-investing-and-related-disclosures-by-mutual-funds_74186.html.

regulations in order to achieve the primary mandates of protecting the investors, ensuring the long-term efficiency and sustainability of the market and detecting and mitigating systemic risks. There is a need to mobilize finances to the sustainable linked projects and companies to achieve the goals of sustainable development the world has set, and securities regulator has a key role in enabling the mobilization of private funds into such fields. Further, it has been recognized that the securities regulator should push for disclosures of non-financial factors and risks that have a significant impact on the long-term viability of the company and its securities. This ensures that the investors are not disadvantaged by informational asymmetry and can make an informed decision. Furthermore, the securities regulator can also regulate the intermediaries and institutional investors to consider ESG factors to facilitate such investments.

While these efforts of securities regulators have significantly advanced the ESG disclosure regime, challenges remain, especially in reaching retail investors who may struggle to comprehend or act upon complex ESG disclosures. The securities regulator also needs to focus on incorporating such ESG principles in a manner that it does not lose its actual focus on the primary mandates. The ESG principles must weigh equitably with the economic viability of the market and its participants.

In India, it is the role of the State to recognize the promotion of social welfare and environmental protection as a fundamental duty of the State under the Directive Principles of State Policy (DPSP), particularly Articles 38 and 48A of the Indian Constitution. These provisions call upon the State to ensure the welfare of its citizens by minimizing economic inequalities and protecting the environment. The integration of ESG principles into the securities market is intrinsically linked to these constitutional objectives ensuring that India's financial system supports both social and environmental sustainability.

India is only at the initial stages of incorporating the ESG principles and reporting to the Indian capital market. Recognizing the significance of sustainable business practices, the SEBI has outlined a cautious and phased approach to incorporate these principles into the regulatory framework. This phased implementation is particularly beneficial in an emerging market like India, where businesses are still adapting to global standards and where regulatory framework could potentially affect growth, profitability, or competitiveness. SEBI by such approach, thus, aims to allow businesses time to adjust without significantly disrupting their ease of doing business. By introducing ESG regulations incrementally SEBI ensures that companies, particularly small and medium-sized enterprises, can align their operations with sustainability goals without facing undue financial or operational pressure.

India is taking steps towards integrating sustainability principles into its securities market framework with the Ministry of Finance actively working on developing a combined Securities Market Code.[56] This proposed code should aim to also address the challenges of implementing ESG principles currently on SEBI while ensuring that the transition is gradual and does not disrupt the ease of doing business of the listed entities or the capital market. The consolidated code would optimistically provide a more cohesive and streamlined regulatory framework, enabling entities to align with sustainability goals without overwhelming them, thus balancing economic growth with responsible business practices.

[56] Press Information Bureau, Government of India, Ministry of Finance, Press Release**,** *Government to Introduce Single Securities Markets Code* (Feb 2021), https://pib.gov.in/Pressreleaseshare.aspx?PRID=1693901.

SAFEGUARDING THE DISSENT: AN EMPIRICAL INQUIRY INTO RESOLUTION PAYOUTS UNDER THE IBC

Raghav Sharma[1] *

ABSTRACT

This paper takes an empirical approach to evaluate the statutory safeguards of dissenting financial creditors under the Insolvency and Bankruptcy Code, 2016, in pursuing the objective of equitable modes. The context to this study are the instances of the resolutions like Swiss Ribbons and Essar Steel, in which the Supreme Court upheld the differential treatment to different classes of the creditors and laid emphasis on the equitable treatment. This study intends to explore that whether dissenting secured financial creditors are systematically worse off than the assenting secured financial creditors in the insolvency procedure. With the help of data on recent rulings made by National Company Law Tribunal, the National Company Law Appellate Tribunal and Insolvency and Bankruptcy Board of India from January 2022 to March 2025, the study empirically identify diversities between the payout ratio and contends that dissenting secured financial creditors are not being treated unfairly in terms of payout. The results go to the general discourse of the concept of fairness and commercial justice in the IBC context and build into a normative discourse of law change and the paper.

KEYWORDS: *Dissenting secured financial creditors, Equitable treatment, Insolvency and Bankruptcy Code, 2016, Judicial trends, Resolution plan payouts*

"*Justice without fairness is a hollow illusion*."

— **Amartya Sen**, Nobel Laureate in Economics

I. INTRODUCTION

Creditors[2] of an insolvent business do not only have the means to seek solutions that are beneficial to their interests, but they are also charged with maintaining the main goal of bankruptcy law on a wider efficiency basis, which is the rehabilitation of businesses, not only financially distressed but also financially viable and to cause the orderly liquidation of

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[2] The Insolvency and Bankruptcy Code, 2016 § 3(10) defines "creditor" as any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder; Further, § 3(30) defines a 'secured creditor' as a creditor in favour of whom security interest is created.

non-viable businesses.[3] Additionally, insolvency laws also ensure the 'ex-post economic efficiency'.[4] Despite such pivotal role played by the creditors in forming the large part of the bankruptcy system, the determinants and the implications of social efficiency in and of themselves in the decisions of creditors on the fate of the proposed bankruptcy reorganization plans are not fully known.[5]

India is a growing economy[6] and endeavors to be World's 3rd largest economy[7] but to attain this milestone, a well functioned corporate insolvency framework that resolves disputes in a timely and efficient manner is pivotal[8]. The Insolvency and Bankruptcy Code, 2016 (**"IBC"**) was introduced in India with the objective of consolidating the insolvency laws to resolve the disputes in a time bound manner and to balance the interest of all the stakeholders. The key characteristics of the IBC are the significance of allocating the prominent role of the commercial wisdom of the Committee of Creditors (**"CoC"**) and the concept of commercial wisdom in confirming the resolution plans.[9] But in this creditor-based framework, there exists an important contradiction: that of dissenting (but bound) financial creditors, those who vote against the resolution plan but are bound by it, when it passes the test of the required majority[10].

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[3] Lemma W. Senbet & Tracy Yue Wang, Corporate fnancial distress and bankruptcy: a survey, 5(4) FOUND. TRENDS. FINANC. 243 (2012).

[4] Francesca Cornelli & Felli Leonardo, *Ex-ante efficiency of bankruptcy procedures* 41(3-5) EUR. ECON. REV. 475 (1997).

[5] Jaka Cepec & Peter Grajzl, *Creditors, Plan Confrmations, and Bankruptcy Reorganizations: Lessons from Slovenia*, 22 EUR. BUS. ORGAN. L. REW. 559 (Springer, 2021).

[6] India overtakes Japan to become world's 4th largest economy: NITI Aayog CEO, DD NEWS (May 25, 2025, 12:49 P.M.), https://ddnews.gov.in/en/india-overtakes-japan-to-become-worlds-4th-largest-economy-niti-aayog-ceo/ (last accessed July 29, 2025); India has become 4th largest economy, ahead of Japan, TOI (May 26, 2025, 2:33 P.M.), https://economictimes.indiatimes.com//news/economy/finance/india-has-become-4th-largest-economy-ahead-of-japan-niti-ceo/articleshow/121393266.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign =cppst (last accessed July 29, 2025).

[7] India's Impending Economic Boom, MORGAN STANLEY (Nov. 08, 2022), https://www.morganstanley.com/ideas/investment-opportunities-in-india (last accessed July 29, 2025); India to be 3rd largest economy by 2028: Morgan Stanley, ET (Mar 13, 2025, 7:33 P.M.), https://economictimes.indiatimes.com/ news/economy/ indicators/india-to-be-3rd-largest-economy-by-2028-morgan- stanley/ articleshow/ 118983662.cms?utm_source= contentofinterest&utm _medium =text&utm _campaign= cppst (last accessed July 29, 2025). ("In 2028, India will overtake Germany as its economy will expand to USD 5.7 trillion."); India Poised To Become Third Largest Economy: Consul General In Shanghai, NDTV WORLD (Jun. 7, 2025, 5:16 P.M.), https://www.ndtv.com/ world-news/ india-poised-to-become- third-largest-economy-consul- general-in- shanghai- 8611077 (last accessed July 29, 2025).

[8] Rajeshwari Senguta & Anjali Sharma, *Corporate Insolvency Resolution in India: Lessons from across-country comparison*, 51(15) EPW 37 (2016).

[9] Sunaina Kanojia & Shasta Gupta, *An empirical analysis of India's insolvency code: perspectives based on ex-post economic efficiency*, IJLM (2024).

[10] *Supra* note 2, § 30(4). This provision states that once a vote of not less than 66% of voting share of the financial creditors is achieved, the CoC may approve the plan after considering the feasibility and viability.

The Section 30(2)(b)[11] of the IBC states that the resolution plan has to, at least, make available the liquidation value to the dissenting financial creditors (**"DFCs"**), as calculated in Section 53[12]. This provides a basic floors to protection, but does not illuminate the issue of in what proportion dissenting creditors should share in excess of liquidation values. In *Essar Steel India Ltd. case*[13] and *Swiss Ribbons Pvt. Ltd. v. Union of India*[14] the court has upheld the provisions of the IBC that treat creditors differently. These instances are indicative of an institutionalized silencing of minority opinions and there arises a question of whether the IBC has gone overboard on majoritarianism. These precedents essentially did not go down well with the DFCs who found themselves on the back footed in comparison to compliant non-dissenting creditors. The logic of suppressing the opposing opinion is that we do not want obstructive strategies that will jeopardize a prompt solution. This has however brought to question issues of fairness, particularly when there are dissenting creditors, who have a great exposure, but low recoveries.

In this context, the contribution of this paper is manifold, it seeks to analyze the data of the Corporate insolvency resolution process (**"CIRP"**)[15] from actual judgements of the National Company Law Tribunal (**"NCLT"**), the National Company Law Appellate Tribunal (**"NCLAT"**) and the Insolvency and Bankruptcy Board of India (**"IBBI"**), and inquires whether there is some distinction in the payout ratios of the dissenting secured financial creditors (**"DSFCs"**) and the assenting secured financial creditors (**"ASFCs"**). This explicit formulation and testing of hypothesis using actual experience data is one way that this research is an example of how a move to evidence-based jurisprudence can be used to justify effective and specific reform in insolvency law and practice. It also contributes to the ongoing normative debate on whether current protections for dissenting creditors align with the IBC's core objectives of fairness, efficiency, and stakeholder maximization.

[11] *Id.*, § 30(2)(b).

[12] *Id.*, § 53.

[13] Essar Steel India Ltd. v. Satish Kumar Gupta, (2020) 8 SCC 531.

[14] Swiss Ribbons Pvt. Ltd. v. Union of India, 2019 (4) SCC 17.

[15] Insolvency and Bankruptcy Board of India & International Financial Corporation, *Understanding the IBC: key jurisprudence and practical considerations* (2021), https://www.ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf (last accessed July 30, 2025). The step-by-step procedure of the CIRP is elucidated as follows: IBC grants the right to file a CIRP petition against any CD with a payment default of at least INR 1 crore. After the insolvency petition is filed, the National Company Law Tribunal (NCLT) has a time limit of 14 days to admit or reject it. The date of admission of the petition is called "insolvency commencement date" (ICD), on which the CIRP stands commenced, board and management get suspended, an insolvency professional (IP) gets appointed and a moratorium is put in place. A CIRP must get completed within 180 days from the ICD, subject to an extension of 90 days and an overall limit of 330 days.

II. DIFFERENTIAL TREATMENT UNDER THE IBC: JUDICIAL APPROACHES TO CREDITOR CLASSIFICATION

Swiss Ribbons Pvt. Ltd. V. Union of India[16] is the first landmark case concerned with the IBC where, a two judge bench of the Supreme court upheld the constitutionality of the IBC. The court while dealing with the question of the constitutional validity of Section 53 held that the provision is not in contravention of Article 14[17] as it is based on "intelligible differentia"[18]. The reasoning for differentiating the two was laid down by the court as -

> "*A perusal of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an "operational debt" would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority*"[19]

Similarly, in *Essar Steel India Ltd. case*[20], a three judge bench upheld the differential treatment of different classes of creditors while reaffirming the dominance of the commercial wisdom[21] of the CoC.

> "*Thus, it can be seen that the Code and the Regulations, read as a whole, together with the observations of expert bodies and this Court's judgment, all lead to the conclusion that the equality principle cannot be stretched to treating unequals equally, as that will destroy the very objective of the Code-to resolve stressed assets. Equitable*

[16] *Supra* note 13.
[17] India Const. art. 14.
[18] *See State of West Bengal v. Anwar Ali Sarkar*, 1952 SCR 284; *Dr. Saurabh Choudhary And Ors. v. Union Of India*, AIR 2004 SC 2212. Any reasonable classification must be based on an intelligible differentia and there must be the presence of a nexus between the object of the Act and the basis of classification.
[19] *Supra* note 13, at ¶23.
[20] *Supra* note 12.
[21] The "commercial wisdom" of the CoC refers to the collective business judgment and decision-making authority granted to the CoC. The CoC, primarily comprising the financial creditors of the insolvent company, is empowered to make critical decisions regarding the resolution process, including the approval of resolution plans or opting for liquidation. Further, in India Resurgence ARC (P) Ltd. v. Amit Metaliks Ltd., (2021) 19 SCC 672, the NCLAT rejected the aggrieved creditor's appeal to be given a superior compensation and reaffirmed that the commercial wisdom of the CoC cannot be challenged.

> *treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational*."[22]

One may interpret the rationale in *Swiss Ribbons case*. as bringing into the existence an area of difference between dissenting and assenting secured financial creditors. The Court has pointed out the significance of FCs to the capital formation, which Separate the FCs and OCs on grounds of the contribution of financial resource and evaluation of viability. Taking the argument further, it could be said that among the FCs, the ones who agree to a resolution plan can be said to play a part in revival by facilitating a consensus based resolution, thus conforming to the goal of the IBC of insolvency resolution and maximization of values in a timely manner. The DCs on the other hand may be viewed as hindering this process, which may require different treatment in the disbursement of resolution plans. The act of dissent might therefore be considered as a reasonable differential motivation founded upon maintenance of an assurance of business and rewarding helpful participation during the decision making process of the CoC. Further, Section 30(2)(b) provides for different treatment and pay-out to a Financial Creditor who has voted in favour and a Financial Creditor does not vote in favour of a Resolution Plan. The Code provides that in the event a Financial Creditor does not vote in favour of the Resolution Plan, it should be offered an amount atleast equivalent to the liquidated value irrespective of what is being paid to the other similarly placed Financial Creditors who have voted in favour of the Plan.

III. DATA METHODOLOGY

The author collected a list of companies that have yielded CIRP from January 2022 to March 2025, by accessing the Quarterly newsletters of the IBBI[23]. The author examined every case and each case was segregated into two groups, namely (i) Where a DSFCs are involved and (ii) Where no DSFCs were involved. Since, the main focus of the research revolves around the DSFCs, the cases put under group (i), which were 29 in number, were further examined in detail and data from the individual cases was collected from the actual judgements of NCLT, IBBI and NCALT.

IV. ARE DSFCS BEING UNFAIRLY TREATED ?

[22] *Supra* note 13, at ¶57.
[23] Insolvency and Bankrupcy Board of India, Newsletters, https://ibbi.gov.in//en/publication (last accessed July 30, 2025).

Name	Year	Amount Admitted (in crores)		Payout Amount (in crores)		Amount provided to amount claimed (in %)	
		DSFCs	ASFCs	DSFCs	ASFCs	DSFCs	ASFCs
Rki BuildersPvt Ltd.	2025	10.18	45.93	1.68	8.63	15.94	18.79
Cane Agro Energy (India) Ltd.	2025	1.25	251.8	0.7	267.98	55.95	106.42
Neptune Developers Ltd.	2025	60.13	1265.29	2.48	48.74	27.16	3.85
Manjeera Constructions Ltd.	2025	4.72	339	0.1	63.47	1.14	15.74
Neueon Towers Ltd.	2024	140.14	3267.11	4.03	94.03	2.88	2.88
Metenere Ltd.	2024	33.36	3006.67	2.63	269.64	7.88	8.96
Karvy Data Management Services Ltd.	2024	29.42	323.42	6.75	74.25	22.96	22.96
Lanco Amarkantak Power Ltd.	2024	674.42	13957.29	100.87	4000.13	14.96	28.66
Msx Mall Pvt Ltd.	2024	4.93	5.81	0.49	0.58	10	10
Worlds Window Infrastructure and Logistics Pvt. Ltd.	2024	32.77	140.77	16.51	24.49	50.37	17.4

Eastern Silk Industries Ltd.	2024	90.67	803.24	5.9	52.25	6.46	6.5
Privilege Industries Ltd.	2024	2.53	554.43	1.72	377.57	68.1	68.1
Rajvir Industries Ltd.	2024	9.13	208	4.95	110.9	54.25	53.31
Starlite Componet Ltd.	2024	0.7	4.71	0.24	1.6	33.93	33.93
Educmop Solutions Ltd.	2023	743.83	2254.34	64.02	249.5	7.83	9.11
Hindustan Tankers Pvt. Ltd.	2023	0.88	10.16	0.11	1.29	12.67	12.67
Ujaas Energy Ltd.	2023	31.76	71.77	9.49	18.51	29.89	25.78
Decent Laminate Pvt. Ltd.	2023	4.46	766.98	4.46	745.69	100	74.62
Kail Ltd.	2023	73.20	24565.60	0.54	122.33	0.5	0.44
Unimark Remedies Pvt. Ltd.	2023	297.60	775.05	32.86	88	11.04	11.37
D S Kulkarni Developers	2023	181.07	89.41	1012.50	726.1	48.87	71.71
Innovative tyres & Tubes Pvt. Ltd.	2023	0.12	39.03	10.96	36.28	92.95	92.95
Action Ispat And Power Pvt. Ltd.	2023	319.33	2136.22	32.64	218.35	10.22	10.22

Degree Cotsyn Pvt. Ltd.	2022	47.33	98.47	0.71	31	1.5	31.5
Kudos Chemie Pvt. Ltd.	2022	3.30	3693.92	0.19	227.82	6.33	6.17
Gupta Exim India Pvt. Ltd.	2022	12.95	626.60	2.06	99.72	15.92	15.92
Kannu Aditya (India) Ltd.	2022	9.63	329.55	0.08	16.92	0.78	5.14
R P Basmati Rice Ltd.	2022	101.52	228.29	1.71	3.78	1.69	1.66
Value Infracon India Pvt. Ltd.	2022	1.86	0.53	1.00	0.42	53.76	78.05
Mean Payout Ratio*						26.41	29.13

Table 1

Source: NCLT, NCALT and IBBI[24] , **Author's calculation*

[24] Insolvency and Bankruptcy Board of India, Quarterly Newsletter for January-March, 2025, https://ibbi.gov.in/uploads/publication/912e97d4d9f96651386541fb7059203b.pdf (last accessed July 31, 2025); Insolvency and Bankruptcy Board of India, Quarterly Newsletter for October-December, 2024, https://ibbi.gov.in/uploads/publication/1885c0421a20cc4173386ba9c5dc3466.pdf (last accessed July 31, 2025); Insolvency and Bankruptcy Board of India, Quarterly Newsletter for July-September, 2024, https://ibbi.gov.in/uploads/publication/edc044b410d37f0fd22cbe07a74665f3.pdf (last accessed July 31, 2025); Insolvency and Bankruptcy Board of India, Quarterly Newsletter for April-June, 2024, https://ibbi.gov.in/uploads/publication/9bc46bf1e4b86dab3b0310cb8284cb74.pdf (last accessed July 31, 2025); Insolvency and Bankruptcy Board of India, Quarterly Newsletter for January-March, 2024, https://ibbi.gov.in/uploads/publication/21aa7620a9e809f7a20b432eec89888b.pdf (last accessed July 31, 2025); Insolvency and Bankruptcy Board of India, Quarterly Newsletter for October-December, 2023, https://ibbi.gov.in/uploads/publication/eed07a9e474cf8da4bf6338a54953ebb.pdf (last accessed July 31, 2025); Insolvency and Bankruptcy Board of India, Quarterly Newsletter for July-September, 2023, https://ibbi.gov.in/uploads/publication/b4ce3516920836e9ff9b1e816137bf97.pdf (last accessed July 31, 2025); Insolvency and Bankruptcy Board of India, Quarterly Newsletter for January-March, 2023, https://ibbi.gov.in/uploads/publication/51cd3268be50c04f9745bb3959b09a89.pdf (last accessed July 31, 2025); Insolvency and Bankruptcy Board of India, Quarterly Newsletter for October-December, 2022, https://ibbi.gov.in/uploads/publication/138597264c97f5fe167e1250e1e1e4bf.pdf (last accessed July 31, 2025); Insolvency and Bankruptcy Board of India, Quarterly Newsletter for July-September, 2022, https://ibbi.gov.in/uploads/publication/f3ddc90d7391bcae84ef2f87f793eb3c.pdf (last accessed July 31, 2025); Insolvency and Bankruptcy Board of India, Quarterly Newsletter for April-June, 2022, https://ibbi.gov.in/uploads/publication/11177d63dbf602b97f179669aa8b7eb0.pdf (last accessed July 31, 2025); Insolvency and Bankruptcy Board of India, Quarterly Newsletter for January-Marcch, 2022, https://ibbi.gov.in/uploads/publication/7d78e821aeec9191e8a9f863669492a9.pdf (last accessed July 31, 2025);

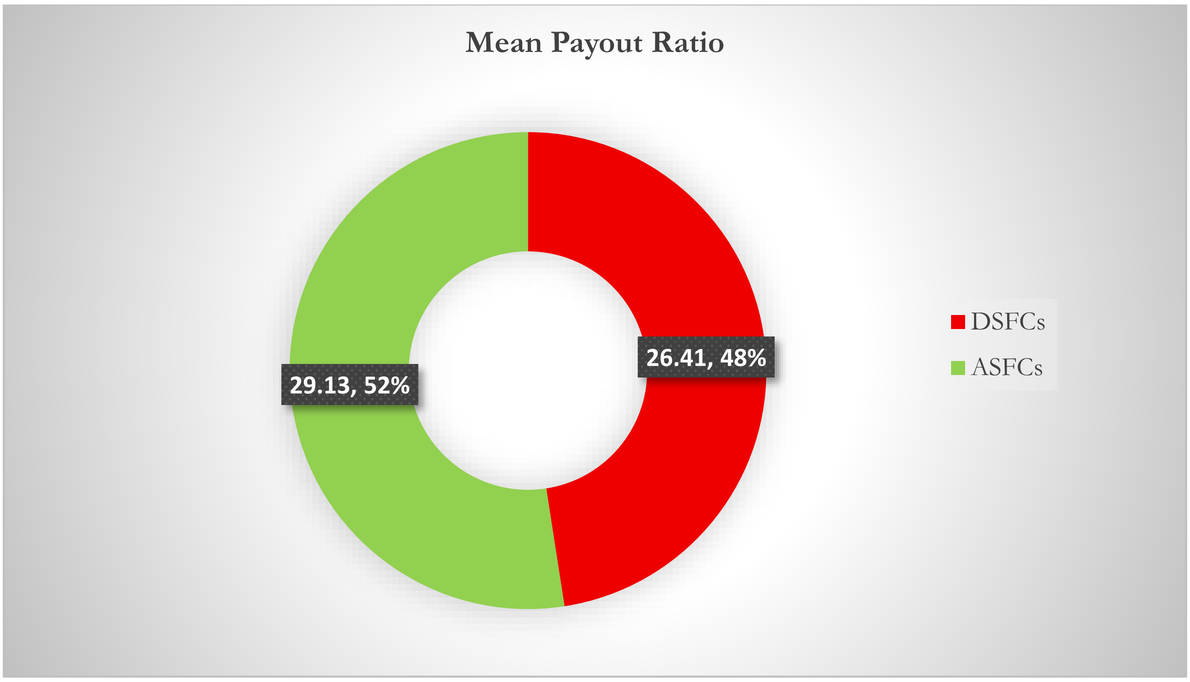

Figure 1

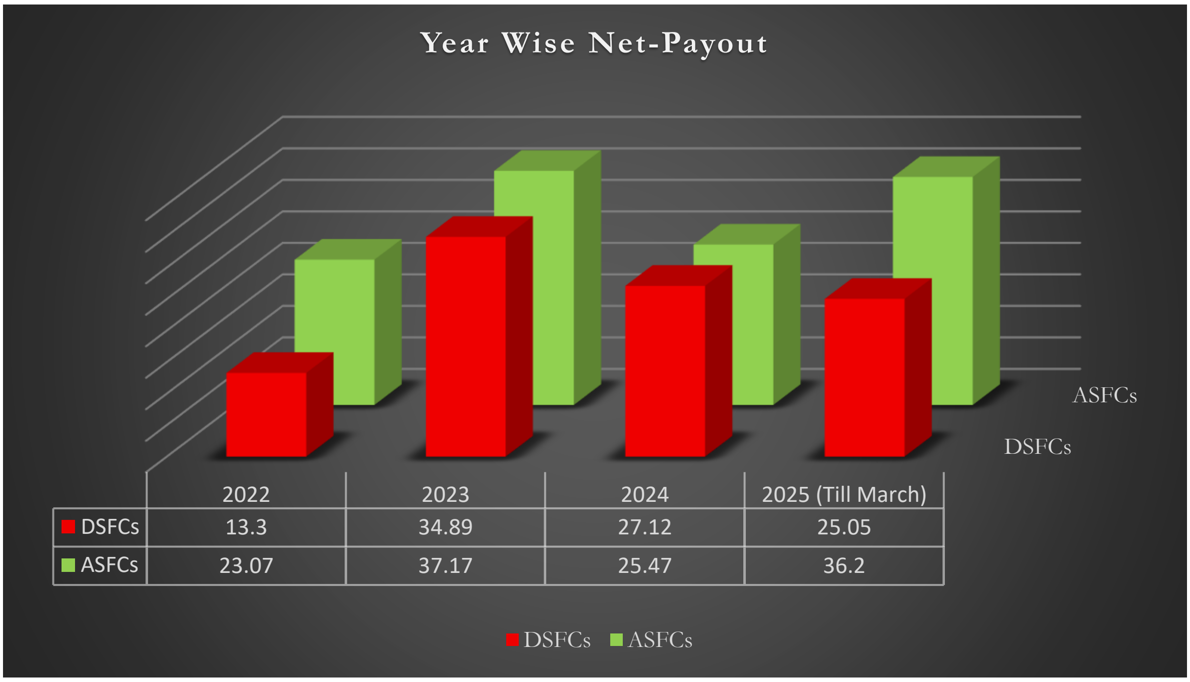

Figure 2

V. FINDINGS

The empirical study revealed that though there exists some gap in the payout ratios between the DSFCs and the ASFCs, it is meagre in nature. As depicted in Table 1 and Figure 1, there exists only a difference of 2.72 in the mean payout ratios of the DSFCs and the ASFCs and claiming that DSFCs are being treated unfairly would not be the correct proposition. Additionally, despite the widespread concern surrounding the treatment of DSFCs under the IBC, an empirical review of post-litigation resolution plans reveals that the judiciary has, in all of the cases, adhered strictly to the statutory requirement under Section 30(2)(b), which mandates that DSFCs receive at least the amount they would have otherwise received in the event of liquidation. This consistent enforcement by the NCLT and the NCALT indicates that the legal threshold is being respected in practice. However, the uniformity of judicial adherence does not necessarily resolve the underlying dilemma. Instead, it raises a more nuanced concern that whether mere compliance with the liquidation value threshold is substantively sufficient to protect dissenting creditors in a process often dominated by majority financial creditors. The findings suggest that while statutory safeguards are being implemented, the practical fairness and equity of these outcomes remain open to question, especially in light of structural limitations in dissenting creditors' bargaining power within the CoC. This calls for a deeper re-examination of whether the current legal framework genuinely balances the interests of all creditors or merely provides a procedural minimum that may not reflect commercial justice in every case.

VI. SUGGESTIONS AND CONCLUSION

This paper depicts that although payout ratios in DSFCs are slightly lower when compared to payout ratios in ASFCs, the difference is actually quite minimal thus being counterproductive to the usual thought that DSFCs will be treated unfairly under the IBC[25]. The enforcement of the statutory protection provided that the dissenting creditors be paid at least the liquidation value monitored by the court seems to be strictly applied as can be seen in the decision of the NCLT and appellate courts. However, the results point to a bigger problem that an emphasis that the liquidation value at a distinct threshold can provide effective results which may be commercially viable and fair alike. Existing insolvency resolution procedures are largely couched in terms of the commercial wisdom of majority creditors and may result in a restricted level of substantive influence and bargaining power by dissenters.

In light of the findings discussed, it becomes essential to have a centralized mechanism for case data collection in IBBI. Unlike, the Reserve Bank of India, Securities and Exchange

[25] *See* C. Scott Pryor & Risham Garg, *Differential Treatment Among Creditors Under India's Insolvency and Bankruptcy Code, 2016: Issues and Solutions*, 94 AM. BANKER. L.J. 123 (2020).

Board of India and other authorities, data is not available for every insolvency case on the IBBI website. An improved mechanism for public availability of data would help conduct future researches in a much smoother manner.

Secondly, the existing body of legal legislations should be reconsidered to enhance the level of protection to DSFCs. The right of obtaining reconsideration of valuation reports should be given statutorily with the ability of the dissenting creditors to obtain a second independent valuation by professionals empaneled by IBBI to the maximum extent there is a material difference in the plan value and valuation of that specific assigned creditors value. The increased participatory rights of dissenting creditors can create a more level playing field of the negotiations which will accurately represent all variable interests.

Thirdly, each resolution plan ought to be required to contain a Dissent Impact Statement, that sets forth the number and percentage of dissenting claims, how those creditors are going to be treated, and the legal rationale to treat those who do not agree with the resolution in a similar manner to those who do. This would enhance scrutiny and make the judiciary more accountable.

Lastly, a new system of providing dissenting secured creditors with a Value Participation Right would enable the former to participate in future upsides in the form of deferrals or convertible securities without compromising the feasibility of the plan. The combination of these would transform dissenting as a formal process to more of a substantive right, so reflecting resolutions in insolvency more in line with the objectives of fairness, maximization of stakeholders, and the bringing of commercial justice to insolvencies outlined in the IBC.

VII. LIMITATIONS AND FURTHER SCOPE OF STUDY

Many cases were mentioned in the Quarterly newsletters of the IBBI but the author could not find the orders (approved resolution plans) of the same date on those cases, in the IBBI, NCLT and the NCALT website. In some cases, while opening the case file an error displayed saying 'address not found'. This paper only deals with the issue of difference in treatment between the DSFCs and ASFCs and leaves a further scope of research in the differential treatment of secured and unsecured financial creditors, and operational creditors. Several avenues also remain open for a cross-jurisdictional analysis of the protection provided to DFCs under IBC with other regimes.

TURBULENCE & TRANSITION: RETHINKING ON ROLE OF IBC IN AIRLINE INSOLVENCY

Vaidik Sohani[26] and Vansh Garg[27]***

ABSTRACT

*The aviation industry often suffers from financial stress, regulatory complexity, and operational vulnerability. It is a capital-intensive business with thin margins, and airlines are susceptible to jerks in the industry, as the prominent example of the insolvency of Jet Airways and Go First illustrates. This paper examines whether the Insolvency and Bankruptcy Code, 2016, is structurally capable and compatible with the needs of sectoral problems in aviation industry. It makes an emphasis on the tension between the IBC's**[“IBC”]** moratorium in Section 14 and the international leasing requirements of the Cape Town Convention (CTC) **[“CTC”]**, showing how rigid procedures can devalue rather than conserve value. This paper proposes a hybrid model of fast-track frameworks for certain aspects of insolvency, policy elements, and industry-specific safeguards, referencing Indian case law, international norms, and the U.S. Chapter 11 system. In addition, this research proposes a phased limitation of Section 29A and pre-pack frameworks. This piece of work is a step towards future research in the use of competition law in relation to post-insolvency route dominance in the aviation sector.*

Keywords- *Insolvency, Bankruptcy, going concern, leasing agreements, Pre-packed Insolvency, Fast-track Insolvency, Liquidation, Moratorium.*

I. INTRODUCTION

The international as well as the Indian aviation industry has all along been symbolic of risk-involvement, low margins, and high capital input. Even in those pre-pandemic days, the airline business was entangled under the huge weight of unpredictable fuel prices, currency depreciation, lease commitments, and thin yields. The COVID-19 pandemic further exposed these structural weaknesses, as global aviation was dealt a historic blow.

The impact of the COVID-19 pandemic has led to global aviation suffering losses of about USD 137 billion in 2020, reducing to USD 4 billion by 2023 as travel restrictions were lifted, and demand started to recover incrementally. In comparison, Indian airlines were projected to

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have sustained total losses exceeding USD 12 billion from 2020 to 2023, maintaining an average debt-equity ratio of 2.1:1 among key operators[28]. Even with a significant recovery in domestic air travel after 2022, ongoing financial vulnerabilities still affect the industry, as evidenced by recent insolvency instances.

Two of the most significant bankruptcy incidents in India's aviation history, Jet Airways (2019) and Go First (2023), have highlighted the shortcomings of current legal frameworks, especially the Insolvency and Bankruptcy Code, 2016 (IBC)[29], in addressing the specific challenges of the airline sector. Jet Airways, previously the second-largest airline in India, holding a 15% market share, ceased operations in April 2019 because of increasing debts, unpaid wages, and failures to meet lease obligations. A successful resolution plan received approval in 2021, but by mid-2025, the airline had yet to restart operations due to regulatory, financial, and strategic challenges. Go First's voluntary insolvency petition under Section 10[30] of the IBC in 2023 represented the initial major case featuring the use of the interim moratorium, resulting in considerable clashes with foreign lessors seeking to reclaim aircraft, thereby highlighting significant discord between Section 14 of the IBC and global leasing standards under the Cape Town Convention and IDERA principles.

Such considerations raise significant questions about the role and adaptability of the IBC in dealing with service-oriented and asset-light industries as Airlines. This paper explores the following research questions:

I. *To what extent is the IBC suitable to resolve the insolvency crisis in the aviation sector with its peculiar blend of technical, regulatory, operational and financial difficulties?*
II. *What are the main legal difficulties, in relation to leases, moratorium, and public interest, whose interaction stifles the productive governance of airlines under the Code?*
III. *Can a workable model for restructuring or limited operation be sustained within the IBC, or are sector-specific amendments necessary?*

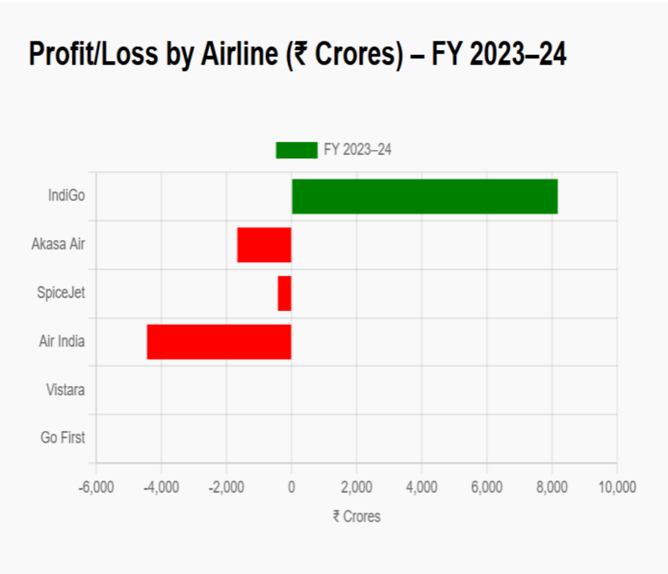
This research is multidisciplinary and employs a doctrinal and comparative legal method focusing on Indian law, studying legal texts, NCLT/NCLAT decisions, and analysis, with cross-references to other insolvency regimes. Prominent attention is paid to the recovery in

[28] CAPA India, 2023.
[29] Insolvency and Bankruptcy Code, No. 31 of 2016, Acts of Parliament, 2016 (India).
[30] Insolvency & Bankruptcy Code, § 10, No. 31 of 2016, Acts of Parliament, 2016 (India).

American Jurisdiction through the Chapter 11 Reorganization of legacy airlines like American and Delta Airlines and the international obligations of the Cape Town Convention on International Interests in Mobile Equipment (2001) to which India ratified in 2008 but has failed to fully domesticate through implementation legislation.

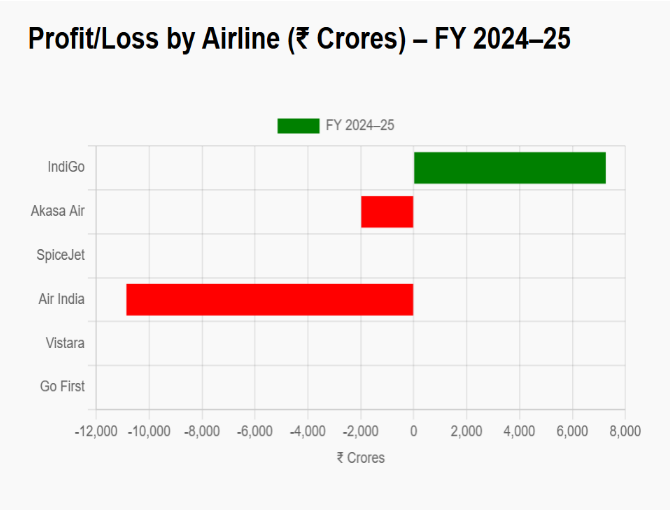
Through the analysis of doctrines and comparative case studies, this paper attempts to identify systemic problems and potential legal and policy interventions to improve the effectiveness of insolvency resolution in the Indian aviation industry.

- Below given are graphical representations according to live mint reports of the *Profit After Tax (PAT)* value of Airlines functioning in India, which gives a glimpse and outline of the performance of airlines in India.



"Chart 1: FY 2023–24

- ***IndiGo****: ₹ 8,172 crore profit*
- ***Akasa Air****: ₹ –1,670 crore loss*
- ***SpiceJet****: ₹ –424 crore loss*
- ***Air India****: ₹ –4,444 crore loss*
- ***Vistara****: Data N/A → Vistara's standalone financials not publicly disclosed; integrated under Tata Group.*
- ***Go First****: Data N/A → Ceased operations in May 2023; did not publish FY24 results.*"



"Chart 2: FY 2024–25

- **IndiGo**: *₹ 7,258 crore profit*
- **Akasa Air**: *₹ –1,983 crore loss*
- **Air India**: *₹ –10,859 crore loss*
- **SpiceJet**: *Data N/A → FY25 audited results not yet published.*
- **Vistara**: *Data N/A → Continues to be part of Tata Group consolidated accounts.*
- **Go First**: *Data N/A → Under insolvency; no FY25 results."*

II. ANATOMY OF THE AVIATION BUSINESS & VULNERABILITIES

Sustainable management of the aviation industry is difficult, and a testimony to this fact is the number of airlines that have shut down operations in recent years due to their inability to compete in the market[31]. In particular, the last 5 years have witnessed the exit of Jet Airways, Go First, Zoom Air and Air Deccan[32]. This trend raises major concern for the Indian aviation industry as it may lead to a concentration of market share in the hands of a few airlines like Indigo and Air India (with its subsidiaries Vistara and Air Asia), which already hold 81.3 per cent of the Indian aviation market[33]. Although aviation is a high-capital industry, unlike others, it operates on marginal profits, and survival depends more on the volume than on high returns[34]. Even a slight rise in costs can tip the balance for airlines, given how thin their profit margins are. The cost of the imported Airline Turbine Fuel accounts for almost half of the costs[35] and currently, ATF is not covered within the ambit of Goods and Services Tax ('GST') which means that both central's excise duty and state-level value-added tax ('VAT') are imposed on it and

[31] Five Reasons Why Private Airlines Fail So Often In India, Econ. Times (May 3, 2023), https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/five-reasons-why-privateairlines-fail-so-often-in-india/articleshow/99959908.cms?from=mdr.
[32] Manu Balachandran, Between Air India and IndiGo, India's Skies Are Headed for A Duopoly. What's This New Reality?, FORBES (Sept. 21, 2024), https://www.forbesindia.com/article/take-one-big-story-ofthe-day/between-air-india-and-indigo-indias-skies-are-headed-for-a-duopoly-whats-this-new-reality/88431/1.
[33] Sukalp Sharma, Expect High Competitive Intensity Between Indigo and Air India Group From 2024: CAPA India, Indian Express, Dec. 31, 2023, https://indianexpress.com/article/business/aviation/indigo-air-india-group-high-competitive-intensity-from-2024-9088698/.
[34] Ashley Lutz & Gus Lubin, Airlines Have an Insanely Small Profit Margin, BUS. INSIDER, June 16, 2012, https://www.businessinsider.com/airlines-have-a-small-profit-margin-2012-6?IR=T.
[35] THE ECONOMIC TIMES, Five Reasons Why Private Airlines Fail So Often in India, May 3, 2023, https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/five-reasons-why-privateairlines-fail-so-often-in-india/articleshow/99959908.cms.

the fact that India derives almost 85% of its oil requirements through imports highlights the need to reduce the taxes on the fuel prices[36].

The problem is further compounded by fluctuations in the value of the Rupee vis-à-vis the Dollar, which is the currency for most of the payments, and any depreciation of the Rupee increases the cost of fuel for Indian operators, thereby putting them at a disadvantage vis-à-vis their international counterparts[37]. These structural and financial pressures make it increasingly difficult for Indian airlines to stay competitive, and without targeted reforms, the industry risks becoming both unsustainable and monopolized.

III. THE LEASE CONTRACT: LESSORS' CONFLICT WITH SECTION 14 OF THE IBC

Aircraft leasing plays a crucial role in Indian aviation, as more than 80% of the fleet is operated under leases. These leases, mainly obtained from international lessors, entail the aircraft remaining the property of the lessor. India has signed the Cape Town Convention[38] (CTC) and its Aircraft Protocol, which is designed to safeguard the interests of lessors in cases of insolvency. Nevertheless, the nation has not implemented national laws to fully fulfil its commitments, particularly regarding the enforcement of Irrevocable Deregistration and Export Request (IDERA). This discrepancy became evident during Jet Airways' insolvency (2019)[39], and a similar case happened with Go First Airlines (2023)[40]. In both instances, the NCLT interpreted the Section 14[41] IBC moratorium to prevent lessors from reclaiming aircraft[42], even in cases where Irrevocable Deregistration and Export Request (IDERA) were raised. This leads to contradictions with Article XI of the Cape Town Convention[43], which mandates that aircraft must be returned within 60 days after insolvency proceedings. The NCLT Delhi Bench decision in the case of Go First Airlines affirmed that aircraft, even as leased assets, are included in the

[36] PRESS TRUST OF INDIA, 'No Decision on reduction in Tax on ATF to bring down prices: Report', BUSINESS STANDARD, May 25, 2022, https://www.business-standard.com/article/current-affairs/no-decision-on-reduction-in-tax-on-atf-to-bring-down-prices-report-122052501443_1.html.

[37] PRESS TRUST OF INDIA, 'No Decision on reduction in Tax on ATF to bring down prices: Report', BUSINESS STANDARD, May 25, 2022, https://www.business-standard.com/article/current-affairs/no-decision-on-reduction-in-tax-on-atf-to-bring-down-prices-report-122052501443_1.html.

[38] Economic Laws Practice, Implementation of the Cape Town Convention in India: A Legal Framework for Protection and Enforcement of Security Interests in Aircraft (2025), https://elplaw.in/wp-content/uploads/2025/04/Implementation-of-the-Cape-Town-Convention-in-India-A-Legal-Framework-for-Protection-and-Enforcement-of-Security-Interests-in-Aircraft.pdf.

[39] State Bank of India v. Jet Airways (India) Ltd., CP(IB) 2205/MB/2019 (NCLT, Mumbai, 2019).

[40] Go Airlines (India) Ltd. v. SMBC Aviation Capital Ltd. & Ors., CP No. 123/2023 (NCLT Delhi Bench, May 2023).

[41] Insolvency and Bankruptcy Code, 2016, § 14.

[42] Insolvency and Bankruptcy Board of India (IBBI), Legal Framework, https://ibbi.gov.in/legal-framework/act

[43] Cape Town Convention on International Interests in Mobile Equipment, Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, art. XI, Nov. 16, 2001, https://www.unidroit.org/instruments/security-interests/cape-town-convention.

moratorium under Section 14 of IBC, limiting lessors' rights. Resultantly, the Aviation Working Group (AWG)[44] decreased India's compliance rating, imposing a strategic distrust on the Indian aviation industries.

IV. MARKET REALITIES AND SECTORAL AMBIGUITIES

Even with the organized framework of the Insolvency and Bankruptcy Code (IBC), the Indian aviation industry has not seen a successful recovery of any airline via its procedures[45]. Jet Airways, formerly a profitable airline, exemplifies a case where its resolution plan received approval, but the airline still does not operate, as revival efforts have consistently faltered due to financial limitations, the absence of investor commitment, and regulatory hold-ups. Likewise, Go First's recent bankruptcy highlights the systemic issues in the CIRP framework for the aviation sector. While Go First pointed to engine malfunctions and supplier failures as causes for its decline, its insolvency submission under Section 10 (2)[46] of the IBC initiated a moratorium under Section 14 (3)[47], immobilizing the lessors' entitlements and essentially stalling its operational resources. This halt resulted in a cash drain from parked planes and diminished any possible value retention, particularly due to the lengthy CIRP process that typically lasts around two years.

Compounding this crisis is the hesitation of financial institutions to finance airline insolvency proceedings, mainly because of the significant risk, poor recovery chances, and absence of physical assets (since most planes are leased). Strategic investors have also displayed minimal interest, discouraged by unclear regulations, sector volatility, and ambiguous legislation regarding aircraft repossession[48]. The moratorium has led to the loss of aviation slots, skilled personnel, and most importantly, passenger confidence, all of which are challenging to restore after resolution. As lessors act proactively to reclaim aircraft at initial signs of trouble, this further narrows the opportunity for operational recovery. The overall impact is a CIRP framework that fails to draw in resolution applicants or ensure the continuity of airlines. This

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[44] Aviation Working Group, AWG Compliance Report 2023, (2023), https://ctc-compliance-index.awg.aero/

[45] Thejas Velaga & Aastha Gupta, Airline Insolvency in India: Balancing Interests Between the Insolvency and Bankruptcy Code and the Cape Town Convention, 17 NUJS L. Rev. 1, 2–3 (2024).

[46] Insolvency and Bankruptcy Code, 2016, § 10.

[47] Insolvency and Bankruptcy Code, 2016, § 14.

[48] Business Today, Aviation Working Group Downgrades India Ratings Amid Go First, Lessors Fight Over Possession of Aircraft, Dec. 7, 2023, https://www.businesstoday.in/industry/aviation/story/aviation-working-group-downgrades-india-ratings-amid-go-first-lessors-fight-over-possession-of-aircraft-408553-2023-12-07.

highlights a difficult truth: in the absence of tailored insolvency measures for the sector, the IBC is not prepared to tackle the intricacies of airline recovery[49].

V. CHALLENGES IN THE CASE OF REVIVAL AS A GOING CONCERN

The term "going concern" in aviation is more than a legal classification; it refers to an airline's ability to realistically operate again. Theoretically, it means the airline is free to continue operations, flying, abiding by licenses, preserving operational relationships with regulators, and maintaining goodwill with lessors. However, for many insolvent airlines, it becomes more of a myth than a model.

Consider the example of Jet Airways, which used to be the largest private airline in India. Jet was placed under the control of a corporate restructuring entity in 2021 with an approved resolution plan in place, but continued waiting because of pending regulatory approvals, lack of fresh funding, viable options and attrition for critical resources, including aircraft, crews and pilots. The Go First RP also struggled with severe operational challenges like incurable aircraft, lessors terminating contracts, and no confirmed investors after waiting for months.

American Airlines is an example of a company that went through intense restructuring and emerged successfully after Chapter 11. They made a change to airline contracts and continued operating through the process. Even Air India, which was not under an insolvency regime, also went through a deep corporate restructuring alongside state aid prior to privatization.

Limited state aid and judicial delays, alongside the absence of government-backed respite financing, artificial frameworks, and making 'going concern' an appealing strategy, are too much for gleaming. The outcome is lacking a pragmatic viability.

VI. LEGAL AND POLICY CHALLENGES

The Insolvency and Bankruptcy Code (IBC), while a landmark in numerous ways, was never intended for high-dependency, high-risk industries such as aviation. Airlines don't run like factory/manufacturing units; they are public-facing enterprises, closely embedded with national infrastructure such as airports, security, and public interest. Eventually, it comes up with structural incongruity between the IBC's corporate rescue and revival architecture and the on-the-ground needs of stranded aircraft.

[49] Arpan Chaturvedi & Tanvi Mehta, Go First Gone: Engine Troubles, COVID Bring Down India's Third-Largest Airline, Reuters (India), May 4, 2023, https://www.reuters.com/business/aerospace-defense/go-first-gone-engine-troubles-covid-bring-down-indias-third-largest-airline-2023-05-03.

The greatest friction is regulatory fragmentation. On paper, the National Company Law Tribunal (NCLT) governs insolvency. But in aviation, the Directorate General of Civil Aviation (DGCA) and the Ministry of Civil Aviation (MoCA) have significant powers over licenses, slots, and safety certifications. The IBC offers no guidance on how these regulators work together with insolvency professionals. Often, that leaves resolution professionals flying blind.

Public interest, including refunds to passengers, service continuity of flights, and air safety, also receives little room in existing insolvency proceedings. India is not like the UK's Civil Aviation Act[50], which does not have a specialized regime of insolvency that strikes a balance between commercial resolution, public safety, and service continuity.

There is also a missing element of proactive government intervention. While industries such as banking or infrastructure see policy-level shove in distress, aviation appears to be left to market forces even when rebirth could be for the larger economic or connectivity purposes.

Briefly put, the policy and legal environment provides no soft landing for ailing carriers. Absent structural changes or industry-specific measures, insolvency in aviation will be a slow glide towards liquidation and not a runway to revival.

VII. SUGGESTED POLICY AND LEGAL REFORMS

India's aviation sector is too fragile and too susceptible to be subject to generic or standard insolvency resolution procedures. Airlines, as distinct from most other enterprises, run on paper-thin margins and are incredibly time-sensitive. A halted airline depreciates quickly. So the question that comes to mind is what the possible outlook could be?

First of all, the Insolvency and Bankruptcy Code (IBC) must have a designated and strategic insolvency process for the airline sector. Airline operations, unlike factories that can close and reopen months down the line, require continuity slots, pilots, permissions, and planes, as well as aircraft bodies, which are highly depreciable in nature, all of which are lost in no time once operations are suspended. A time-bound procedure, 90–120 days, could capture some of the operational value. The legal framework for such quick processes already exists under Section 55–58 of the IBC, though presently restricted to small companies[51].

Asset ring-fencing is also a step. It refers to the protection of major assets (such as leased aircraft, routes, or landing slots) from complete sale in the event of insolvency. This makes

[50] Civil Aviation Act 1982, c. 16 (UK).
[51] Insolvency and Bankruptcy Code, 2016.

partial operation possible, keeping the airline in business pending its sale. This also fits in with the concept of resolution as a "going concern" under Section 30(2)(b) of IBC.[52]

Third, greater clarity is urgently required over the lease provisions, particularly in relation to the Cape Town Convention. India acceded to this treaty to ensure foreign lessors that they can repossess aircraft without hitches. However, courts have sometimes hindered this under IBC's Section 14 moratorium. The government has to either repeal the IBC or notify complete conformity with the Cape Town Protocol. This would draw greater leasing confidence and reduce borrowing costs[53].

In addition, pre-pack insolvency structures can be promoted in the industry so that airlines can negotiate revival with creditors prior to seeking formal CIRP. This minimizes disruption. Lastly, look at establishing a National Aviation Distress Fund, supported in part by public sector banks or aviation PSUs, to provide conditional assistance to financially stressed but viable airlines, like those post-COVID-19[54].

VIII. Easing Section 29A of IBC: The Potential of Revival

Section 29A of the IBC, 2016[55], was introduced to prevent defaulter/corporate applicant promoters and their promoters from regaining disproportionate and unfair control of the company during the CIRP. While its intent was to curtail willful defaults and process misuse, its consequences have been more detrimental and often backfire, particularly in the airline industry, where a founder’s experience and network, as well as brand equity, can be essential for industry recovery and revival.

Considering Jet Airways, as an example. Both the former promoters and key managerial personnel were barred under Section 29A of the IBC, despite the fact that they were well-positioned to resource industry-specific turnaround strategies. In Go First, the exacerbation of non-promoter-led continuity during the grounding of aircraft, the exodus of employees, and operational losses was profound and remains unaverted.

If the 29A restriction were to be relaxed in the case of promoters addressing defaults due to systemic factors (e.g., oil price surges, currency devaluation, or the pandemic's economic

[52] Insolvency and Bankruptcy Code, 2016, § 30(2)(b).

[53] Airline Insolvency Review, UK Department for Transport, Final Report (May 9, 2019), https://www.gov.uk/government/publications/airline-insolvency-review-final-report.

[54] Airline Insolvency Review, UK Department for Transport, Final Report (May 9, 2019), https://www.gov.uk/government/publications/airline-insolvency-review-final-report.

[55] INSOLVENCY AND BANKRUPTCY CODE, 2016, § 29A.

impact), they might be able to formulate plans for reinstatement under the NCLT. In *Swiss Ribbons v. Union of India (2019) 4 SCC 17*[56], the Supreme Court commented that, "Section 29A should not be applied in a mechanical manner", giving room for reasonable application to "genuine promoters. "Such easing could come with conditions, such as upfront repayment of a percentage of dues, infusion of fresh equity, or post-resolution scrutiny to avoid backdoor entry. This could be implemented via sector-specific guidelines or temporary relaxations akin to RBI's restructuring schemes during COVID-19[57].

Hence, a calibrated relaxation of Section 29A, not a complete blanket waiver, could indeed facilitate viable promoter-led revivals, particularly for service-intensive sectors like aviation.

IX. CONCLUSION

India's existing insolvency regime seems to have multiple roadblocks in coping with the operational fragility of the aviation industry. The Go First and Jet Airways cases showcase the value destruction that can arise from rigid procedures and unresolved regulatory boundaries not designed to accommodate all the sectors. Where aviation seeks swift action and structural flexibility, India lacks sector-specific legal frameworks. A blend of fast-track insolvency, temporary governance, some minimal policy intervention, and aviation-specific legislative adjustments or a standalone aviation insolvency law could provide the much-needed legal guidance and operational viability.

Apart from this, the pragmatic example can be witnessed in the Maritime Industry, which has a designated legislation for recovery and has way better viable opportunities. *The Admiralty (Jurisdiction & Settlement of Maritime Claims) Act, 2017*[58], establishes a specialized system for claims to vessels that functions alongside IBC seamlessly. This shows that tailored legal frameworks can complement general insolvency frameworks for smoother and executable operations.

There is much to be said about competition law, the exploration of dominance, barriers post insolvency, and route assignment that can be discussed alongside this topic. In the end, distressed airlines need legal reform, and that need arises from the desire for a healthy, competitive landscape in aviation.

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[56] Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 SCC 17.
[57] Reserve Bank of India, Circular No. FIDD.CO.Plan.BC.5/07.09.20/2020-21 (Sept. 7, 2020), https://www.rbi.org.in/commonman/English/Scripts/Notification.aspx?Id=848.
[58] The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017, Act No. 22 of 2017, enacted August 9, 2017.

WHETHER FRAGMENTATION OR REFORM: EVALUATING DIFFERENTIAL TREATMENT OF LESSORS THROUGH THE AIRCRAFT OBJECTS ACT AND ITS INTERPLAY WITH IBC

*By Shristi Goswami & Shreyas Ranjan[1]**

ABSTRACT

The interplay of the aviation sector and IBC in India can be seen to have been tested at its nascent stage, being further complicated with the enactment of the Aircraft Objects Act, 2025. Previously, IBC governed airline insolvencies in entirety through a consolidated framework aimed at value maximization, uniform creditor treatment, and revival of distressed entities. However, the recent passing of the Aircraft Objects Bill has challenged this uniformity by creating exceptions for aircraft lessors. This paper critically examines the impact of this new legislation on the functioning of IBC, by also exploring how the Aircraft Objects Act, through the adoption of Alternative A of the Cape Town Convention, alters the treatment of lessors, while also bypassing the moratorium under Section 14 of the IBC. Additionally, by introducing a reduced moratorium equivalent that affects the going concern status of airline companies, the Act brings forth several clash points that are to be analysed in this research paper. The research highlights three key areas of clashes: the position of lessors in the sphere of operational creditors; the implications of early repossession on enterprise value; and the risk of sector-specific fragmentation under the IBC. The paper concludes by proposing a hybrid model drawing from Alternative C of the Luxembourg Rail Protocol and Chapter 11 of the U.S. Bankruptcy Code, suggesting judicial discretion and debtor-in-possession safeguards to maintain both creditor confidence and debtor revival.

Keywords: Aircraft Objects Act of 2025, Operational Creditors, Aircraft Lessors, Insolvency and Bankruptcy Code of 2016, Cape Town Convention.

I. INTRODUCTION

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Airline Insolvencies for long have been governed in entirety by the Insolvency and Bankruptcy Code, 2016 ("IBC")[2] which has been a landmark and consolidated code that has replaced the previously existing laws governing the reorganization and insolvency resolution of corporate persons, and has thereby been pivotal in ensuring a time bound manner of resolution or liquidation of corporate entities. Whether the Code has been effective in accurately sticking to the timelines or not, along with a successful resolution of companies remains contentious, the Code is nevertheless effective in offering a consolidated process to govern corporate insolvencies.[3] The purpose of the code was to ensure that distressed companies revive in a time bound manner which essentially is called the value maximization of assets, thereby providing them sufficient opportunity for using the Moratorium for revival. It is additionally noteworthy to mention that the Moratorium period extends upto the date of the order of the Corporate Insolvency Resolution Proceedings ("CIRP") until a period of 180 days, which may be extended by 90 days at the discretion of the adjudicating authority.[4] The concept of the corporate debtor as a growing concern is therefore ensured only under the IBC. However, the coming up of the Aircraft Objects Act of 2025 poses concerns of clash with the IBC. While the shift from debtors in possession to creditors in control is visible, the object of IBC has been to address the needs of both- the creditors of all three kings, as well as the debtors by attempting to facilitate a probable revival of the debtor.[5] Therefore, it can be said that the code is crucial in ensuring timely resolution, and is a consolidated code that considers the interests of all the stakeholders involved.

II. BACKGROUND

The IBC, being the sole code governing corporate insolvencies in India has for long since its enactment witnessed two insolvencies whether failed or not, in the aviation sector. The Jet Airways and Go First Airlines cases are noteworthy to examine for the purpose of the application of IBC in aviation insolvencies. However, out of the two, it is crucial to understand for the purpose of this research- the case of Go First which in particular saw the event of a

[2] Insolvency and Bankruptcy Code, No. 31 of 2016, Acts of Parliament, 2016 (India).
[3] Aseem Chaturvedi, Arpit Kumar Singh, Siddhant Kumar & Amaan Khan, Is Time of Essence: A Test of IBC's Timelines and Accountability, SCC Online (Apr. 9, 2025), https://www.scconline.com/blog/post/2025/04/09/time-of-essence-ibc-timelines-accountability/ (last visited July 30, 2025).
[4] Analysis of Time Limit under Section 12 of the Code for Completion of CIRP," IBC Law (undated), https://ibclaw.in/analysis-on-time-limit-under-section-12-of-the-code-for-completion-of-cirp/ (last visited July 30, 2025).
[5] Aparna Ravi, The Indian Insolvency Regime in Practice: An Analysis of Insolvency and Debt Recovery Proceedings, SSRN (Oct. 15, 2020), https://ssrn.com/abstract=3710944 (last visited July 30, 2025).

corporate debtor seldom applying to trigger the CIRP, and the position of aircraft lessors in aviation insolvencies governed by the IBC.[6] The Go First case witnessed the coming up of the October 2023 notification by the Ministry of Corporate Affairs ("MCA") which exempted aircrafts and aircraft parts from the Moratorium period under Section 14[7] of the IBC.[8] This cherry-picked move by MCA highlighted concerns of the negligible chances of an airline from ever reviving, given that aircrafts form the essence of any airline company. The move by the MCA aimed at benefitting and giving respite to the lessors in particular. Therefore, the question that came about after this notification was on the feasibility of exempting aircrafts and aircraft parts from the Moratorium period, given that IBC's object was not merely to shift the model from debtors in possession to creditors in control, but was also to ensure resolution over liquidation. If the airlines are bereft of the essentials that the airline companies survive on, then that would deprive them of any possibility for revival using these resources which they could have otherwise used or acted with the use of- to adopt a method at their revival. This is even more so as the October 2023 notification gave sweeping powers to the ability of lessors to reclaim the aircraft without any Moratorium period having application over such claims by lessors, thereby completely barring the application of the IBC process in entirety for the aircraft lessors who primarily seek quick deregistration and retaining of the leased aircrafts and/or aircraft parts.

The concerns over deregistration and the disadvantaged position of lessors in the Indian aviation sector under aviation insolvencies is the primary factor leading to the October 2023 notification. However, in a country where over eighty percent of the aircrafts are leased, the rights of lessors needs to be addressed as well.[9] The Cape Town Convention ("Convention")[10] is one such global convention that addresses the interests of lessors, by ensuring certainty by allowing lessors to register their claims in an international registry for aircraft interests, and attempt to repossess their leased aircrafts.[11] While some parts of the Convention have been

[6] Accipiter Investments Aircraft 2 Ltd. v. Union of India, 2024 SCC OnLine Del 3125.
[7] Insolvency and Bankruptcy Code, 2016, § 14 (Act No. 31 of 2016) (India).
[8] Ishaan Pratap Singh & Mohit Goel, Interplay between IBC and MCA Notification: Balancing Lessors' Interests and Airline Revival, Bar & Bench (Feb. 18, 2025), https://www.barandbench.com/view-point/interplay-between-ibc-and-mca-notification-balancing-lessors-interests-and-airline-revival (last visited July 30, 2025).
[9] Centre for Aviation, Aircraft Leasing in India: Opportunity Knocks for the Indian Lessor (Sept. 2018), https://centreforaviation.com/analysis/reports/aircraft-leasing-in-india-opportunity-knocks-for-an-indian-lessor-443995 (last visited July 30, 2025).
[10] Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285, with Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Aircraft Protocol), Nov. 16, 2001 (entered into force Mar. 1, 2006).
[11] Reshma G., Balancing Interests in Airline Insolvency: Reconciling the Insolvency and Bankruptcy Code with the Cape Town Convention in India, 7 Indian J.L. & Legal Rsch. 4083 (2024).

already applied, such as in the case of the Aircraft Rules of 1937[12], the entirety of the Convention until recently remained unimplemented. It is only recently, that the Aircraft Object Bill of 2025 was introduced which was subsequently passed, giving effect to the Convention as well as the Protocol on the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment. India adopted Alternative A of the Convention, which places an equivalent to the Moratorium, by mandating a 60 day wait period before the return of the aircrafts to the lessors, following the initiation of the insolvency proceedings.[13] This essentially leads to the following questions over the clash points between the Aircraft Objects Act[14] and the IBC: on the differentiation achieved between lessors in particular with other operational creditors and their rights and duties post the passing of the Aircraft Objects Bill of 2025 **[A];** on the reduced Moratorium equivalent as a clash point between the IBC and the Aircraft Objects Act **[B];** and whether the Aircraft Objects Act fundamentally carves out a sector specific application of proceedings after the commencement of CIRP which was unachievable with any other effective solution **[C].**

III. OPERATIONAL CREDITORS IN THE AVIATION SECTOR

The position of Operational Creditors is important to deduce for the reason that only three categories of persons can trigger CIRP, each of whom enjoy certain rights and differential treatment under the waterfall mechanism- Financial Creditors (Secured and Unsecured), Operational Creditors, and Corporate Debtors. Under the IBC, the definition of Operational Creditor can be traced from Section 5(20)[15] of the Code as anyone to whom an operational debt is owed, and for which operational debt is to be construed as any claim for providing services or goods including employment or debt as stated under Section 5(21)[16] of the Code. Therefore, it becomes imperative that aircraft lessors are to be construed as Operational Creditors on a literal reading of the Act, which in fact they are treated as. The case of *Parmod Yadav & Anr. v. Divine Infracon Pvt. Ltd.* had introduced the Input-Output test to consider the nexus of the services or goods provided by the Operational Creditor with the output on the affirmation of which would constitute to be Operational Debt.[17] In the case of aircrafts, the direct result of the

[12] Aircraft Rules, 1937, r. 30(7), Gazette of India, pt. II, sec. 4 (Mar. 23, 1937) (India).
[13] JurisCorp, Aircraft Objects Bill 2025 (Apr. 2025), https://www.juriscorp.in/aircraft-objects-bill-2025/ (last visited July 30, 2025).
[14] The Protection of Interests in Aircraft Objects Act, No. 17 of 2025, Acts of Parliament, 2025 (India).
[15] Insolvency and Bankruptcy Code, 2016, § 5(20) (Act No. 31 of 2016) (India).
[16] *Id.*
[17] Parmod Yadav & Anr. v. Divine Infracon Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 251 of 2017, Order dated Sept. 28, 2017 (NCLAT) (Mukhopadhaya, J.) (India).

goods provided by the lessors is resulting in the running of the airline company, therefore satisfying the Input-Output test, in addition to also fulfilling the requirements to be termed as Operational Debt as defined under the IBC. Therefore, having established the essential requirements and the fundamentals that result in the constitution of an Operational Debt or to be tagged as an Operational Creditor, it is now crucial to consider the position of aircraft lessors under the IBC as Operational Creditors.

An intrusive reading into the nature of the aviation sector wherein aircraft is the only component on the basis of which an airline could run, the reasonable question that is posed is on the nature of Operational Creditor in contrast to that of the lessors in this particular case, in addition to assessing the role of lessors in particular as Operational Creditor. The Aircraft Objects Act, 2025 and the October 2023 notification which go in tandem with each other have changed the way aircraft lessors are treated under the IBC. Unlike other Operational Creditors like fuel suppliers or ground staff service providers, aircraft lessors are now allowed to bypass the Moratorium under Section 14[18] of the IBC and take back their aircrafts during the CIRP. This gives them a clear advantage over other Operational Creditors. Even though they do not have voting rights in the Committee of Creditors, they now have special rights that let them recover their assets without having to wait for the entire resolution process to play out. This creates a visible imbalance within the group of operational creditors. Additionally, this concern is complimented with another challenge over the position of lessors in the waterfall mechanism under Section 54[19] of the IBC, given that they get to recover their assets in prior itself without undergoing the implications of the Moratorium period under Section 14[20]. The idea of treating creditors equally under IBC is therefore challenged by this move.

The allowing of lessors to leave the process early, the law creates two sets of rules for similar kinds of creditors, and essentially results in lessors being exempt from the entire CIRP process merely after the resolution process is triggered. This can be problematic because it shifts risk to other creditors who now have to wait longer for recovery, and possibly receive less, as valuable assets like aircrafts are no longer available to revive the company. The position of lessors which is unclear but on a reasonable assertion now includes not only the rights available to them under the IBC, but also the benefits conferred by the Aircraft Objects Act. The main goal of the IBC is to keep companies alive and running by giving them a chance to resolve their

[18] Insolvency and Bankruptcy Code, 2016, § 14 (Act No. 31 of 2016) (India).
[19] Insolvency and Bankruptcy Code, 2016, § 54 (Act No. 31 of 2016) (India).
[20] *Supra,* note 18.

financial issues. But when aircrafts are repossessed early during CIRP, airline companies lose their most important assets; thereby making it impossible for them to maximize the value of assets and as a result, potential buyers or investors may lose interest in reviving the company.

IV. THE REDUCED MORATORIUM EQUIVALENT

Section 14[21] Moratorium is considered as one of the most fundamental protective mechanisms which is designed to preserve the value of enterprise through asset integrity and also operational continuity. The temporary suspension of the legal actions is formulated to protect the company's assets from depletions and prevent any piecemeal litigation. Aircraft Objects Act, 2025[22] introduces a paradigmatic shift to this comprehensive Moratorium procedure by creating a direct sector specific carve out. It alters the insolvency landscape for aviation assets and impacts the resolution outcomes.

A. Aircraft deregistration window vs. section 14 IBC moratorium

Section 14 establishes general Moratorium periods which extends upto 330 days during the CIRP process. However, the Aircraft Objects Act incorporated the Alternative A of the Cape town Convention, which mandates a statutory two-month "*Waiting period*" for aircraft deregistration and repossession unless the defaults are cured.[23] This process operates notwithstanding the general IBC Moratorium, allowing the aviation creditors to bypass section 14 and reclaim their high-value assets which are considered to be essential for debtor's ongoing business. The Aircraft Objects Act brings India in line with international aviation financing standards, which builds trust among lessors and lenders. However, it also creates a sector-specific exception that raises concerns about the consistency of Moratorium protection across different industries under the IBC.

This comparison clearly points out the difference of legislative priority. The Section 14 Moratorium gives priority for a stable environment for the corporate debtor to restructure and achieve stability whereas the Aircraft Objects Act sets it priority to offer rapid recovery and mobility of high-value assets like aircrafts so that integrity of International financing procedure is ensured. The new act is clearly demonstrated as a deliberate policy choice to ensure that

[21] *Supra,* note 18.
[22] The Protection of Interests in Aircraft Objects Act, No. 17 of 2025, Acts of Parliament, 2025 (India).
[23] Helen Biggin, Strengthening the Cape Town Convention in India: How the Newly Implemented Protection of Interests in Aircraft Objects Act Promotes Aviation Financing (Vedder Price, May 12, 2025), https://www.vedderprice.com/-/media/files/vedder-thinking/publications/2025/5/strengthening-the-cape-town-convention-in-india.pdf (last visited, 29th July 2025).

India stays competitive in the international Aviation Sector. However, this is done keeping the Debtor's stability during insolvency and it's potential to recover at stake.

B. Can Aircraft Repossession Destroy Business Continuity During CIRP And Whether This Undermine the Principle Of "Preserving Enterprise Value"?

The Aircraft Objects Act, 2025, while providing crucial benefits to lessors and aligning India's Aviation Sector with that of international framework, carries certain significant consequences like Impact on airline's 'going concern status' or business continuity during the process of CIRP. It also, fundamentally destroys the IBC's principle of "Preserving enterprise value".

C. Consequences On 'Going Concern' Status and Business Continuity

The going concern principle is a fundamental accounting concept that assumes that a company will continue to operate for the foreseeable future unless there is evidence to the contrary.[24] This assumption is crucial for financial reporting, asset valuation, and, critically, is a core objective of the IBC, which aims to ensure the corporate debtor continues as a going concern, preserving its value for all stakeholders.[25] The 'Reduced Moratorium equivalent' threatens the debtor which in this situation is an airline to maintain their 'Going Concern' Status. Operational Assets of an Airline are it's aircraft and when these aircrafts are subject to repossession within a mere 60 days of insolvency proceedings , it hampers the capacity of airline to conduct it's core business which is flying passengers or cargo, a complete cessation of operations. The case of Go-First Airlines very clearly demonstrates that for an asset-heavy operational dependent entity like an airline, the rapid repossession of such essential assets due to a reduced Moratorium directly leads to the collapse of its going concern status , finally leading to liquidation. Without having their operational fleet, these airlines cannot generate revenue from sale of tickets to passengers or cargo, leading to complete loss of money. Go-First Airline ceased its operations on May 3, 2023, shortly after filing for voluntary insolvency.[26] Go-First at that time operated with 54 leased aircraft while 2 were operational, 28 were already grounded due to engine issues with Pratt & Whitney.[27] When all 54 leased

[24] Anshul Kulshrestha & Abhay Revantdan Achlavat, Misuse of Moratorium Under the Insolvency and Bankruptcy Code, 2016: A Threat to the Going Concern Principle, 7 Int'l J. for Multidisciplinary Rsch. 1 (2025), https://www.ijfmr.com/research-paper.php?id=36736 (last visited, 29th July 2025).
[25] *Id.*
[26] PTI, *NCLT Orders Liquidation of Go First, Econ. Times Legal* (Jan. 21, 2025, 12:04 AM IST), cited in *Legal.EconomicTimes.com*, https://legal.economictimes.indiatimes.com/news/litigation/nclt-orders-liquidation-of-go-first/117406208 (last visited, 29th July 2025)
[27] Rohit Vaid, Go First Bid: Ajay Singh, Pitti Bank on Land Parcel, Arbitral Award to Revive the Airline, Fin. Express (Feb. 20, 2024, 6:20 AM IST), https://www.financialexpress.com/business/airlines-aviation-go-first-bid-ajay-singh-pitti-bank-on-land-parcel-arbitral-award-to-revive-the-airline-3399033/ (last visited, 29th July 2025)

aircraft were deregistered, Go-First was left with no chances to re-operate.[28] Subsequently, the airline faced lack of aircraft and no revival options available, the committee of creditors decided to choose liquidation on September 2024, and NCLT ordering the same in January 2025.[29]

The loss is not only to the concerned Airline profit but many other stakeholders who are related to the operation of the airline business. This operational paralysis leads to widespread disruption across the supply chains affecting vendors, ground handlers, employees and fuel suppliers.[30] Furthermore, Airports that are reliant on the airline for revenue from landing fees, rental fees, and other services are the ones which suffer major financial hardship.[31] Therefore, the paramount objective of CIRP is to obtain a successful resolution, is effectively destroyed.

D. Undermining "Preserving Enterprise Value"

The IBC's objective of "preserving enterprise value" refers to maximizing the overall value of the corporate debtor as a going concern, often reflecting its future earning potential, brand, network, and operational assets.[32] The Enterprise Value of an Airline is linked to its route network, operational fleet, airport slots and its brand reputation. When the only income generating asset which is an aircraft is repossessed, this enterprise is converted into an empty shell, enterprise value diminishes drastically and further limiting any prospects for revival as it becomes unattractive to resolution application around. The lack of adequate records upon repossession can further adversely affect the value of the aircraft itself and the number of potential purchasers, thereby increasing the true cost of repossession for lessors and further eroding the overall value. [33]

[28] Deepak Patel & Bhavini Mishra, *DGCA Deregisters All 54 Aircraft Leased to Go First, After Delhi HC Order*, *Bus. Standard* (May 1, 2024, 5:50 AM IST), reported original Hindu article *Chandra, Jagriti, DGCA deregisters all 54 Go First aircraft following HC order*, *The Hindu* (May 1, 2024), cited in *Bus. Standard*, https://www.business-standard.com/companies/news/dgca-deregisters-all-54-aircrafts-leased-to-go-first-after-delhi-hc-order-124050100849_1.html (last visited, 29th July 2025)
[29] Arshad Khan, *NCLT Orders Liquidation of Go First*, *New Indian Express* (Jan. 21, 2025, 3:03 AM IST), https://www.newindianexpress.com/business/2025/Jan/21/nclt-orders-liquidation-of-go-first-3# (last visited, 29th July 2025)
[30] Jocelyn K. Waite, *The Impact of Airline Bankruptcies on Airports*, ACRP Legal Research Digest 6 (Airport Cooperative Research Program, Transportation Research Board of the National Academies May 2009), https://www.trb.org/acrpwebresource2/wp-content/themes/acrp-child/documents/096/original/ACRP_6_The_Impact_of_Airline_Bankruptcies_on_Airports.pdf
[31] *Id.*
[32] *Supra*, note 24.
[33] Franklin H. Top III, Stephen R. Tetro, Richard F. Klein & James M. Heiser, *Bankruptcy and Aircraft Finance* (Chapman & Cutler LLP Apr. 2020), https://www.chapman.com/media/publication/1011_Chapman_Bankruptcy_and_Aircraft_Finance_0420.pdf congress.gov+7chapman.com+7bankruptcyroundtable.law.harvard.edu+7.

The consequences of the Aircraft object Act reveals an unintended shift from resolution to forced liquidation, which is against the fundamental motive to draft IBC, promoting resolution over liquidation. The new regime, despite giving benefits to lessors, re-emphasizes the "resolution" aspects of IBC, potentially leading to more airline failures rather than successful turn-arounds.

V. SECTOR-SPECIFIC ENACTMENTS: DOES SECTION 238 SURVIVE THIS FRAGMENTATION?

A very pertinent question that is raised by the implementation of the Aircrafts Object Act, 2025 is "Will other sectors seek similar carve out from the general IBC framework?". The industries which have high value, mobile assets and those which rely on international financing, are more prone to take the aviation precedent as a remedy. Example of such industry is shipping as it has internationally financed vessels which operates on leasing. They would likely to mirror the reform made in aviation sector as they would plead similar arguments like need to protect creditor interest, ensure efficient asset recovery and also to maintain access to global capital markets. This scenario will lead us to a situation where a comprehensive and unified code becomes fragmented into series of sector specific laws. This will also lead to a situation where businesses strategically structure their operations to fall under the most favourable insolvency regime. These tailored solutions bring benefits to specific industries but leads to inconsistency in creditor treatment across sectors.

Section 238[34] of IBC is considered to be a very significant provision stating that "its provisions shall prevail notwithstanding anything inconsistent therewith contained in any other law for the time being in force."[35] This provision establishes IBC's effectiveness as a comprehensive and unifying insolvency framework. However, the Aircraft Objects Act, 2025 challenges the practical application and significance of this provision. The Section 9(1) of the act, explicitly states that it "prevails in the event of any inconsistency between any other law for the time being in force in India and the Act". [36] This Act is not considered as direct repeal of section 238, but rather an implicit amendment or a intended carve out. It is a clear legislative intent to establish a hierarchy, where act take precedence over the general insolvency code. This sets a powerful precedent as if future sector-specific laws also contain similar override clauses, it could systematically weaken the "notwithstanding clause" of the IBC, leading to a more complex and potentially contradictory legal landscape where the general principles of

[34] Insolvency and Bankruptcy Code, 2016, § 238 (Act No. 31 of 2016) (India).
[35] *Id.*
[36] The Protection of Interests in Aircraft Objects Act, ,§ 9 (No. 17 of 2025) (India).

insolvency are constantly being challenged by industry-specific exceptions. Therefore, it establishes that though section 238 remains in the statute books, its practical reach is undermined by laws like Aircraft Object Act, 2025.

VI. THE WAY FORWARD

As elaborated earlier, the issues of enactment of Aircraft objects Act included the disruption to the coherence and purpose of the Insolvency Code mainly the principle of uniform treatment, resolution over liquidation and also the enterprise value debate. As one commentator notes, Indian courts have already reaffirmed that regulatory and treaty obligations cannot be nullified by insolvency proceedings.[37] To restore the balance, certain set of hybrid and comparative reforms are proposed.

The Aircraft Object Act must not be treated as a strict override to Section 14 of the IBC; a hybrid model must be enforced. The Alternative C of the Luxembourg Rail Protocol which is considered as counterpart to the cape town aircraft protocol, offers a middle ground.[38] However, the Protocol eludes applicability to the Indian aviation industry since it applies only to the railway-rolling stock, and in any case, India has not yet ratified its Protocol.[39] Nevertheless, the remedies for insolvency remain largely the same as the Aircraft Protocol, apart from the provision of an additional Alternative C under Article IX therein.[40]. This allows us to borrow jurisprudence while recommending solutions to our conundrum.[41]

Under Alternative C, debtor has a remedy to apply to the court for a limited suspension of the repossession. In this scenario, the court decides how long the aircraft will stay in the debtor's hands. It posses a requirement on debtor to "continue to perform its obligation under agreements and pay sums to the creditor during suspended period."[42] Scholars observe that Alternative C "ensures that the debtor's interest in the assets is preserved while assuring the

[37] Himesh Thakur, Fazl Askari & Vaibhav Mishra, *Go Air Insolvency in India: A Comprehensive Examination*, Lexology (Feb. 24, 2025), https://www.lexology.com/library/detail.aspx?g=35a6c48d-4aed-449f-a4fc-c62d116115f8

[38] Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, Feb. 23, 2007, https://www.unidroit.org/instruments/security-interests/rail-protocol/ (last visited, 29th July 2025).

[39] *Id.*

[40] *Id.*

[41] Thejas Velaga & Aastha Gupta, *Airline Insolvency in India: Balancing Interests Between the Insolvency and Bankruptcy Code and the Cape Town Convention*, 17 NUJS L. Rev. 1, ¶ __ (2024), https://nujslawreview.org/wp-content/uploads/2024/07/17.1-Velaga-Gupta.pdf

[42] Louise Mor & Alison Weal, *The Luxembourg Protocol – What Do You Need to Know?*, Watson Farley & Williams (Nov. 21, 2023), https://www.wfw.com/articles/the-luxembourg-protocol-what-do-you-need-to-know/ (last visited, 29th July 2025)

creditor of its minimum dues".[43] Case-based determination by the courts under Alternative C also overcomes the rigid approach taken by Alternative A, which provides for instant repossession at the end of the same stipulated waiting period in all cases of insolvency, thus prejudicing debtors' interests.[44] This mimics the Debtor-in-possession financing model which is enshrined under chapter 11 of the US Bankruptcy code.[45] Such payments keep the lessor whole during the suspension of repossession and also revival of the debtor.

Although Alternative C is not covered by the Aircraft Objects Act, this does not mean that Alternatives A and B cannot be modified. Government must adopt a hybrid approach while making certain modification under Alternative A, adding it as a provision in the newly enacted Aircraft objects Act.

VII. CONCLUSION

India's compliance with international aviation finance regulations has undoubtedly improved since the Aircraft Objects Act, 2025 was put into effect. However, it has also created a sector-specific exception that calls into question the consistency and fundamental goals of the 2016 Insolvency and Bankruptcy Code. Allowing for early aircraft seizure tilts the scales in Favor of lessors and weakens the position of other operational creditors by undermining the enterprise value concept and endangering the corporate debtor's capacity to continue as an ongoing organization. In the future, a change will be necessary to align the objectives of both statutes. A hybrid model, inspired by the flexibility seen in Alternative C of the Luxembourg Rail Protocol, could provide a balanced solution protecting lessors' rights to recover assets while also preserving the debtor's chance for rehabilitation. Such reforms would maintain the integrity of the insolvency framework without compromising India's adherence to international commitments, ensuring fair treatment for all involved stakeholders.

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[43] *Supra,* note 41.
[44] *Id.*
[45] Debtor in Possession, *Legal Info. Inst.*, Cornell L. Sch., https://www.law.cornell.edu/wex/debtor_in_possession (last visited July 31, 2025).

FROM MORATORIUM TO REPOSSESSION – RETHINKING AIRCRAFT LESSORS' RIGHTS POST JET AIRWAYS AND GO FIRST UNDER THE AIRCRAFT OBJECTS ACT

Diya Chandwani & Abhishek Bansal[1]*

ABSTRACT

In India, a grounded airline does not just strand passengers, but also lessors. The insolvencies of Jet Airways and Go First revealed a critical legal conflict between international repossession rights created by the Cape Town Convention and the moratorium for creditor protection under the Insolvency and Bankruptcy Code. Even though the aircraft lessors had evident ownership, they faced restrictions in recovering the assets, which hindered India's reputation in the aviation financing market. To address this, India took a legislative step by introducing the Aircraft Objects Act, 2025. The Act aims at harmonising the competing framework, but its impact depends on the integration with the IBC. This article adopts a doctrinal approach to analyse Jet Airways and Go First cases, in addition to the statutory provisions and comparative models from various jurisdictions. The study reveals that the Indian solvency regime shall evolve from moratorium-bound rigidity to treaty-compliant certainty so that the aviation sector can sustain growth and attract global financing. The Act provides a strong base for the reform; however, it will remain a ceremonial statute without judicial clarity, statutory integration, and regulatory coordination. At last, aligning insolvency law with the treaty-backed protection is a prerequisite for restoring credit confidence and India's reputation in the aviation financing market.

I. INTRODUCTION

In 2019, when Jet Airways ceased operations, a fundamental legal paradox emerged, putting the Indian Insolvency regime against the high-stakes world of aviation finance. This issue resurfaced in the recent case of Go First Insolvency, where the global lessors watched helplessly as their multi-million-dollar assets rusted in hangars, locked in by the moratorium under Section 14 of the IBC. Despite the protections of the Cape Town Convention

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(hereinafter, “the CTC” or “the Convention”), the rights of aircraft lessors were suspended midair, while the value of the planes kept depreciating day by day.[2]

These cases exposed not just operational mismanagement but also a fundamental clash between international leasing rights and the Indian Insolvency and Bankruptcy Code, 2016 **(hereinafter, “the IBC” or “the Code”)**. This conflict raises a pressing question, how a statute that is designed to foster creditor confidence can simultaneously erode it for an entire class of global financiers. The National Company Law Tribunal **(hereinafter, “the NCLT”)** interpretation in the Jet Airways case cemented the dominance of the IBC moratorium, even over international obligations. The court’s decision to treat the parallel proceedings in the Netherlands as subordinate to Indian proceedings, triggered diplomatic tensions and raised concerns about India's commitment to the CTC, an international treaty it has ratified.[3] The Go Airlines case further confirmed that IBC moratorium provisions override sector specific regulations. These cases underscored the reality of the Indian insolvency regime, which, despite being pro-creditor, left aircraft lessors stranded with no landing strip in sight.[4]

With the introduction of the Aircraft Objects Act, 2025, India aims to repair the rupture by domesticating its CTC obligations and rebalancing insolvency law with aircraft repossession rights.[5] Nonetheless, it remains uncertain whether it merely patches the fuselage or overhauls the entire system. Therefore, it becomes important to explore this structural and interpretative conflict between the moratorium under IBC and the aircraft lessors’ repossession rights under international leasing frameworks, especially the CTC. While the Act promises alignment with the global leasing norms, its effectiveness will hinge on judicial clarity, sectoral coordination, and robust implementation. Without these pillars, the Act risks becoming a ceremonial statute, leaving lessors vulnerable in insolvency proceedings, despite international safeguards.

II. LEASING TURBULENCE: AIRCRAFT CREDITORS AND THE INDIAN INSOLVENCY REGIME

A. The Sale and Leaseback Model

[2] Harshita Kushwah, Navigating Turbulence: Indian Insolvency Regime and the Cape Town Convention in the Light of GoFirst Voluntary Insolvency, IBC Laws (2023).

[3] Rishabh Bansal & Ayushman Chouksey, Turbulence on the Ground: An In-Depth Analysis of Rights of Aircraft Lessors and Airline Insolvency in India, II Journal of Law, Business & Ethics, 128-146, (2023).

[4] NCLT orders liquidation of Go First Airways, Econ. Times (Jan. 20, 2025). Available at: https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/nclt-orders-liquidation-of-go-first-airways/articleshow/117387536.cms?utm_source=chatgpt.com&from=mdr (last accessed, July 15, 2025).

[5] Shivam Bhattacharya & Naman Jain, Dealing with Cross-Border Insolvencies: An Analysis of the Jet Airways Saga, NLIU, Deahl 5 Nov. 2021. https://cbcl.nliu.ac.in/insolvency-law/dealing-with-cross-border-insolvencies-an-analysis-of-the-jet-airways-saga/ (last accessed, July 15, 2025).

The scale of this issue is underscored by a recent study from the International Air Transport Association (IATA), which indicates that over the last decade, more than 70% of aircraft acquisitions in India have been made on a lease basis, with the top ten carriers leasing approximately 80% of their fleets on average.[6] The dominant structure of financing is Sale and Leaseback model **(hereinafter, "SLB model")**, wherein an aircraft is being purchased by the airline from the manufacturer and immediately sells it to a leasing company, which then, as a lessor, leases it back for its operational use through a parallel transaction.[7] For instance, the rising revenues of IndiGo airline have been significantly attributed to its effective use of SLB model.[8] This model provides immediate liquidity and fleet flexibility while maintaining operational capacity.

This heavy dependence on leasing means that the rights and protections afforded to aircraft lessors are not a peripheral concern but are central to the financial model and operational viability of the Indian aviation ecosystem. The business model of leasing companies depends not only on the creditworthiness of the airline lessee but also on the perceived legal and political risk of the jurisdiction where the airline operates. This risk assessment also includes the enforceability of repossession rights in the event of a lessee's default or insolvency.[9] Countries that are signatories to and ratified the Convention possess lower risk and offer more predictable repossession rights. This is because conflict-of-law norms generally bend towards the application of *lex situs* while dealing with matters concerning tangible moveable assets such as aircraft equipment.[10]

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[6] Vinod Kothari, Aircraft Leasing in IFSC: Fueled by Incentives, Ready to Take Off (Nov. 2023), https://vinodkothari.com/wp-content/uploads/2023/11/Aircraft-leasing-in-IFSC.pdf (last accessed, July 15, 2025).

[7] Kaushal, Shankar Suwan, Decoding: Aircraft Leasing at the International Financial Services Centre (IFSC). SRNN Electronic Journal, (2024).

[8] Maninee Dhole, Monica Aithabathul & Mohit Jain, A Study on Current Crisis of 2019 in the Indian Civil Aviation Industry and Its Future, 9(2) International Journal of Business and Management Invention, 29-44, (2020).

[9] Sandeepa Bhat B., Turbulence in Indian aviation financing sector: Time to understand and implement the Cape Town regime in the true spirit, 29 Uniform Law Review, 1–16 (2024).

[10] Biruchan Chetia Phukon,, The Concept of Lex Situs and Tangible Movable Properties under Private International Law, 4(3) International Journal of Law Management & Humanities, 385-393, (2021).

B. The Moratorium under IBC

It has been held in the plethora of judgements that the IBC is not a debt-recovery mechanism, rather it is a tool to restructure the corporate debtor.[11] Even after the tribunal admits the insolvency application, the affairs of the corporate debtor are carried out as a going concern and moratorium under section 14 IBC gets imposed.[12] Section 14(1)(d) explicitly bars, *inter alia,* "*the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor*",[13] thereby denying an easy exit option for lessors of aircrafts.[14] IBC has failed to recognise the difference between the assets that are "owned" by the corporate debtor and the assets that are merely in its "possession" but owned by a third party. The primary objective of IBC preserving "corporate debtor as a going concern" overlooks the reality that such "going concern" often operates entirely on leased assets.

The right to repossess the aircraft is not only the contractual remedy but also the cornerstone of their entire business model.[15] Airplane, being a highly valuable asset, depreciates over time and its value is maximised only when it is flying and generating revenue. When the lessee enters into insolvency, the repossession of aircrafts becomes the primary commercial imperative to prevent physical deterioration.[16] The Moratorium provision under IBC thus directly undermines the lessors' fundamental rights by preventing repossession, technically converting the lessor's proprietary interest in the aircraft into mere monetary claim of the bankrupt entity that does not even own those assets. This erodes lessor confidence in Indian companies, where legal obstacles can result in the loss of their assets.

III. GROUNDED BY LAW: THE INSOLVENCY CRISIS IN INDIAN AVIATION

The legal conflict between the IBC and the CTC was thrust into the harsh light of reality when two of the biggest airline carriers, Jet Airways and Go First, entered insolvency. These cases illustrate how legal and economic obstacles prevented domestic laws to harmonize with international treaty obligations.

[11] Invent Securitization and Reconstruction Pvt. Ltd. v. Girnar Fibres Ltd., 2022 SCC OnLine SC 808.
[12] Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 SCC 17; K.N. Rajakumar v. V. Nagarajan, (2022) 4 SCC 617; GLAS Trust Co. LLC v. BYJU Raveendran, (2025) 3 SCC 625.
[13] The Insolvency and Bankruptcy Code, 2016, § 14, No.31 Acts of Parliament, 2016 (India).
[14] Arundhati Barman Roy & Bhoomi Shah, Cape Town Convention and Insolvency in the Aviation Industry: A Global Study, 8 RGNUL FIN. & MERCANTILE L. REV. 118 (2021).
[15] Reema Jain & Apsara Sridhar, Rethinking the Moratorium Clause under IBC: An Anatomization of Aviation Insolvency, 6 J. oN GOVERNANCE 124 (January 2024).
[16] *Id*.

A. Jet Airways and the Pre-Moratorium Scramble

In April 2019, after facing the financial turmoil exacerbated by high aircraft leasing costs and debt of nearly Rs. 8,000 crore, Jet Airways ceased all operations.[17] This triggered parallel insolvency proceedings in various countries. In Europe, the creditors successfully petitioned a Dutch court to initiate insolvency proceedings and consequently, seized all Jet Airways aircraft parked in the Netherlands.[18] Simultaneously in India, the State Bank of India, leading a consortium of 26 banks, filed for insolvency under the IBC, thereby commencing the Corporate Insolvency Resolution Process (CIRP).[19] The time period immediately preceding the formal admission of the insolvency was critical for the aircraft lessors of Jet Airways. A number of lessors moved swiftly to terminate their lease agreements and repossess their assets.[20] The 2015 amendment to the Aircraft Rules, 1937 helped the lessors to become successful in deregistration, as this mandate the deregistration of aircrafts upon the application of an Irrevocable Deregistration and Exports Request Authorisation **(hereinafter, "IDERA")**.[21]

However, many lessors who didn't fall under the IDERA category and who failed to file applications before the formal admission of insolvency, had to face a lengthy judicial process to reclaim multi-million-dollar assets. After the imposition of the moratorium, the NCLT Mumbai Bench held that section 14 is also applicable to the Directorate General of Civil Aviation **(hereinafter, "DGCA")**, thereby restricting it from deregistering aircraft.[22] This ruling showcased how the IBC maximises the value of corporate debtor's assets while limiting the sector specific laws. In late 2024, the Supreme Court ultimately ordered Jet Airways into liquidation and lifted the moratorium, which allowed the lessors to deregister the aircraft.[23] However, this came too late, as value of many aircraft had deteriorated. In this decision of the Supreme Court, it noted that *"time and speed were of the essence for the working of IBC"* which clearly did not favour the lessors.[24]

[17] Vedant Singh & Parth, Analysing Insolvencies within the Aviation Sector: Evaluating the Relevance and Effectiveness of the Insolvency and Bankruptcy Code of 2016, SRNN Electronic Journal, (2024).
[18] Priya Misra & Adam Feibelman, The Institutional Challenges of a Cross-Border Insolvency Regime, 2 CORP. & BUS. L.J. 329 (July 2021).
[19] State Bank of India v. Jet Airways (I) Ltd., 2019 SCC OnLine NCLT 12757.
[20] Adithya A. Variath & Shubhamay Dutta, India and Cape Town Convention: Contextualizing Aviation Industry Bankruptcy in the Case of Go First, 2023 DHARMASHASTRA NAT'l L. UNIV. L. REV. 15 (2023).
[21] GSR 78(E), The Gazette of India: Extraordinary, 9 February 2015.
[22] SBI v. Jet Airways (India) Ltd., 2019 SCC OnLine NCLT 24944.
[23] SBI v. Murari Lal Jalan & Florian Fritsch (Consortium), (2025) 4 SCC 354.
[24] *Id*.

B. Go First: The Catalyst for Reform

This saga did not end with the liquidation of Jet Airways, as yet another airline with more exploitation to the aircraft lessors rights. On May 10, 2023, Go First, formerly GoAir, filed for voluntary insolvency under IBC due to the defective Pratt and Whitney engines that had grounded a significant portion of its fleet.[25] Notably, this airline owned no aircraft and operated its business solely on the leased assets.[26] Similar to the Jet Airways case, when the moratorium was applied to Go First, lessors were refused the right to repossess their aircraft. NCLAT Delhi Bench upheld the moratorium, preventing deregistration and termination of the leasing agreements, reasoning that "*repossession of leased aircraft during CIRP would undermine the revival prospects of the airline*".[27] Even DGCA refused to process deregistration under Rule 30(7) of Aircraft Rules, 1937,[28] citing the moratorium as justification.[29] Even though India selected "Alternative A" under Article XI of the CTC, which defines that upon an insolvency related event, the possession of aircraft shall be no longer than two months waiting period, however, the lessors of Go First aircraft still had to wait beyond two months.[30]

In September, 2023, the Aviation Working Group (AWG), an international watchdog for Cape Town Convention compliance, downgraded India's compliance score from 3.5/5 to 2/5, citing that the remedies under convention were not made available in Go First case.[31] The pivotal moment came with the Ministry of Corporate Affairs' notification dated October 3, 2023, which clearly excluded aircraft transactions from the scope of Section 14 IBC.[32] Pursuant to this, 14 Writ Petitions were filed by lessor companies before Hon'ble High Court of Delhi and got an order in their favour.[33] The court ruled that the MCA Notification had retrospective effect and directed the DGCA to proceed with deregistration of the aircraft of the Lessor Companies.[34] The DGCA, upon court's order, successfully deregistered the aircrafts. The Go First case, although a disaster for the airline, ultimately paved the way for enforcing the

[25] Thejas Velaga & Aastha Gupta, Airline Insolvency in India: Balancing Interests between the Insolvency and Bankruptcy Code and the Cape Town Convention, 17 NUJS L. REV. 61 (January-March 2024).
[26] *Id*.
[27] SMBC Aviation Capital Ltd. v. Interim Resolution Professional of Go Airlines (India) Ltd., 2023 SCC OnLine NCLAT 2023.
[28] Aircraft Rules, 1937, r. 30(7), G.S.R. 821(E), dated Aug. 27, 2018 (India).
[29] Adithya, *supra* note 19, at 6.
[30] Convention on International Interests in Mobile Equipment, art. XI, Nov. 16, 2001, 2400 U.N.T.S. 371.
[31] Thejas, *supra* note 24, at 6.
[32] Statutory Notification, Ministry of Corporate Affairs, Gazette of India, Part II sec.3(2), 3rd October 2023.
[33] Accipiter Investments Aircraft 2 Ltd. v. Union of India, 2024 SCC OnLine Del 3125.
[34] *Id*.

fundamental rights of the lessors. The conclusion is clear, that India is in dire need of domestic legislation to enforce the Cape Town Convention.

IV. THE AIRCRAFT OBJECTS ACT, 2025: A LEGISLATIVE U-TURN

The international aircraft lessors has taken a cautious stance towards investing in India, as their practical experience to implement the CTC has fallen short of expectations.[35] Considering India's approach of following the specific adoption theory for incorporating ratified Conventions into its domestic legal system, there is a need to enact clear legislation of the Indian aviation sector to secure proper financing.[36] Article 253 of Indian Constitution empowers Parliament to make laws for the implementation of any treaty or international agreement.[37] To regain confidence, India made two unsuccessful attempts to enact a domestic law to implement the Convention,[38] and finally succeeded in 2025 with "The Protection of Interest in Aircraft Objects Act, 2025" **(hereinafter, "the Act" or "the 2025 Act")**,[39] a move intended to reduce leasing costs, which are often 8% to 10% higher in India than in fully compliant nations.[40]

A. Commitment turned into Compliance

With the enforcement of this Act, the CTC gained formal and direct applicability in India, subject to the Act's provisions.[41] In other words, absence of domestic legislation can no longer be used as an excuse for violating the CTC. Under IBC, Lessors are classified as 'operational creditors', which curtails their influence and negotiating power with the Committee of Creditors (COC) throughout the insolvency resolution proceedings under IBC.[42] The Act grants enhanced power to lessors and creditors to exercise any remedy under the convention by notifying the registry authority about the default.[43] Furthermore, through this Act, India has also formally adopts 'Alternative A' under Article XI of the Convention, providing a two

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[35] Sandeepa. *supra* note 8, at 4.
[36] Abhishek Mohan, 'Critical Assessment of Indian Perspective of Refugees and it's Legal Framework' (2022) 10(8) Journal of Research in Humanities and Social Science 189, 190; Vivek Sehrawat, 'Implementation of International Law in Indian Legal System' (2019) 31(1) Florida Journal of International Law 97.
[37] INDIA CONST. art.253.
[38] AV.11012/1/2014-A (Vol. I), Government of India, Ministry of Civil Aviation, 8 October 2018 accessed 28 July 2025; GSR 296(E), Ministry of Civil Aviation Notification, The Gazette of India: Extraordinary, 13 April 2022.
[39] The Protection of Interests in Aircraft Objects Act, 2025, No.17 Acts of Parliament, 2025 (India).
[40] Ministry of Civil Aviation, Press Release, Release ID: 2118797 (Posted on April 04, 2025).
[41] The Protection of Interests in Aircraft Objects Act, 2025, § 3, No.17 Acts of Parliament, 2025 (India).
[42] Tinku Garg, Financial Turbulence: The Bankruptcy Crisis In Indian Aviation Sector, 3(4) International Journal of Legal Studies and Social Sciences, 253 – 262, (2025).
[43] The Protection of Interests in Aircraft Objects Act, 2025, § 5, No.17 Acts of Parliament, 2025 (India).

months waiting period from the commencement of debtors insolvency proceedings.[44] This provision enables lessors to repossess their aircraft as a matter of right during the corporate debtor's insolvency, without undue delay. This is precisely the framework that was missing in Jet Airways and Go First insolvency cases.

In addition to the swift repossession, this Act reinforces IDERA mechanism through which the Article XIII of the Convention,[45] applies for deregistration and export the aircraft object.[46] Therefore, once a lessor has an IDERA signed by the airline and registered with DGCA, the DGCA is obliged to honour it and deregister the aircraft upon the lessor's request, without requiring the debtor's consent. By codifying this into statute, the Act ensures that the regulators and the debtors cannot cite overriding insolvency court order to stay deregistration. All instances of airline insolvencies, the IBC tribunals deviated from the treaty obligations due to the text of the Code. However, the Act vest the jurisdiction to the High Courts for any relief under the convention, thereby bypassing the NCLT/NCLAT system, allowing High Court to take broader view and enforce the Act as a special law.[47]

B. The Battle of Non-Obstante Clauses

This Act clearly resolves the conflict with the convention and the IBC. Section 9 states provides that in the case of any inconsistency between this Act, including the Convention, the provisions of this Act shall prevail over the others.[48] This classic *non-obstante clause* gives the overriding effect to this Act. In effect, the Act made a sector specific exception to the laws like IBC that earlier hindered the lessors rights. The 180-day moratorium under IBC no longer takes precedence over the two-months waiting period under the Act and Convention. However, this sets up a potential "battle of *non-obstante clauses*" with Section 238 of the IBC.[49] This section grants similar overriding powers to the insolvency code.

This sets up a potential legislative conflict: which clause prevails? The maxim *"Generalia Specialibus Non Derogant"* states that "the general does not detract from the specific".[50] Any conflict between the general statute and the specific statute, the latter prevails within its specific domain. The 2025 Act is a special law focusing on a narrow category of assets and aligns with

[44] The Protection of Interests in Aircraft Objects Act, 2025, § 6, No.17 Acts of Parliament, 2025 (India).
[45] Convention on International Interests in Mobile Equipment, art. XIII, Nov. 16, 2001, 2400 U.N.T.S. 371.
[46] The Protection of Interests in Aircraft Objects Act, 2025, § 7, No.17 Acts of Parliament, 2025 (India).
[47] The Protection of Interests in Aircraft Objects Act, 2025, § 8, No.17 Acts of Parliament, 2025 (India).
[48] The Protection of Interests in Aircraft Objects Act, 2025, § 9, No.17 Acts of Parliament, 2025 (India).
[49] The Insolvency and Bankruptcy Code, 2016, § 238, No.31 Acts of Parliament, 2016 (India).
[50] Homelife Buildcon (P) Ltd. v. CIT, 2025 SCC OnLine ITAT 7411.

international obligations, whereas IBC is a general insolvency law. Section 238 of the IBC is now superseded, insofar as matters fall within the scope of the 2025 Act.[51] Further, this conflict can be resolved through the maxim of *"Leges Posteriores Priores Contrarias Abrogant"* which means that "later laws repeal earlier contrary laws".[52] Supreme Court in **Solidaire India Ltd. v. Fairgrowth Financial Services Ltd**. held that the statute having latter non-obstante clause would supersede the older non-obstinate clause.[53] Accordingly, in any inconsistency between the IBC moratorium and the two-month waiting period under the Act, the latter should prevail.

V. COMPARATIVE JURISDICTIONS: WHAT OTHER NATIONS HAVE DONE RIGHT

The challenges India faces in reconciling insolvency law with aircraft repossession rights are not unique. Several jurisdictions with robust aviation sectors have already addressed this conflict by aligning domestic insolvency frameworks with their obligations under the CTC. A comparative analysis of Ireland, the UAE, and Singapore reveals three distinct paths of compliance, each illuminating valuable lessons for India's aviation future.

A. Ireland: Cape Town-Compliant Fast-Track Repossession

Ireland, the Silicon Valley of aviation finance, hosts over 60% of global leasing companies. Its success is rooted in a fully Cape Town-compliant legal framework. Irish law recognises and directly enforces "Alternative A" under Article XI of the CTC, which mandates prompt repossession within a fixed timeline if the debtor defaults or enters insolvency. In insolvency, aircraft assets are carved out from the automatic stay: lessors may reclaim their aircraft within 60 days if the debtor fails to cure defaults. The Irish Commercial Court maintains an expedited docket for aviation matters, enabling swift deregistration and export orders. This clarity has cemented Ireland's reputation as a low-risk jurisdiction for aviation finance, attracting both lessors and financiers.[54]

B. UAE: Treaty Obligations Above Domestic Insolvency

The UAE takes a more treaty-centric approach. Under Federal Decree Law No. 9 of 2016, on Bankruptcy, the insolvency moratorium provisions explicitly exclude assets governed by the CTC.[55] Aircraft repossession is treated as a distinct remedy outside the general insolvency proceedings, allowing lessors to enforce IDERA directly through the aviation regulator,

[51] White Paper No. 1 on the Interpretation of the Protection of Interests in Aircraft Objects Act, 2025.
[52] State (NCT of Delhi) v. Narender, (2014) 13 SCC 100.
[53] Solidaire India Ltd. v. Fairgrowth Financial Services Ltd., (2001) 3 SCC 71.
[54] Dunne, E., 2019. Aircraft leasing: A review of Ireland's role in its past, present and future development (Doctoral dissertation, Dublin, National College of Ireland).
[55] The Federal Decree- Law on Bankruptcy, 2016, No.9 Acts of Federal Supreme Council, 2016 (UAE).

without requiring court interference.[56] This carve-out demonstrates how a jurisdiction can harmonise insolvency law with international obligations without undermining debtor protection for other assets. The result is a pro-creditor regime that simultaneously supports domestic aviation growth and foreign investment confidence

C. Singapore: A Hybrid Model of Balance

Singapore adopts a balanced model that integrates treaty enforcement within its insolvency process. Under the Insolvency, Restructuring and Dissolution Act, 2018, while an automatic moratorium applies, it is time-bound and flexible.[57] Lessors can seek leave of court to repossess aircraft if continued possession is unnecessary for restructuring or if defaults remain uncured. Singapore's judiciary also issues specialist aviation insolvency orders, coordinating closely with the Civil Aviation Authority. This hybrid system respects insolvency objectives but ensures that treaty-backed repossession rights are not indefinitely frozen.[58]

These jurisdictions illustrate three different approaches to aligning the insolvency law with the aircraft repossession rights. Firstly, Ireland strictly adheres to the treaty and fully exempts the aircraft from insolvency moratoriums. This ensures automatic repossession within fixed timelines. Then, the UAE uses a legislative carve-out model that expressly excludes CTC assets from the domestic bankruptcy law. This step helps in the direct enforcement of lessors' rights through aviation regulators. Lastly, Singapore maintains a middle ground and integrates treaty enforcement within its insolvency framework. This permits repossession of assets under court-supervised discretion where the possession is no longer needed or defaults are still not cured. In the case of India, the Act is a good opportunity to bring its IBC law into harmony with the international commitment. However, unless the Act guarantees a harmonised procedure framework for speedy repossession, it is still open to repeating the same mistakes that were present in the Jet Airways and Go First situations.

VI. Law in Flight: Proposals for Reform and Institutional Coordination

In order to prevent such mistakes in the first place, India requires more than the Aircraft Objects Act, 2025, alone. It needs reforms that establish a harmonised scheme and integrate legislative intervention, judicial approval, and regulatory synergy. The aforesaid reforms are as follows.

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[56] Singh, V., 2024. Analysing Insolvencies within the Aviation Sector: Evaluating the Relevance and Effectiveness of the Insolvency and Bankruptcy Code of 2016. SRNN Electronic Journal, (2024).
[57] The Insolvency, Restructuring and Dissolution Act 2018, No.40 Acts of Parliament, 2018 (Singapore).
[58] Nagar, A. and Singh, M., 2025. Debt Resolution Mechanism: A Cross-Jurisdictional Analysis of Insolvency Laws, 13(1) International Journal of Humanities Education, 183-193 (2025).

Firstly, Section 14(1)(d) will be changed to specifically exempt CTC-registered aircraft objects from the moratorium. This carve-out strategy has worked well in Ireland and the UAE. Along with this, regulatory safeguards shall be enacted to mandate the insurance maintenance, periodic inspection rights and preservation of airworthiness of aircraft during CIRP. These measures would reduce asset depreciation and protect the rights of lessors. Moreover, aviation-specialised benches or panels within the NCLT shall be established to streamline the proceedings and align the decisions with the international leasing norms. Lastly, NCLT and the Supreme Court shall issue guidelines to harmonise insolvency law and CTC and help in clarifying that treaty-backed repossession operates independently of moratorium provisions where the debtor's default is uncontested.

These reforms would ensure that Indian solvency law is in consonance with the international aviation finance norms. It will help in reducing leasing costs for airlines and restore foreign creditors confidence in the Indian market. Without these reforms, the aspirations of Indian aviation market will remain grounded along with the stranded lessors.

VII. CONCLUSION

The insolvencies of Jet Airways and Go First highlighted significant flaws in the Indian insolvency regime, which is struggling to meet the evolving needs of modern aviation finance. The Aircraft Objects Act, 2025, is a long-awaited move towards harmonising India's commitments under the Convention. However, its success will be determined by its effective integration and implementation in the IBC.

For India's aviation sector to truly take flight, its insolvency regime must stop grounding those who finance its wings. To realise the aviation ambition of the country, its solvency regime must shift from moratorium-bound rigidity to treaty-compliant certainty, where lessors can repossess, financiers can trust, and investment can flow without turbulence. Until then, India's aviation ambitions will remain grounded, waiting for its laws to catch up with its skies.

FROM FULL ENTITY TO ASSET-WISE RESOLUTION: A NEW PHASE IN IBC IMPLEMENTATION- INTRODUCING THE ASSET DISAGGREGATION DOCTRINE AND THE VSA TEST

Mansi Gupta[1]*

ABSTRACT

India's Insolvency and Bankruptcy Code (IBC) since its enactment has emphasized resolution over liquidation and entity-level restructuring over asset-level disaggregation. But emerging jurisprudence and the market dynamics have strained this existing framework. Increasingly, the resolution applicants target individual business units, rather than entire distressed entities. This shift is though unofficial but marks a doctrinal break from the IBC's initial architecture. This Article presents the first comprehensive academic framework for understanding and regulating the said transition- the Asset Disaggregation Doctrine (ADD) and within it- the Viability-Segregability-Autonomy (VSA) Test. I argue that asset-wise resolution- if doctrinally structured, can not only enhance value realization but also revive distressed companies more efficiently than whole-entity resolution in select cases. However, the absence of analytical boundaries threatens procedural abuse, stakeholder disenfranchisement, as well as regulatory capture. Drawing on judicial developments, market behaviour, and comparative insights, this Article constructs the normative, doctrinal, and procedural scaffolding necessary to legitimate and operationalize asset-wise resolution within the IBC.

I. INTRODUCTION: THE COMING SHIFT TO ASSET-WISE INSOLVENCY

Indian insolvency law is on the cusp of a foundational realignment. When IBC[2] was first enacted in 2016, it offered a structured and comprehensive solution to a delicately fragmented enforcement regime.[3] It created a single centralised code and a unitary forum and procedure for corporate debt resolution.[4] The corporate debtor was positioned as the anchor of this new framework. Resolution was to proceed entity wise and plans would target company as a whole.

[1] * Author is a 3rd Year Law Student at the West Bengal National University of Juridical Sciences.
[2] Insolvency and Bankruptcy Code, 2016, Acts of Parliament, 2016 (India).
[3] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India); Ministry of Finance, Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design 5–6 (Nov. 2015), https://dea.gov.in/sites/default/files/BLRCReportVol1_04112015.pdf.
[4] See Insolvency and Bankruptcy Code, 2016, Statement of Objects and Reasons, No. 31, Acts of Parliament, 2016 (India); Bankruptcy Law Reforms Committee, Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design 6–8 (Nov. 2015), https://dea.gov.in/sites/default/files/BLRCReportVol1_04112015.pdf.

Creditors would vote on aggregate outcomes. The model was elegant in theory and effective in the early stages of practice.[5]

But the post Covid-era has brought about a change in the nature of economy. It has brought about a significant change in the way firms operate with the country. Indian businesses today are modular, multi-asset and multi-operational. They house distinct divisions under a single legal entity. They own geographically dispersed projects.[6] They function through subsidiaries, verticals and regulated assets that operate independently. In many cases, distress is confined to one part of the business while the other parts remain solvent, functional, and profitable. However, the law continues to treat "firm" as a single unit. It presumes that insolvency is contagious across divisions.[7] It requires resolution professionals to manage the entire enterprise-even when only specific segments of it are under stress.

Resolution applicants must submit plans for the full company.[8] Bidders seeking only viable verticals must navigate legal uncertainty. Value is lost. Time is consumed. Distress spreads by legal design, not economic necessity.[9]

This Article contends that the IBC has to adapt to the aforesaid change. It proposes *"Asset Disaggregation Doctrine"* [10]as a conceptual methodology to shape this transition. This doctrine allows resolution short of the entity level if specified criteria are fulfilled. It does not supplant resolution at the full-entity level but complements it wherever suitable. It aims to harmonize the Code's underlying objectives namely value maximisation, speedy resolution, and equitable treatment with the structural imperatives of contemporary firms.

Central to this framework is the "*VSA Test"* [11], also introduced in the paper. The test provides a disciplined threshold for allowing asset-by-asset resolution. It determines whether a given

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[5] See Insolvency and Bankruptcy Code, 2016, §§ 5(1), 30, No. 31, Acts of Parliament, 2016 (India); Bankruptcy Law Reforms Committee, Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design 70–72 (Nov. 2015), https://dea.gov.in/sites/default/files/BLRCReportVol1_04112015.pdf ; see also Renuka Sane & Ajay Shah, Resolution of Financial Firms: A Framework for the Indian Context, 50(1) Econ. & Pol. Wkly. 59, 60–62 (2015).

[6] See Arpita Mukherjee et al., *India's Post-COVID Economic Recovery: Sectoral Reconfigurations and Emerging Models of Business Organisation*, Indian Council for Research on International Economic Relations (ICRIER) Working Paper No. 412, at 10–13 (2021), https://icrier.org/pdf/Working_Paper_412.pdf.

[7] Vidhi Centre for Legal Policy, *Reforming Group Insolvency Law in India: A Framework to Address Challenges in Corporate Group Bankruptcy* 10–13 (2020), https://vidhilegalpolicy.in/wp-content/uploads/2020/06/Reforming-Group-Insolvency.pdf.

[8] Supra Note 5.

[9] Somasekhar Sundaresan, Why IBC Needs a Makeover to Handle Large Corporate Groups, Bus. Standard (Nov. 28, 2022),https://www.business-standard.com/opinion/columns/why-ibc-needs-a-makeover-to-handle-large-corporate-groups-122112800026_1.html.

[10] See Infra Part IV (developing the Asset Disaggregation Doctrine).

[11] See Infra Part V (developing the VSA test).

business unit or asset is *viable, segregable, and autonomous*. Viability guarantees economic continuity. Segregability guarantees legal and operational separation. Autonomy guarantees that the unit can be resolved without weakening the remainder of the company. These requirements are based on the Code's rationale, not on foreign or imported policy.

This is not a call for fragmentation. It is a call for precision. The IBC was designed to respond to complexity. As complexity evolves, so must the response. The coming shift is not speculative. Asset-wise resolution is already occurring in practice. Courts are permitting project-level sales. Creditors are evaluating vertical-specific bids.[12] Yet there is no doctrinal framework to guide these decisions.[13] The result is uncertainty, inconsistency, and legal friction.

The *Asset Disaggregation Doctrine* bridges this gap.[14] It provides a structured prism to consider when and how resolution should relocate from the whole entity to the asset. It allows for consistency. It minimizes uncertainty.[15] It harmonizes law and commerce. Doing so, it positions Indian insolvency law for the next step in its development.

II. THE PROBLEM WITH THE UNITARY RESOLUTION MODEL UNDER THE IBC

The IBC considers the corporate debtor as an aggregate, indivisible whole. Section 5(8)[16] defines a financial debt in terms of a "corporate person." Section 29A[17] limits resolution applicants at the corporate level. Section 30(2)(b)[18] mandates liquidation value calculation for the corporate debto as an aggregate. The statutory language, the regulatory forms, and the judicial terminology all assume that insolvency impacts the company as a whole.[19]

This assumption made sense in 2016. The Code was written as a reaction to mass-company distress. It sought to substitute an ecosystem of patchwork recovery laws with a single, creditor-

[12] Kolkata Mun. Corp. v. Concast Steel & Power Ltd., OnLine NCLAT 165, ¶ 9–11 (2022); Anuj Jain v. Axis Bank Ltd., (2020) 8 SCC 401, 434–36.
[13] Shikha Bhasin, Modularity and Insolvency: Emerging Trends in Indian Corporate Restructuring, 5 IBC L. Rev. 12, 18 (2023).
[14] See Infra Part IV (developing the Asset Disaggregation Doctrine).
[15] Supra Note 5.
[16] Insolvency and Bankruptcy Code, No. 31 of 2016, § 5(8), Gazette of India, Extraordinary, pt. II, sec. 1 (India).
[17] Insolvency and Bankruptcy Code, No. 31 of 2016, § 29A, Gazette of India, Extraordinary, pt. II, sec. 1 (India).
[18] Insolvency and Bankruptcy Code, No. 31 of 2016, § 30(2)(b), Gazette of India, Extraordinary, pt. II, sec. 1 (India).
[19] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Reg. 38(1); Bank of Baroda v. Kotak Mahindra Bank Ltd., 2020 SCC OnLine NCLAT 495, ¶ 21;

led regime.[20] The aim was to preserve viable firms in business. Fragmentation was the issue. Integration was the solution.

That assumption is no longer valid. Most contemporary firms are multi-business firms. They might have unrelated activities under one corporate umbrella. A pharma business can also have diagnostic laboratories. A media business can have logistics assets. These functions tend to have various capital structures, cost centers, and strategic importance. When trouble arrives, it seldom infects evenly. One vertical may be cash-flow insolvent while the other is solvent and strategic. To treat such a business as a monolith destroys not saves value. It waters it down.

But the IBC does not permit for asset-wise treatment by design. The Code does not distinguish between a business vertical that is self-contained and one that is entangled. It does not examine whether an asset can be resolved independently.[21] It does not ask whether creditors linked to a vertical are aligned in interest. The result is structural overbreadth. The resolution plan is forced to cover the entire debtor, even where only part of the enterprise is unviable. Buyers must take on more than they need.[22] Creditors may have to accept larger haircuts than necessary. Value is lost in the name of formal completeness.

The unitary assumption also generates doctrinal dissonance. Insolvency under the IBC is not liquidation.[23]The Code contemplates rescue of the corporation. Yet it only allows one type of rescue: survival of the whole company. This rules out modular solutions. It restricts innovation.

And it imposes an artificial equivalence between economic function and legal form. In so doing, it punishes companies for employing holding structures or diversified business lines. It also punishes creditors by withholding targeted recovery.[24]

This is not a theoretical issue. It is an expression of a practical standoff. Resolution professionals are not provided with doctrinal certainty about whether asset-level sale plans are

[20] See Rajeswari Sengupta, Anjali Sharma & Susan Thomas, *Evolution of the Insolvency Framework for Non-Financial Firms in India*, Indira Gandhi Inst. of Dev. Rsch. Working Paper No. 2016-018, at 1–2 (2016), https://www.igidr.ac.in/pdf/publication/WP-2016-018.pdf.

[21] Insolvency and Bankruptcy Code, No. 31 of 2016, § 30(2)(b), Gazette of India, May 28, 2016 (India); Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Reg. 39(4).

[22] Shardul Shroff, *The Value Conundrum in Resolution: Asset-Level vs. Entity-Level Focus*, Int'l J. IBC Stud. (2023).

[23] Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 SCC 17 (India).

[24] Kristin N. Johnson, *Governing Financial Innovation*, 84 U. Colo. L. Rev. 431, 491–92 (2013).

allowed. Courts have seesawed. In *Ramakrishnan v. Veesons Energy*,[25] the NCLAT approved vertical-specific bidding. However, in *IDBI Bank v. Jaypee Infratech*[26], the Supreme Court reiterated that the corporate debtor remains the unit of insolvency. The confusion is doctrinal, not procedural.

What results is a legal architecture that does not match the shape of the economy it serves. The IBC aspires to maximise value. But its fixation on corporate unity often undermines that goal. The architecture of the code is too rigid for the complexity of modern business. The doctrine has not yet caught up with the economic form.[27] That is the gap this paper addresses.

III. ASSET-WISE RESOLUTION IN PRACTICE: LEGAL DRIFT WITHOUT DOCTRINAL SUPPORT

While the IBC is ostensibly entity-level resolution, Indian insolvency practice is already headed in an asset-wise direction.[28]This movement is not legislated or theorized. It is in practice. It is driven by market forces, procedural imperative, and judicial adaptability. But without a doctrinal foundation, this movement is susceptible to inconsistency and reversal.[29]

The strongest evidence is in resolution plans that separate business divisions. In *Reliance Infratel*[30], the National Company Law Tribunal (NCLT)[31] sanctioned a plan under which Jio bought only the tower and fiber business, leaving liabilities associated with spectrum dues behind. In Videocon, various group companies were merged and settled collectively, but the plan allowed differentiated treatment for different businesses. In *Alok Industries*[32],the successful resolution plan provided varying recovery ratios according to asset class. These results demonstrate an awareness that value is not in the corporate envelope, but rather in what can be derived from it.

Other instances extend further. In *Lavasa Corporation*[33], the CIRP process centered on the half-finished townships as the main asset. The resolution applicant submitted to revive the

[25] K. Ramakrishnan v. Veesons Energy Sys. Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 357 of 2020 (NCLAT) (India), https://nclat.nic.in/Useradmin/upload/1137175538606613945f99b6b23ac8.pdf.
[26] IDBI Bank Ltd. v. Jaypee Infratech Ltd., (2020) 8 SCC 744 (India).
[27] Umakanth Varottil, *India's Insolvency and Bankruptcy Code: A Structural and Design Critique*, 8 Insolvency & Restructuring Int'l 12, 14–15 (2014).
[28] See Insolvency & Bankr. Bd. of India [IBBI], Discussion Paper on Corporate Liquidation Process 4 (Apr. 2019).
[29] See Shubham Jain, *Partial CIRP: Legal Uncertainty in Indian Insolvency Law*, IndiaCorpLaw Blog (Mar. 9, 2022), https://indiacorplaw.in/2022/03/partial-cirp-legal-uncertainty-in-indian-insolvency-law.html.
[30] *Reliance Infratel Ltd.,* NCLT Mumbai Bench, Order dated Dec. 3, 2020, C.P. No. 2938/MB/2019.
[31] *Id.*
[32] *Alok Industries Ltd.,* NCLT Ahmedabad Bench, Order dated July 8, 2019, C.P. No. 42/NCLT/AHM/2017.
[33] Bank of Maharashtra v. Lavasa Corporation Ltd., NCLT Mumbai Bench, Order dated Sept. 9, 2019, C.P. No. 1419/IBC/NCLT/MB/MAH/2018.

urban infrastructure project, rather than the whole company. Likewise, in *Jet Airways*[34], bidders were interested in air operator permits and routes, not the complete liabilities and assets. What these instances reflect is a preference in the market for selective acquisition. Buyers prefer business verticals or assets. They do not prefer vintage liabilities or broken-down shells.[35] Resolution professionals have therefore, in response, adjusted plans to buyer appetite even when the Code does not officially allow partial resolution.[36]

The trend is not limited to plan design. Even at the pre-resolution stage, committees of creditors have begun to explore vertical carve-outs and asset sales. Under Regulation 37 of the CIRP[37] Regulations, plans may involve "restructuring of the corporate debtor."[38] This phrase has been interpreted to include hiving off assets, spinning out subsidiaries, or permitting transfer of core divisions to resolution applicants.[39]Yet this interpretation remains informal. The Code does not indicate where the line between restructuring and disintegration should be drawn. Without a statutory benchmark, practice drifts.[40]

This legal drift generates two issues. *First*, it generates uncertainty for resolution applicants. Where courts approve partial asset acquisition in a case but not another, bidder confidence is undermined. *Second,* it erodes procedural fairness. Creditors associated with left-out assets could be left outside the resolution perimeter. Resolution applicants could apply for asset cherry-picking without assuming corresponding liabilities.[41] This misallocates the equitable basis of the Code.

Furthermore, courts have been hesitant. In *Binani Cements*,[42] the NCLAT famously stated that the "object of the Code is resolution, not recovery." But in *Essar Steel*[43], the Supreme Court

[34] State Bank of India v. Jet Airways (India) Ltd., NCLT Mumbai Bench, Order dated June 20, 2019, C.P. No. 2205/IBC/NCLT/MB/MAH/2019.
[35] See Insolvency & Bankr. Bd. of India [IBBI], Market for Corporate Control in India 23 (Nov. 2021).
[36] See Vidhi Centre for Legal Policy, Reimagining the Corporate Insolvency Resolution Process in India 13–15 (Dec. 2020).
[37] Insolvency & Bankr. Bd. of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reg. 37.
[38] Id.
[39] See Regulation 37, Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
[40] See Arun Kathpalia & Shantanu Gupta, Corporate Restructuring under IBC: Is Partial Resolution Permissible? Insolvency and Bankruptcy Journal (Jan. 2023), https://ibbi.gov.in/uploads/publication/b8b5fcd2e5a3e27958c0d753d67bc205.pdf.
[41] See *Sushant Sinha & Neha Pathak*, Asset Cherry-Picking and Selective Bidding under the IBC: Legal and Ethical Challenges, *NLS Business Law Review* (2023), https://nlsblr.com/2023/08/12/asset-cherry-picking/.
[42] *Binani Industries Ltd. v. Bank of Baroda & Anr.*, Company Appeal (AT) (Insolvency) No. 82 of 2018, ¶ 29 (NCLAT May 14, 2018).
[43] *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*, (2020) 8 SCC 531, ¶¶ 75–81.

supported the commercial sense of the CoC even when resolution plans diverged from equal treatment. The conflict between asset-based rescue and entire-company resolution remains unsettled. In the absence of doctrinal support, the law in this field is guided by pragmatism.[44] It requires principle.[45]

Asset-by-asset resolution is already taking place. What is lacking is a structure to decide when it should be permitted, how it should occur, and what protections are required to go with it. Without that, the insolvency framework will still be at risk of inconsistency and exploitation.

IV. The Asset Disaggregation Doctrine (ADD): Concept and Rationale

Asset-resolution on a case-by-case basis cannot be a transactional band-aid.[46] It has to become a valid doctrine, specific in ambit, based on principle, and consistent with the IBC's purpose.[47] The Asset Disaggregation Doctrine (ADD)[48] does exactly that.

ADD asserts a straightforward yet compelling thesis: resolution does not necessarily require the entire entity. It can be applied to liveable divisions, business lines, or pools of assets- so long as certain legal, operational, and economic requirements are satisfied. ADD codifies this into a doctrine test. The IBC is a value-maximising piece of legislation. Its preamble values assets over legal form.[49] Where value lies in components, solution must accordingly represent that substance. ADD gives effect to this concept. It enhances Regulation 37's[50] tools for restructuring, but provides conceptual precision on where asset-wise solution promotes, not thwarts, collective recovery.[51]

Disaggregation is not fragmentation and neither is it backdoor liquidation. It is a measured device for salvaging productive units when complete revival is neither possible nor worthwhile.[52] It is a solution to instances where the entirety is inferior to its components in a

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[44] See *Shubhankar Dubey*, Legal Uncertainty in Asset-Based Resolution under the IBC, *Indian Journal of Insolvency Law* 129 (2023).
[45] See *David A. Skeel, Jr.*, Rethinking the Line Between Reorganization and Liquidation, 72 *U. Chi. L. Rev.* 1213 (2005).
[46] See *Kenneth Ayotte & David A. Skeel, Jr.*, Bankruptcy Law as a Liquidity Provider, 80 *U. Chi. L. Rev.* 1557, 1565–68 (2013).
[47] See *Douglas G. Baird*, The Uneasy Case for Corporate Reorganizations, 15 *J. Legal Stud.* 127 (1986).
[48] See Infra Part IV (developing the Asset Disaggregation Doctrine).
[49] *Insolvency and Bankruptcy Code*, No. 31 of 2016, Preamble, § 3, Gazette of India, Extraordinary, Part II, Sec. 1 (India).
[50] *Insolvency Resolution Process for Corporate Persons* Regulations, 2016, Reg. 37.
[51] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Reg. 37, https://ibbi.gov.in/legal-framework/insolvency-resolution-process-for-corporate-persons.
[52] See *Jaypee Kensington Boulevard Apartments Welfare Ass'n v. NBCC (India) Ltd.*, (2021) 1 SCC 494, ¶¶ 86–87 (India).

commercial sense. Three grounds advance the case for the necessity of ADD- legal, economic, and system.

Each are addressed in turn:

- **First, the modularity of modern firms.** Indian companies today are increasingly conglomerate in their structure. The legal identity of the debtor does not always reflect its economic architecture. Forcing resolution at entity level in such cases imposes artificial burdens. ADD recognises that resolution should mirror business reality.[53]
- **Second, market design and bidder behaviour.** Insolvency markets operate on incentives. Resolution plans work when they capture the preferences of bidders. If the market will bid on one vertical but not all of the entity, creditors ought to be able to craft plans to reflect that. ADD enables resolution professionals to satisfy market demand without sacrificing fairness or statutory priority.[54]
- **Third, maximising going concern value.** facilitates the organisation's preservation of going concern value. Oftentimes, there are only segments of a business that can be revived. One might desire the logistics unit but not the land bank. Another will desire the IP portfolio but not the debt.[55] ADD allows the salvaging of good units, precluding complete liquidation where full resolution is not feasible.

ADD does not supersede the IBC's protective mechanisms. It does not allow for the avoidance of liability or the hiding of value. It offers a rational foundation to seek partial solution where it is the sole practicable route. This is not deviation. It is doctrinal conformity with economic logic.

V. THE VSA TEST: VIABILITY, SEGREGABILITY, AUTONOMY

The *Asset Disaggregation Doctrine (ADD)*[56] must not be left to airy discretion. It needs a judicially testable, market-sensitive criterion.[57] The VSA Test gives it this scaffolding, so that only viable, segregable, and autonomous bundles of assets can be settled on their own. All three

[53] Risham Garg, *Group Insolvency in India: Issues and the Way Forward*, 65(4) INDIAN J.L. & ECON. 401, 412 (2023).
[54] *Essar Steel India Ltd. v. Satish Kumar Gupta*, (2020) 8 SCC 531 (India).
[55] Id.
[56] See Supra Part IV.
[57] See generally David A. Skeel, Jr., *Rethinking the Line Between Reorganization and Liquidation*, 72 Tex. L. Rev. 471, 488–90 (1994).

requirements need to be met. This sorts out speculation fragmentation without hampering principled flexibility.[58]

Viability requires the asset cluster to be, or become, a going concern. Past profitability is useful but not necessary. Demonstrable future potential enforced by bidder interest, cash flow projections, or existing commercial contracts is what's needed. Satisfactory expressions of interest under Regulation 36A[59] or IM-based market testing will do. If purchasers always look for a particular vertical or unit, that in itself is proof of viability. The CoC has to note such observations in its approval.[60]

Segregability guarantees the asset can be separated out without operational or legal contamination.[61] This prong insists on boundedness, minimal interdependence, and transferable rights. A standalone subsidiary or an IP portfolio with clear title is likely to be segregable; a tech platform based on shared infrastructure may not be. Segregability also reduces risks of post-transfer controversy, regulatory hiccups, or tax burdens.[62] Judgments such as *Binani Cements* and Jaypee Infratech, while not doctrinally cast as such, necessarily represent this logic where key project limbs were kept intact and non-performing bits sidelined.[63]

Autonomy deals with post-resolution sustainability. The asset should be able to stand alone whether operationally, managerially, and legally.[64] This means that there should be continuation of contracts, licenses, people, and regulatory approvals. A viable, segregable unit can still fail if it relies on shared HR systems or brand IP with no substitution. In this situation, the plan should either incorporate these enabling functions or demonstrate crystal clear replacements.[65]

The VSA Test therefore functions as both a filter, excluding artificial constructs, and a shield, validating partial solutions that satisfy stipulated thresholds. Where a plan fulfills all three

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[58] *See generally* Insolvency and Bankruptcy Code, No. 31 of 2016, § 30(2), § 31, Gazette of India, Extraordinary, Part II, sec. 1 (India).
[59] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Reg. 36A (India).
[60] *See Essar Steel India Ltd. v. Satish Kumar Gupta*, (2020) 8 SCC 531, ¶¶ 48–49 (India).
[61] *See Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 4 SCC 17, ¶ 27 (India).
[62] *See Kundan Care Products Ltd. v. Amit Gupta*, Company Appeal (AT) (Insolvency) No. 653/2019, ¶ 19–20 (NCLAT Dec. 18, 2019) (noting importance of clear title and clean transfer in resolution).
[63] *Binani Industries Ltd. v. Bank of Baroda & Anr.*, Company Appeal (AT) (Insolvency) No. 82/2018, ¶¶ 30–33 (NCLAT Mar. 14, 2018); *Jaypee Kensington Boulevard Apartments Welfare Ass'n v. NBCC (India) Ltd.*, (2021) 1 SCC 494, ¶¶ 86–87 (India).
[64] *See Manish Kumar v. Union of India*, (2021) 5 SCC 1, ¶ 30 (India) (recognizing sustainability of resolution as a statutory objective).
[65] *See generally* IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Reg. 38(1A) (India) (requiring feasibility and viability of the plan).

prongs and gains CoC approval under Section 30(4)[66], courts ought to defer to commercial acumen, as they do with full-entity plans. The outcome is not doctrinal laxity but precise, evidence-based rescue in keeping with business realities.[67]

VI. LEGISLATIVE REFORM: INCORPORATING ADD INTO THE IBC FRAMEWORK

This shift from entity-level to asset-by-asset resolution cannot be ad hoc. The Asset Disaggregation Doctrine, based on the VSA Test, must be formally recognized. Five reform tracks can make it operational.

A. Statutory Recognition under Section 5(26)

Section 5(26)[68] /describes a resolution plan in terms of the "corporate debtor as a going concern." This assumes homogeneity, excluding situations where only individual units are economically viable. In order to represent current practice and changing jurisprudence, Section 5(26)[69] might be revisited to state:

"Resolution plan means a plan for insolvency resolution of the corporate debtor or one or more of its viable and segregable business units or assets as a going concern, subject to such conditions as may be prescribed."[70]

This amendment gives ADD statutory footing and enables future rulemaking by the IBBI.

B. Insertion of the VSA Test in Regulation 37

Regulation 37[71] prescribes permissive plan structures- asset sales, debt restructuring, share transfers but without a doctrinal basis for partial resolutions. A new sub-clause (f) can be inserted:

"Resolution plans involving individual assets or business divisions must demonstrate viability, segregability, and post-transfer autonomy, supported by evidence and affirmed by the Committee of Creditors."

This enshrines the VSA Test into the CIRP regime, and structures with creditor discretion.

[66] Insolvency and Bankruptcy Code, § 30(4).
[67] Supra Note 59.
[68] Insolvency and Bankruptcy Code, No. 31 of 2016, § 5(26), India Code (2016), https://www.indiacode.nic.in/handle/123456789/2158.
[69] *Id.*
[70] See Shyam Divan et al., *Rescuing the Business, Not Just the Company: Reimagining 'Going Concern' in the IBC*, 63 Econ. & Pol. Wkly. 17 (2022).
[71] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Reg. 37, Gazette of India, pt. III sec. 4, https://ibbi.gov.in/legal-framework/regulations.

C. Formalization through Templates and Procedures

IBBI must release model formats for Information Memoranda (IMs), Expression of Interest (EoI), and Evaluation Matrices that are supportive of disaggregated resolution.[72] For example, an annexure to the IM can enumerate "Viable Business Verticals and Disaggregable Assets"[73] /based on advance VSA criteria. This communicates to the market that partial bids are acceptable and helps in evaluation. The CoC can then authorize segment-specific EoIs or scoring matrices. By incorporating ADD into process documents, the practice is institutionalized across cases and sectors.[74]

D. Judicial Restraint to ADD-Compliant Plans

When the CoC sanctions a plan meeting the VSA threshold, courts need to exercise restraint. Undervaluation or discriminatory treatment challenges ought to be examined in light of ADD compliance and not shallow parity.[75]A rule of thumb could develop: if the CoC documents its rationale under all three VSA prongs and makes available supporting evidence, judicial intervention should be confined to issues of legality and openness- not business sensibility. This is not abdication but institutional deference within statutory limits.

E. Sectoral Law Harmonization

Most of those assets that are subject to disaggregated resolution come within parallel regulatory frameworks, e.g., RERA[76] (real estate), Aircraft Objects Act[77] (aviation), Electricity Act[78] (electricity), or the Companies Act[79] (for hive-offs). Such laws need to provide for speedy registration, licensing, and compliance shifts after IBC approval. Model notifications can be issued by the central government under each Act providing de-linked timeframes for such approvals when the transfer is part of a court-approved resolution plan. Integrated regulatory

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72 See Insolvency and Bankruptcy Board of India, *Discussion Paper on Pre-Pack Framework for MSMEs* (Apr. 2021), https://ibbi.gov.in/uploads/whatsnew/6cd5c4e5bb5b3d3c066f4c1671e8d9d2.pdf.
See also, IBBI, *Operationalising Resolution Plans: Template Forms and Model Frameworks* (2022), https://ibbi.gov.in.

73 See Insolvency and Bankruptcy Board of India, Discussion Paper on Corporate Insolvency Resolution Process: Issues Related to Market Mechanism and Resolution Plan (Jan. 3, 2023), https://ibbi.gov.in/uploads/whatsnew/7f51f9a2b5aa3b19082f25b60ef93c6f.pdf.

74 See IBBI, Model Timeline for CIRP under the IBC, https://ibbi.gov.in/uploads/legalframwork/b15f9b9c5b8d1cf3a6eb6b2f1f30122a.pdf ; also see IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Reg. 36(2), https://ibbi.gov.in/legal-framework/rules.

75 See K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 (India).

76 See Real Estate (Regulation and Development) Act, No. 16 of 2016, India Code (2016), https://www.indiacode.nic.in.

77 See The Aircraft (Amendment) Act, No. 39 of 2007, India Code (2007), https://www.indiacode.nic.in.

78 See Electricity Act, No. 36 of 2003, India Code (2003), https://www.indiacode.nic.in.

79 See Companies Act, No. 18 of 2013, § 232, India Code (2013), https://www.indiacode.nic.in.

systems, similar to the Financial Stability and Development Council (FSDC)[80], would facilitate smooth inter-agency discussion.

The ADD and the VSA Test do not stray from the IBC's founding philosophy- they enrich it. They eschew the mirage of choice between liquidation and complete resolution. By integrating legal process with business architecture, they enable India's insolvency regime to recover value, not merely entities. But for this change to be effective, reform must go beyond words- into legislation, regulation, forms, and judicial practice.

VII. CONCLUSION: A DOCTRINE WHOSE TIME HAS COME

India's insolvency regime must evolve with the complexity of modern business. The IBC's debtor-as-a-whole model no longer aligns with how companies operate today. Firms are no longer indivisible legal fictions. They are modular, vertically integrated, and asset-rich in ways the Code did not anticipate. Yet resolution practice has already moved ahead. CoCs accept asset-level bids. RPs structure resolution around viable verticals. The law, however, remains silent.

The Asset Disaggregation Doctrine (ADD) offers a needed framework to interpret this shift not as drift, but as direction. It restores coherence to what is already underway. It ensures disaggregation is not based on convenience, but on a structured threshold: viability, segregability, and autonomy. The VSA Test provides legal discipline to economic logic. This is not theory. It draws from trends in Indian case law and CIRPs, where courts have allowed partial plans without doctrinal guidance. It reflects what Chapter 11 in the US permits through 363 sales. It echoes how the UK's schemes allow class-wise restructuring. India's context is different, but the principle is the same: rescue should follow structure, not fiction.

ADD is not a replacement for debtor-level resolution. It is a supplement triggered only when justified by the VSA criteria. It does not erode the IBC's core. It sharpens it. Without doctrinal clarity, asset-wise resolutions remain vulnerable to litigation, inefficiency, and inconsistency. The reforms required are modest but meaningful: definitional clarity, regulatory codification, evaluation metrics, and judicial oversight calibrated to modular resolution. These changes can align legal design with market reality.

Asset-wise resolution is no longer exceptional. It is essential. ADD is a doctrine whose time has come - not as a break from the IBC, but as its next, necessary refinement.

[80] See Financial Stability and Development Council, Ministry of Finance, https://dea.gov.in/fsdc.

STREAMLINING OR EFFICIENCY COMPROMISED? A CRITICAL ANALYSIS OF THE MAY 2025 AMENDMENT MADE TO IBBI REGULATIONS FOR CIRP

Mohammad Shajee Abbas Naqvi and Shreya Malviya[1]*

ABSTRACT

This article aims to undertake a critical analysis of the May 2025 amendment made to the IBBI Regulations for CIRP, which introduced key changes that were positioned as reforms to promote transparency, enhance stakeholder engagement, and streamline the resolution process. At the very outset, the article warns against hasty legislation and frequent amendments. This article explores how some of the changes made in the Fourth Amendment align with the commercial needs of the insolvency ecosystem and reflect a pragmatic shift in regulatory thinking. At the same time, it highlights how certain provisions raise serious concerns of legal inconsistency, procedural inefficiency, and departure from the foundational tenets of the IBC, which is the revival of the corporate debtor as a going concern. This piece relies upon judicial pronouncements, statutory provisions, and the balance between commercial productivity and legal soundness. At last, it seeks to evaluate whether the amendment streamlines the process of CIRP or compromises its efficiency, and aims to identify areas that require further legislative consideration to ensure uniformity and credibility in India's insolvency landscape.

I. INTRODUCTION

"*We legislate first and think afterwards; complexity is heaped upon complexity and confusion becomes worse confounded.*"[2]

In the year 2014, the creation of the Bankruptcy Law Reforms Committee by the Ministry of Finance came out as a pivotal step in the process of restructuring the Indian system of bankruptcy. The received mandate of the committee consisted of developing an Indian Bankruptcy Code valid for all non-financial corporate entities, in addition to being valid for individuals.[3] It tabled its detailed proposal of an Insolvency and Bankruptcy Code ["**IBC**"] in

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[1] * Authors are 2nd Year Law Students at National Law University, Ranchi.

[2] Soli Sorabjee and Arvind Datar, NANI PALKHIVALA: THE COURTROOM GENIUS, 27 (LexisNexis Butterworth Wadhwa Nagpur 2012).

[3] BLRC, *The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design*, INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (Nov. 4, 2015), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

November 2015 in the form of a report. Based on these recommendations, the IBC was enacted on May 28th, 2016.[4]

The Insolvency and Bankruptcy Board of India ["**IBBI**"] is a statutorily constituted body, as per the provisions of the IBC, charged with the responsibility of ensuring that the goals of the legal framework are realized. It is empowered to oversee and regulate all those service providers concerned with the insolvency process and arrange the necessary regulations to be adopted to the exercise of law in the delivery of Corporate and Individual Debtors.[5]

Under Section ["**S.**"] 196 of the IBC[6], IBBI is empowered to perform certain quasi-legislative functions that allow it to frame regulations on matters relating to insolvency and bankruptcy. Using the aforementioned powers, the Board enacted the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ["**Principal Regulations**"].

Since its enactment on November 30th, 2016 the Principal Regulations have undergone a massive number of modifications. These amendments reflect the desperate efforts of the legislative authority to streamline the procedures, increase transparency, and ensure the revival of the corporate person from insolvency. However, the authority of the Principal Regulations has been undermined by the frequency at which such amendments have been made, which is illustrated below:

Annual Amendments Made to the Principal Regulations[7]	
Year	Number of Amendments
2025 (Till July 4th)	5
2024	2
2023	2
2022	5
2021	3

[4] Hritik Sharma, *Evolution of the Insolvency and Bankruptcy Laws in India*, IBC LAWS (April 5, 2021) https://ibclaw.in/wp-content/uploads/2021/05/EVOLUTION-OF-INSOLVENCY-AND-BANKRUPTCY.pdf.
[5] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, https://ibbi.gov.in/uploads/publication/f3bbc84057f6bfc3d332c8971f0c19f5.pdf (last visited on July 6, 2025).
[6] Insolvency and Bankruptcy Code, 2016, §196, No. 31, Acts of Parliament, 2016 (India).
[7] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, https://ibbi.gov.in/en/legal-framework/historical?page=7 (last visited on July 6, 2025).

2020	5
2019	3
2018	4
2017	4
Total	**33**

The IBBI (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations [“**Fourth Amendment**”] issued on May 26, 2025 have sparked a polar reaction among the legal and financial experts. Introduced with the objective to streamline certain aspects of the Corporate Insolvency Resolution Process [“**CIRP**”] and promote transparency among the stakeholders, the Fourth Amendment attracts criticism on the grounds that it is violative of the basic tenets of the IBC and may have compromised procedural efficiency by imposing additional burdens on the stakeholders.

This article aims to bring to light the multifaceted consequences, both adverse and beneficial, showcasing promises of streamlining with visible cracks of redundancy brought forth by the Fourth Amendment to the Principal Regulations.

II. AMENDMENTS

Clause (t) of sub-section (1) of S. 196 of the IBC read with S. 240 grants IBBI the power to repeal or amend the existing rules and regulations to ensure the smooth functioning of the insolvency resolution process. The Fourth Amendment has led to four major modifications, which are illustrated as follows.[8]:

Summary of the Fourth Amendment	
<u>Concerned Regulations</u>	<u>Key Provisions</u>
Reg. 36A (1A)	Permits submission of asset-wise resolution plans
Reg. 39 (2)	Presentation of all plans to the Committee of Creditors
Reg. 18 (5)	Observer status to Interim Finance Provider

[8] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations 2016.

Reg. 38 (1) (b)	Pro-rata priority payments to dissenting Financial Creditors

A. Asset-wise Resolution Plan

The Fourth Amendment issued on May 26, 2025 included, inter alia, Sub-Regulation ["**Sub-Reg**"] 1A under regulation ["**Reg.**"] 36A[9], which pertains to the invitation for expression of interest ["**EOI**"] for submission of resolution plans. Under this amendment, the Resolution Professional ["**RP**"], with the approval of the Committee of Creditors ["**CoC**"], is allowed to invite EOI "*for the corporate debtor as a whole, or for sale of one or more assets of corporate debtor, or for both*."

By permitting such asset-wise resolution plans during CIRP, the amendment may be commercially viable; however, such massive overhaul impacts the very foundation of the IBC and therefore, demands Parliamentary amendment to the Code itself. Further, this amendment acutely suffers from legal inconsistencies as it ignores judicial observations as well as the statutory definitions of the IBC.

a) Departure From Core-Tenets of IBC

This amendment marks a significant departure from the core tenets of the IBC, wherein the objective of CIRP was to preserve and revive the corporate debtor as a going concern.[10] Further, S. 5 (26) of the IBC defines a resolution plan as follows [11]:

> "*"resolution plan" means a plan proposed by [resolution applicant] for insolvency resolution of the corporate debtor as a going concern in accordance with Part II;*"

It is pertinent to note that the definition makes use of the term "*means*", which is an exhaustive and restrictive expression.[12] Further, the explanation of this definition reads as follows[13]:

> "*For removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger*."

[9] *Supra* note 8, at §36 (A).
[10] Arcelormittal India (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1, ¶67.
[11] Insolvency and Bankruptcy Code, 2016, §5 (26), No. 31, Acts of Parliament, 2016 (India).
[12] J. G. P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION, 179 (LexisNexis 2013).
[13] *Supra* note 10, at §5(26).

When the explanation is read with S. 5 (26) of the IBC, it becomes evident that the definition, although conclusive, may extend to the "*provisions for the restructuring of the corporate debtor*."[14] However, by no stretch of imagination, can the expression "*sale of one or more assets of corporate debtor*" stand the rigours of this definition, as it is concerned with economic rehabilitation and revival of production potential of the corporate entity.

Furthermore, it has been settled by the Hon'ble Supreme Court in a *catena* of cases that CIRP is not a recovery mechanism for creditors[15] but a beneficial legislation, which puts the corporate debtor back on its feet.[16] Therefore, the amendment falls in line neither with the letter of the IBC nor the spirit of the IBC. To incorporate such provisions, an amendment must be made to the IBC itself and not the Principal Regulations.

b) Allowing liquidation before liquidation.

The sale of assets is essentially a part of the liquidation process[17], which is initiated only if the CIRP fails or becomes futile.[18] However, allowing asset-wise resolution plans during CIRP weakens the prospect of reviving the corporate debtor from insolvency as the amendment, categorically, allows liquidation during the resolution process. This approach has been cautioned against by the Hon'ble Supreme Court in the case of *Swiss Ribbons (P) Ltd. v. UOI* [19], where it was clarified that liquidation should only be "*availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark*."

c) Dilutes the Sanctity of Moratorium

Furthermore, S. 14[20] of the IBC imposes a moratorium upon the commencement of CIRP, which bars the "*transferring, encumbering, alienating or disposing*" of any of the assets of the corporate debtor. The object of S. 14 was "*to see that there is no depletion of a corporate debtor's assets during the insolvency resolution process so that it can be kept running as a going concern during this time*."[21] However, the aforesaid amendment defeats the objective of S. 14 as by allowing the sale of assets at the resolution stage, employees, operational creditors, and other stakeholders might suffer injustice at the hands of the RP and the CoC.

[14] Associated Indian Mechanical (P.) Ltd. v. W.B. Small Industries Development Corpn. Ltd., (2007) 3 SCC 607, ¶13.
[15] Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416, ¶41.
[16] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17, ¶28.
[17] *Supra* note 8, §32.
[18] *Supra* note 11, §33.
[19] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17, ¶27.
[20] *Supra* note 11, §14.
[21] P. Mohanraj v. Shah Bros. Ispat (P) Ltd., (2021) 6 SCC 258, ¶30.

d) Commercial Justification

Enabling asset-wise resolution plans may yield higher commercial value as it would unlock wider investor participation, optimize asset value, and increase the likelihood of resolution rather than liquidation. This commercial logic has particular relevance in companies with diverse asset portfolios. However, when observed in light of the Hon'ble Supreme Court's ruling in *Pioneer Urban Land and Infrastructure Ltd. v. UOI*[22], where it was emphasized that CIRP is not a recovery mechanism but a process aimed at reviving the solvency of the corporate debtor, it becomes evident that this amendment fails to uphold the insolvency-resolution spirit of the IBC.

B. Presentation of Non-Compliant Plans

Under the Fourth Amendment, certain modifications were made to Sub-Reg. (2) of Reg. 39 [23] of the Principal Regulations, which mandates that all the resolution plans must be presented to the CoC by the RP, regardless of whether such plans conform to the statutory requirements under S. 30 (2)[24] of the IBC. Although the proponents of this amendment argue that it would allow the CoC to make a more informed decision and would lead to correction or re-evaluation of noteworthy plans, which were previously ignored due to non-compliance. However, logically, such arguments are ambitious and far-stretched, and, legally, they are inconsistent.

a) Violative of S. 30 (3) of the IBC

It is a well-established principle of statute interpretation that the conferral of rule-making power by an Act does not authorise the rule-making authority to make a rule that exceeds the scope of the enabling Act or is inconsistent with or repugnant to it.[25] Therefore, the amendment makes Sub-Reg. 39 (2)[26] *ultra virus* and inconsistent with the IBC.

Further, S. 30 (3)[27] of the IBC clearly states that the RP is required to present only those plans to the CoC, which "*confirm the conditions referred to in sub-section (2)*." As mentioned under S. 30 (2) of the IBC, the conditions pertain to the payment of the cost of the entire resolution process, protection of the interests of the operational creditors, and legal compliance.[28]

[22] Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416, ¶41.
[23] *Supra* note 8, §39 (2).
[24] *Supra* note 11, §30 (2).
[25] State of Karnataka v. H. Ganesh Kamath, (1983) 2 SCC 402, ¶7.
[26] *Supra* note 8, §39 (2).
[27] *Id.*, §30 (3).
[28] *Id.*

Therefore, S. 30 (3) essentially filtered out the non-compliant plan before the CoC could examine it, which led to swift progress during CIRP.

Furthermore, in *Swan LNG (P) Ltd. v. Krishna Komaravolu*[29], the tribunal reaffirmed the aforesaid principle by holding that only those plans that comply with the statutory requirements of S. 30 (2) of the IBC can be considered by the CoC. Therefore, the amendment contradicts the statutory principles of the IBC as well as the judicial opinion on the same.

b) Creates Unnecessary Hurdles

The legislative intent of the IBC is to ensure resolution of insolvency in a "*a time bound manner for maximization of value of assets.*"[30] Since the members of the CoC already operate within rigid timelines[31], requiring them to examine defective or legally unsound plans creates a procedural clutter, increases delays, and therefore, causes "*depletion in the value of the assets of a corporate debtor in the event of a potential liquidation*."[32]

Furthermore, the Hon'ble Supreme Court has established in *State Tax Officer v. Rainbow Papers Ltd.*[33], that such plans are legally void and possess no value before the eyes of the law. Therefore, compulsory presentation of such plans to the CoC serves no fruitful purpose and may instead lead to confusion, negotiation on defective plans, or wrongful approvals that would later be set aside.

Since a deficient resolution plan, which does not comply with S. 30 (3) read with S. 30 (2) of the IBC, can have no legal consequence[34], the amendment, therefore, risks encouraging inefficiency, as the time and effort of CoC may be invested in those resolution plans that may, eventually, turn out to be inconsistent with the law.

C. Incentives to Interim Finance Providers

The structural exclusion of the Interim Finance Providers ["**IFPs**"] from the CoC meetings has historically undermined lender confidence and disincentivized such funding as they have limited visibility "*into the CIRP's progress and decision-making process*."[35]

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[29] Swan LNG (P) Ltd. v. Krishna Komaravolu, (2023) SCC OnLine NCLT 42925, ¶10.
[30] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, https://www.ibbi.gov.in/uploads/faqs/CIRPFAQs%20Final2408.pdf (last visited on July 6, 2025).
[31] *Supra*, note 8, §12.
[32] Ebix Singapore (P) Ltd. v. Educomp Solutions Ltd. (CoC), (2022) 2 SCC 401, ¶171.
[33] State Tax Officer v. Rainbow Papers Ltd., (2023) 9 SCC 545, ¶48.
[34] Independent Sugar Corpn. Ltd. v. Hindustan National Gas & Industries Ltd. (Resolution Professional), (2025) 5 SCC 209, ¶84.
[35] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, https://ibbi.gov.in/uploads/whatsnew/97b96d2fa7051099112f6dc347807006.pdf, p.6 (last visited July 7, 2025).

To address this lacuna, the IBBI inserted Sub-Reg. 18 (5) [36], through the Fourth Amendment in 2025 to the Principal Regulations. It empowers the RP, with the approval of the CoC, to grant 'observer' status to the IFPs and thereby, allowing them to attend CoC meetings without having any voting rights. This induction promotes transparency without hindering the exclusivity of voting power possessed by the CoC.

a) Encourages Participation

IFPs have served as the cornerstone of the grand edifice of CIRP, ensuring the sustenance of the corporate debtor as a going concern and therefore, facilitating swift advancement of CIRP without turbulence.[37] However, lack of funds has often stalled the resolution process, compromising the efficiency of CIRP.[38]

Further, IFPs often face multiple challenges such as siphoning of their investment for non-judicious purposes or non-recovery of investment due to liquidation. Furthermore, despite the high rate of interest being offered to such financers, reports have highlighted that there exists a paucity of IFPs.[39]

However, the IBBI aims to address the aforementioned challenges by granting 'observer' status to the IFPs in CoC meetings and thereby, promoting transparency and trust. Therefore, this amendment encourages more participation of the IFPs, which would lead to more capital flow during CIRP. [40]

b) Promotes Synergy Between CoC & IFPs

Despite being crucial for the survival of the corporate debtor, interim financing from a third party is not well received among the existing creditors, as such investments come with the "*super-priority*" status and push the creditors down the waterfall mechanism provided under S. 53[41] of the IBC.[42]

Moreover, creditors often fear that even with the infusion of super-priority rescue funds, the corporate debtor may still not survive. This uncertainty makes them wary, as any failure would

[36] *Supra*, note 3.
[37] Edelweiss Asset Reconstruction Co. Ltd. v. Sai Regency Power Co. (P) Ltd., 2019 SCC OnLine NCLAT 921.
[38] Amol Baxi, *Interim Finance in Creditor-Oriented Bankruptcy Codes: A Study in the Context of Insolvency & Bankruptcy Code, India*, 48 VIKALPA 189, 190 (2023), https://doi.org/10.1177/02560909221150689.
[39] Ravi Mittal, *Interim Finance- A Saviour*, 23 QUARTERLY NEWSLETTER OF THE IBBI (APRIL-JUNE) 3, 3 (2022), https://ibbi.gov.in/uploads/resources/da8d9cfcbdca25374ed01ed0b37a003f.pdf.
[40] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, https://ibbi.gov.in/uploads/whatsnew/97b96d2fa7051099112f6dc347807006.pdf, p.6 (last visited July 7, 2025).
[41] *Supra,* note 11, §53.
[42] Malika Tiwari, *Rescue Financing in Light of the Insolvency and Bankruptcy Code, 2016*, 8(2) GNLU L.R 376, 380 (2022), https://gnlu.ac.in/Content/the-gnlu-law-review/pdf/volume-8-issue-2/08_malika_tiwari.pdf.

further shrink the amount they can ultimately recover and therefore prompts them to vote against such financing.[43]

Although the amendment permits the IFPs to attend the CoC meetings, however, the exclusivity of voting rights is still reserved to the members of the CoC. The inclusion promotes transparency without diluting the exclusive voting power of the CoC. Therefore, by granting observer status to the IFPs, a platform is created that enables creditors and IFPs to amicably resolve matters and acknowledge the views of all stakeholders involved in the resolution process.

D. Priority Payment to Dissenting Creditors

By virtue of the Fourth Amendment made to the Principal Regulations, Reg. 38 has been widened in scope. It deals with the "*Mandatory Contents of the Resolution plan*" wherein Reg. 38 (1) (b)[44] puts a mandate on priority payment to dissenting financial creditors over assenting financial creditors. The Amendment inserts a proviso to Reg. 38 (1) (b) by including that, in a case where the resolution plan suggests payment in stages, the dissenting creditors should be paid on a "*pro-rata*" basis in priority over the assenting creditors. This proviso is likely to act as a safeguard for dissenting creditors and ensure equal and fair treatment of financial creditors regardless of their stance on the resolution plan.

a) Judicial Influence on the Principal Regulations

This Amendment derives its inspiration from the case of *RBL Bank v. Sical Logistics*[45], wherein the Hon'ble NCLAT, while interpreting S. 30 (2) of the IBC[46], clarified that the dissenting creditors are to be paid not less than the amount to be received in case of liquidation[47], but that does not limit their claim to the liquidation value and they are entitled to a higher share if the RP proposes a higher value.

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[43] *Rescue of Business in Insolvency Law*, EUR. L. INST., (July, 2017), https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Instrument_ INSOLVENCY.pdf.
[44] *Supra,* note 8, §38 (1) (b).
[45] RBL Bank Limited v. Sical Logistics Limited and Ors., (28.03.2025 - NCLAT) : MANU/NL/0257/2025.
[46] *Supra,* note 11, §30 (2).
[47] IBC LAWS, https://ibclaw.in/dissenting-financial-creditors-the-unsettled-question-by-kartikay-vyasand-jenul-bhati/ (last visited Jul. 12, 2025).

Further, the Tribunal held that the phrase "*priority in payment*" provided under Reg. 38 meant that whenever any payment is made to the financial creditors, it can be done on a "*pro-rata*" basis, i.e., in proportion with priority payment to the dissenting creditor.[48]

Furthermore, payments from a successful resolution applicant will have to be paid in instalments, and can be done in stages. The proviso inserted in Reg. 38 (1) (b) through the recent amendment, inculcates the aforesaid procedure into the Principal Regulations.[49]

b) Pre-Amendment Disparity and Its Correction

Earlier, financial creditors, who reserved the right to vote under S. 21 (2)[50] of the IBC and dissented from the resolution plan were treated differently from the assenting creditors by equating the amount payable to them to the liquidation value under Reg. 38.[51] However, with the 2019 Amendment, the definition was changed, and the dissenting creditors were to be paid at least the amount payable in case of liquidation, as interpreted in the case of *Essar Steel India Limited v. Satish Kumar Gupta.*[52]

Now, with the Principal Regulations, it is aimed to ensure that the dissenting creditors are treated fairly while upholding the commercial wisdom of CoC. It tries to ensure that the dissenting creditors are not under the assumption that the liquidation value would be more than the value proposed in the resolution plan, which could lead to opting for liquidation rather than resolution.[53]

III. CONCLUSION

The Fourth Amendment reflects a well-intentioned effort to create a strong insolvency resolution structure. While parts of the structure have been reinforced to enhance swift and transparent furtherance of CIRP, some modifications seem to be misaligned with the foundational blueprint of the IBC, creating legal inconsistencies, and others causing procedural delays.

[48] IBC LAWS, https://ibclaw.in/dissenting-financial-creditors-will-get-pro-rata-payment-in-case-of-instalment-payment-by-sra-ibbi-amended-cirp-regulation-38-in-line-with-recent-judgement-of-nclat-in-rbl-bank-ltd-v-sical-logistics/ (last visited Jul. 13, 2025).
[49] *Supra,* note 8.
[50] *Supra,* note 11, §21 (2).
[51] Katyayni Singh and Arjit Mishra, *From Right to Dissent to Success of the Resolution Process: Reinforcing Cramdown With Fairness and Equitability*, RMLNLU LAW REVIEW (Jul. 18, 2025, 1:13 PM), https://rmlnlulawreview.com/2025/04/11/from-right-to-dissent-to-success-of-the-resolution-process-reinforcing-cramdown-with-fairness-and-equitability/.
[52] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, (2019) SCC OnLine SC 1478.
[53] *Supra,* note 51.

The amendment made to Reg. 36A (1A)[54], permitting asset-wise resolution plans during CIRP, stands inconsistent with the objective of IBC and the definition of resolution plan, as provided under S. 5 (26)[55] of the IBC. Moreover, by virtually allowing for partial liquidation at the resolution stage, this amendment undermines the protection offered to the assets of the corporate debtor through the moratorium under S. 14[56] of the IBC. Such a substantial shift in the nature and objective of CIRP ought to have been undertaken through a Parliamentary amendment to the IBC itself, not through subordinate legislation.

Similarly, by allowing presentation of all plans, including the non-compliant ones, to the CoC, the amendment made to Reg 39 (2)[57] of the Principal Regulations violates S. 30 (3)[58] of the IBC and circumvents the judicial precedent. It burdens CoC by making them consider defective proposals and thereby making it more difficult for them to complete CIRP within the statutory timelines. Therefore, this amendment demands reconsideration by the IBBI.

Nevertheless, some aspects of the Fourth Amendment can be considered discerning and practical. For instance, through Sub-Reg. 18 (5)[59], observer status given to the IFPs is a reasonable compromise between visibility and authority that allows creating a more valuable informed and trust-based ecology without undermining the exclusive decision-making authority of the CoC.

Furthermore, the amendment made to Reg. 38 (1) (b)[60] of the Principal Regulations, stipulates priority payments to dissenting financial creditors on a *pro-rata* basis during staged payments. The amendment is laudatory since it draws inspiration from the judicial wisdom and the realities of operations concerning fair and equitable distribution to all stakeholders.

Although the Fourth Amendment to the Principal Regulation highlights a commercially advanced outlook towards insolvency resolution, which is not completely devoid of legal merit and partially fulfils its objective of streamlining the process and promoting transparency among all stakeholders, yet, it would be unjust to examine it only in the light of the benefits it will convey if properly administered. A proper examination would require consideration and anticipation of the harms it would cause if subjected to administrative lapses.

[54] *Supra,* note 8, §36 (A).
[55] *Supra,* note 11, §5 (26).
[56] *Id.*, §14.
[57] *Supra,* note 8, §39 (2).
[58] *Supra,* note 11, §30 (3).
[59] *Supra*, note 8, §18 (5).
[60] *Id.*, §38 (1) (b).

Consequently, it becomes pertinent to note that certain modifications conflict with express provisions of the IBC. These changes, though commercially motivated, risk compromising the primary function of CIRP, which is the revival of the corporate debtor as a going concern. For India's insolvency regime to mature and foster credibility, all reforms must ensure coherence with the IBC and remain aligned with established judicial interpretations. Lastly, to minimize the inconveniences caused due to hasty legislation, such reforms should not be introduced without undergoing multiple stages of evaluation with due diligence.

THE DIGITAL MARKET DILEMMA: AN INDIA-CENTRIC STUDY OF PREDATORY PRICING

Vivek Kumar[1] *

ABSTRACT

With the advent of ex-ante competition regulations around the world, India is contemplating to follow suit with its draft Digital Competition Bill, 2024. However, this move has given rise to vigorous critique that an ex-ante regulation might not be the right fit for a fledging and fast-growing digital economy like India. On the other hand, there is a pressing need to protect citizens from pernicious anti-competitive conduct like predatory pricing which has assumed new nature and colour in the digital space. The paper posits that the concept of predatory pricing has evolved in digital markets, which makes it harder to detect with traditional tools. Further, the characteristics of Indian digital markets might make it more vulnerable to predatory pricing. However, the solution is not to rely heavily on regulations from developed economies, but to broaden our understanding of competition in the digital space, the dynamics of impact on innovation, and scrutinize such conduct under a more nuanced lens. The paper suggests how enforcement against predatory pricing can be bolstered by leveraging a broader understanding of each component of predatory pricing analysis.

I. INTRODUCTION

Predatory pricing is the deliberate lowering of prices below some defined measure of cost intended to restrain competitors, drive them out of the market or to deter entry.[2] In other words, it is the setting of prices at a loss-making level for a period of time to capitalize on the foreclosure of the competition in the long run.[3]

Predatory pricing is a highly debated topic amongst economists, academicians and lawyers alike. While the Chicago School essentially ruled out predatory pricing as an effective business strategy,[4] subsequent research not only reinstated the belief that predatory pricing was indeed effective as an anti-competitive tool in the hands of dominant enterprises, but is more common

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[2] MICHAEL KATZ, EXCLUSIONARY CONDUCT IN MULTI-SIDED MARKETS, (OECD 2017).
[3] RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 739 (Oxford Univ. Press 2012).
[4] ROBERT H. BORK, THE ANTITRUST PARADOX (Basic Books 1978).

than was earlier thought.[5] However, the debate is far from being settled as the theories, research and, most importantly, methods of predatory pricing are still widely disputed.

The advent of digital markets has created a jurisprudential vacuum as far as 'predatory pricing' is concerned, since the characteristics of digital markets such as multi-sided nature, network effects, non-price competition, economies of scale and scope, and presence of algorithms distinguish these markets substantially from traditional markets. This would indicate that the existing economic and theoretical research framework relating to predation is rendered largely inapplicable to digital markets.

This, and other related understanding of the peculiarities of the digital markets, has created a semblance of panic across jurisdictions. The fast-changing innovations in the digital space, and the inability of *ex post* regulation to effectively address anticompetitive practices by large digital players with significant presence in relevant markets (Gatekeepers), has prompted many jurisdictions to think in terms of an *ex-ante* approach to competition regulation. The European Union (EU) blazed the trail, and major jurisdictions like the UK and Japan have already passed specialized laws to regulate digital markets following an *ex-ante* approach. Following suit are jurisdictions like Australia, Germany, and China through amendments to existing laws, bills and draft guidelines. The *ex-ante* approach, however, is facing vigorous critique from scholars and policy analysts, who believe that *ex ante* regulation tends to compromise innovation in favor of administrative expediency.

There exists a formidable dilemma for Indian policymakers: whether they should largely and rather literally follow the logic of jurisdictions with more developed competition jurisprudence, ignoring the uniqueness of the domestic digital market (which is still fledging) and stage of India's digital development; or whether they should work on the existing legislation keeping in view various domestic factors as also taking into account the need to promote and sustain innovation, digital inclusivity, access and affordability.

India is contemplating the former approach as is evident from the Report of the Committee on Digital Competition Law.[6] The draft Indian Digital Competition Bill, 2024 follows the *ex-ante* approach aimed to curb anti-competitive conduct at the threshold level. However, there have

[5] LAWRENCE PHILLIPS, COMPETITION POLICY: A GAME-THEORETIC PERSPECTIVE (Cambridge Univ. Press 1995).
[6] COMMITTEE ON DIGITAL COMPETITION LAW, REPORT OF THE COMMITTEE ON DIGITAL COMPETITION LAW (2024).

been allegations that India is largely adopting EU type regulations which would be more detrimental than beneficial, as it would curb innovation, make India unattractive to investors, and adversely impact both the consumers and emerging start-ups.[7]

These allegations do not appear out of place. There is good probability that the growth and maturing of Indian digital markets might be adversely affected if the *ex-ante* approach is adopted. Since Indian digital markets are distinguishable from those of other jurisdictions on account of the large and less literate population, the emerging nature of the economy, very large number of internet users, level and quality of rural penetration, level of digital literacy, price-sensitivity of users, etc., it might be disingenuous to adopt regulations from a jurisdiction where such factors do not exist.

Through this paper, we seek to argue that Indian digital markets are sufficiently different from developed jurisdictions due to a number of factors, which also makes it more vulnerable to anticompetitive conduct such as predatory pricing. Therefore, it becomes imperative to draft a legislation that takes cognizance of the characteristics that set digital markets in India apart; or even better, explore the feasibility of amending the existing law to speed up disposal, so as to blunt to some good extent the main argument against an *ex-ante* regulation.

The paper is divided into four sections: Section I introduces the paper; Section II provides insights into how predatory pricing can take place on digital platforms; Section III explores different factors that make Indian digital markets more prone to predatory conduct; and Section IV suggests how a better framework can help prevent predation in an Indian context.

II. LITERATURE REVIEW

There is sufficient literature which explores the differences between the traditional brick-and-mortar markets and the digital markets. Evans highlights that digital markets do not conform to the Lerner Condition. He also highlights that in a multi-sided market, price cannot be analyzed without taking into consideration all sides.[8] There is a consensus that zero-pricing on one side of the platform cannot establish predation.[9] Behringer and Filistrucchi extend the

[7] Lidija Radic, *India Should Question Europe's Digital Regulation Strategy*, THE ORGANISATION FOR MARKET COMPETITION (Apr. 12, 2024), https://truthonthemarket.com/2024/04/12/india-should-question-europes-digital-regulation-strategy/.
[8] David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 325, 324 (2003).
[9] Eur. Comm'n, Jacques Crémer, *Competition Policy for the Digital Era: Final Report*, (2019).

Areeda-Turner test in two-sided markets and argue that cost and revenues from both sides of the market are to be analyzed.[10]

Lina Khan explores the role of network effects and economies of scale/scope in the digital realm and argues that traditional pricing theories underestimate the possibility of predatory pricing in the digital realm.[11] The concept of "data dominance" in the digital realm has been explored by Srivastava in his paper.[12] However, the available literature does not identify the actual mechanism that allows enterprises to indulge in predation in digital markets with impunity. On the other hand, scholars have shed light on how algorithms can facilitate predatory pricing.[13] The literature is limited to the utility of algorithms in effectuating a predatory pricing scheme.

Further, there is a vacuum in literature that effectively differentiates Indian digital markets from digital markets in other jurisdictions. Studies state that Indian market is extremely price sensitive.[14] Further, Indian consumers are more open to sharing data in return for lucrative offers on products and services.[15] However, its implication in relation to predatory pricing has not been explored.

Lastly, there exists literature criticizing India's move to adopt ex-ante model pioneered by the EU.[16] However, this literature does not, in turn, suggest appropriate measures that can be adopted instead.

III. BACKGROUND ON PREDATORY PRICING

Predatory pricing includes two components: an objective component relating to cost, and a subjective component relating to predatory strategy. In the European Union, prices are presumed predatory if they are below the marginal costs; however, there is no presumption

[10] Stefan Behringer & Lapo Filistrucchi, *Areeda–Turner in Two-Sided Markets*, 46 REV. INDUS. ORG. 287 (2015).
[11] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).
[12] Arpita Srivastava, *Digital Economy, Data, and Dominance: An Indian Perspective*, CCI J. COMPETITION L. & POL'Y 97 (2021).
[13] Christopher R. Leslie, *Predatory Pricing Algorithms*, 98 N.Y.U. L. REV. 49 (2023).
[14] Debashis Saha, *On the Temporal Variations of Online Pricing in India: An Empirical Analysis*, NAT'L CONF. ECON. COMPETITION L (CCI 2016).
[15] *Supra* Note 12; Accenture, *Seven Out of Ten Indian Consumers Willing to Share Personal Data with Banks for Lower Pricing*, ECON. TIMES (Apr. 11, 2019), https://economictimes.indiatimes.com/news/economy/indicators/people-happy-to-share-personal-data-for-better-pricing-service-survey/articleshow/68831610.cms?from=mdr.
[16] Luca Radic, India Should Question Europe's Digital Regulation Strategy, TRUTH ON THE MARKET (Apr. 12, 2024), https://truthonthemarket.com/2024/04/12/india-should-question-europes-digital-regulation-strategy/.

about the prices being below average total cost (**"ATC"**), but above marginal costs. In the latter situation, specific intent is required to be established.[17] Better known as the AKZO test, it is the dominant method of predatory pricing analysis in the EU. Further, since marginal costs are difficult to derive (Barthel, 2002),[18] successive Commissions have used various proxies for marginal costs such as average variable cost (**"AVC"**) or long-run incremental cost (**"LRIC"**) depending on the available data and economic rationale.[19]

In the United States, the test is based on proof of below cost pricing and a probability of recoupment.[20] Similar to the EU approach, the measure of cost is not prescribed and courts have discretion with regards to which measure of cost should be utilized for analysis.[21] Further, the test of recoupment requires proof that the predator has a "dangerous possibility" of recouping its losses, made as a predatory investment, in the long-run.[22]

However, the requirement of intent in US is marred with ambiguity.[23] In *Brooke*, the US Supreme Court held that even a strong and unambiguous evidence of intent cannot independently establish liability.[24] The *Brooke* decision lessened the significance of intent analysis but did not completely dismiss it. With no objective direction, US courts are split over the requirement. In any case, intent still serves as a consideration ancillary to the twin pronged test of cost and recoupment.[25]

In India, explanation (b) to section 4(2) defines predatory pricing as *"the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors."*

[17] France Télécom SA v. Commission, C-202/07 (2009).
[18] Christian Barthel, Predatory Pricing Policy Under EC and US Law (2002) (unpublished Master's thesis, Univ. of Lund).
[19] AKZO Chemie BV v. Commission, C-62/86 (Eur. Ct. Justice).
[20] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
[21] *Id*.
[22] Patrick Bolton, Michael H. Riordan & Joseph F. Brodley, *Predatory Pricing: Strategic Theory and Legal Policy,* U.S. DEP'T OF JUST. (Dec. 29, 2023), https://www.justice.gov/archives/atr/predatory-pricing-strategic-theory-and-legal-policy#2.
[23] Daniel Sharpes, *Reintroducing Intent into Predatory Pricing*, 61 EMORY L.J. 903 (2012).
[24] *Supra* Note 14.
[25] Stephen R. Beck, *Intent as an Element of Predatory Pricing Under Section 2 of the Sherman Act*, 76 CORNELL L. REV. 1253 (1991).

Therefore, from the definition itself, it appears that India also follows a dual test of cost and intent.[26] The CCI (Determination of Cost of Production) Regulations, 2009 lay down various measures of cost, including but not limited to, total cost, total variable cost, long run average incremental costs, etc. to help the CCI in its analysis. The application of the appropriate measure of cost is case-specific, and the CCI has wide discretion.

The subjective arm of the predation test in India focuses on predatory intent. India's approach is closer to the approach of EU than to that of the US. While the US focuses on a "dangerous probability of recoupment" as a major subjective consideration, EU approach involves predatory intent. The latter is a much broader concept and can be proved by various direct or indirect evidence.[27] Recoupment may, nevertheless, be employed as a factor to prove predatory intent in India.[28] The CCI in *MCX v. NSE* recognized that predation occurs in two phases: a predation phase and a recoupment phase. While the usage of the recoupment test in the case was contextual, it becomes implicit to appreciate the conduct in a full strategic context, minimize the probability of false positives, and avoid discouraging genuine competition.[29]

Further, a finding of dominance is a prerequisite of predatory pricing analysis across all jurisdictions, including India.[30] However, In *Uber India Systems,*[31] while dismissing an appeal filed against an order of erstwhile Competition Appellate Tribunal ordering an investigation into allegation of abuse of dominance against Uber, the Supreme Court held the view that there was indeed a *prima facie* case made out against the conduct of Uber, even though it did not possess a dominant position in the market in a formal sense.[32] The Court analyzed section 4 of the Competition Act, 2002, and held that "dominant position" as defined under explanation (a) of section 4 refers to a position of strength which: (1) enables the enterprise to operate independently of the competitive forces prevailing; or (2) is something that would affect its competitors or the relevant market in its favor. Reliance was placed on the statement wherein it was stated that Uber was losing Rs. 204 with each trip, to hold that such conduct would certainly affect Uber's competitors and the relevant market in its favor. Therefore, the SC "flipped the coin" by suggesting that predatory conduct may, by itself, be proof that the entity

[26] *In re Transparent Energy Systems & TECPRO Systems*, Case No. 09 of 2013 (CCI 2013).
[27] Stephen R. Beck, *Intent as an Element of Predatory Pricing Under Section 2 of the Sherman Act*, 76 CORNELL L. REV. 1253 (1991).
[28] MCX Stock Exchange v. National Stock Exchange of India, Case No. 13 of 2009 (CCI 2009).
[29] *Id.*
[30] *Id.*
[31] Uber India Systems v. CCI, Civil Appeal No. 641 of 2017 (India).
[32] *Id.*

engaged in such conduct is dominant.[33] This also means that dominant position might now be assessed on the basis of the ability of the enterprise to offer lower prices, rather than focusing on the market structure.

It is evident that predatory pricing requires a critical rethink with the advent of digital markets. Both the subjective and objective requirements of predation might be made redundant in their application to digital markets as:

Firstly, digital markets do not necessarily involve a price component. In platform markets, involving multiple sides, customers on one side may be provided services absolutely free of cost, which might be subsidized from revenue on the other sides. In the absence of price, the cost-price analysis which is the backbone of various economic tests relating to predatory pricing becomes effectively redundant;

Secondly, the intent to predate is difficult to prove in cases of predation in digital markets, which are often driven by algorithms. An algorithm which is designed for profit maximization might as well resort to predatory pricing on its own accord. However, in such cases, proving intent of the enterprise is exceedingly difficult;

Thirdly, the recoupment phase in digital markets might be very different from what is currently understood. Recoupment in the traditional sense, entailing an increase in price after driving out competitors from the markets to make up forgone profits in the short run, will not necessarily be the strategy adopted by incumbents. Rather, network effects and platform externalities can help the incumbent make up lost profit without the need for increasing prices.

The next section looks at predatory pricing in digital markets and posits that the special characteristics of digital platforms make predatory pricing easier to carry out and much more difficult to be detected on digital platforms.

IV. PREDATORY PRICING IN DIGITAL MARKETS

In 2017, Lina M. Khan, the current Federal Trade Commission Chairperson, wrote a paper titled *Amazon's Antitrust Paradox* arguing that traditional antitrust analysis, focused around

[33] DIVYANSH RAJAN, SHUBHAM JAIN & ANSHUL THAKUR, Predatory Pricing – Not Only Abuse but Also Proof of Dominance, *SCC ONLINE BLOG* (Feb. 7, 2020), https://www.scconline.com/blog/post/2020/02/07/predatory-pricing-not-only-abuse-but-also-proof-of-dominance/.

price and output, fails to adequately address anticompetitive conduct by Digital Platforms.[34] Traditional theories of predatory pricing largely underestimate its possibility, specifically in the digital realm. She highlighted two major characteristics of digital platforms that make predatory pricing much more lucrative: *firstly*, economies of scale and network effects associated with platform markets make it more lucrative to pursue growth, even at the expense of profits. Accrual of customers has become a central pursuit for platform markets as data acquired from such customers can put the incumbent in a better position than if it had just focused on the profits. *Secondly*, platforms act as intermediaries, which grant them control over essential infrastructure that their rivals depend on. Platforms can surveil their competitors and exploit information to undermine them as competition. Despite strong criticism, this pathbreaking paper was enough to signal a necessity of novel antitrust analysis in the digital realm.[35]

This section will explore the main features of digital markets that set it apart from traditional markets and how they can help firms engage in predatory pricing and circumvent competition enforcement.

A. Increased Incentive to Predate in Multi-Sided Markets

Multi-sided markets are markets with two or more distinct groups of customers, which are interdependent.[36] These markets are peculiar, in the sense that they do not conform to traditional pricing theories such as Lerner Condition, as the price cost margin is not always inversely proportional to the elasticity of demand.[37]

An example of a multi-sided market would be a platform for hotel booking. On one hand, it has customers looking for accommodation, and on the other, there are hotels which are looking for customers. In virtually all cases, the platform won't charge any money from the customers for availing its services, and the cost would be covered by the commissions received from the

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[34] Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).
[35] Robert D. Atkinson, *The Flawed Analysis Underlying Calls for Antitrust Reform: Revisiting Lina Khan's Amazon's Antitrust Paradox*, INFO. TECH. & INNOVATION FOUND. (Mar. 1, 2023), https://itif.org/publications/2023/03/01/flawed-analysis-underlying-calls-for-antitrust-reform-revisiting-lina-khans-amazons-antitrust-paradox/.
[36] Aleksandra Rasek, *Two-Sided Market*, CONCURRENCES (n.d.), https://www.concurrences.com/en/dictionary/two-sided-market.
[37] David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 324 (2003).

hotels. Therefore, on one side, the price might be below cost or even zero, without necessarily constituting predatory pricing.

That is not to say that multi-sided platforms cannot engage in predatory pricing. On the contrary, the probability of predatory pricing might increase with the number of sides a platform has. Since the purpose of predatory pricing is to capture market share by driving competitors out of the market or by deterring entry, it becomes relatively more lucrative for platforms, who can affect various market segments simultaneously to capture a large number of customers, and thus engage in predatory pricing more effectively. On the other hand, a single sided platform can only affect one segment at once.

As an example, online platforms for prescription medicines such as Tata 1mg and PharmEazy constitute a three-sided platform with customers, pharmacists, and doctors forming distinct groups, each interdependent on the other. If the player decides to engage in predatory pricing, it can target three distinct groups at once. Further, there will be a cumulative network effect of all the sides, which, over a long term, can be more profitable than price-competition.[38]

A player carrying out the same strategy in three single sided markets cannot normally achieve the same result, as the absence of network effects would make the strategy less effective. While the costs of such large-scale predatory pricing can be easily covered by players with "deep pockets", other players are also incentivized to engage in it, as they can later capitalize on the data acquired from users who are joining the platform, which is elaborated upon in the next section.

While predation might be more lucrative on multi-sided platforms, its detection is far more difficult with existing cost-based theories. In a multi-sided market, prices on one side cannot be analyzed one-dimensionally without due regard to the conditions on the other side. It might be appropriate to compare the total price incurred by both sides combined and compare it to total costs. However, it would fail in markets that do not involve a matchmaking component.[39]

Therefore, multi-sided markets are more vulnerable to predatory conduct as predation in such markets is more lucrative and harder to detect.

[38] *Supra* Note 34.
[39] David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 324 (2003).

B. Recoupment through network effect

Possibility of recoupment of losses is an important component of predatory pricing analysis. It assumes that losses incurred in the short-term for running the predatory scheme are an investment which will be subsequently recovered by raising the price. Together with intent, recoupment establishes a "predatory strategy".

However, increase in price to recoup losses has been rendered an archaic construct in digital markets with strong network effects and limited. Network effect is the understanding that the number of customers using a product or service has a direct or indirect bearing on its value (Yoo, 2006). In other words, utility of a product or service increases with the increase in the number of customers and with it the value.[40]

Broadly, on a platform, network effects might affect both demand and supply sides. For example, on an online marketplace like Amazon or Flipkart, on the demand side, an increase in the number of customers might reduce risk of fraud and misrepresentation by sellers on the platform, as customers write reviews that help subsequent buyers. This is an example of direct network effect where the growth of the network itself increases its value.

On the supply side, an increase in the number of customers attracts more sellers who can capitalize on the exposure to larger numbers of customers. More sellers would, in turn, make the platform more attractive by offering diverse choices of products. This essentially creates a feedback loop of externality which is not only restricted to the participants on the platform but also attracts other actors, such as express delivery companies and delivery partners, who are otherwise outside the platform.

Network effect can render recoupment analysis redundant due to the presence of economies of scale, economies of scope and big data.

Economies of scale become available when cost of producing goods decreases as production volume increases.[41] In platform economics, cost per user decreases with increase in the number of users. This is because, after incurring initial setup costs such as the cost of hardware and

[40] Kirill Voropaev, *Network Effects as a Ground for Anti-Competitive Conduct in Russia*, KLUWER COMPETITION L. BLOG (Feb. 8, 2021), https://competitionlawblog.kluwercompetitionlaw.com/2021/02/08/network-effects-as-a-ground-for-anti-competitive-conduct-in-russia/.
[41] Andrés P. Orduz, Economies of Scale, CONCURRENCES (2007), https://www.concurrences.com/en/dictionary/economies-of-scale#:~:text=The%20implications%20of%20economies%20of,not%20yet%20entered%20the%20business.

server setup, the cost incurred to add a new user is very low [42] This means that accruing a large number of users is an effective way for platforms to grow without incurring proportionately more costs.

Similarly, economies of scope dictate that it is less costly to combine two or more product lines in one firm than to produce them separately.[43] For example, Google allows its users access to multiple services such as Google Search, Google Maps, YouTube, etc. However, its cost for providing different services does not increase significantly as it can employ existing infrastructure to offer multiple services.

Data, on the other hand, has multiple bearings on firms' behavior. The advantages of having access to large quantity of data are multifold. Data, by itself, is an asset having economic value which can be collected and sold by firms for profit [44] Firms might also collect and process data to gain advantage over competitors.[45] For instance, analysis of user data can help the platform offer tailored experiences to different users by identifying their preferences. Video sharing platforms such as YouTube and Instagram specifically benefit from the increased user engagement due to tailored content. Similarly, tailored advertisements increase the likelihood of the user purchasing the goods or services advertised.[46]

Much has been said about the potential anti-competitive effects of data dominance.[47] Possession of large quantity of data helps entrench market position by, *inter alia*, creating entry barriers. It also confers a competitive advantage in terms of offering better quality services and user perception.[48]

[42] OECD, *The Evolving Concept of Market Power in the Digital Economy: Note by Brazil*, UNCTAD/COMP/BRZ/2022 (2022) (Intergovernmental Report).
[43] John C.Panzar & Robert D. Willig, *Economies of Scope*, 71 Am. Econ. Rev. 268 (1981), http://www.jstor.org/stable/1815729.
[44] Sander van Otterloo, *Information Security – Asset Inventory*, ICT INST. (Dec. 9, 2016), https://ictinstitute.nl/information-asset-inventory/.
[45] Srivastava, A., & Kumar, D., *Digital Economy, Data, and Dominance: An Indian Perspective*, Competition Commission of India Journal on Competition Law and Policy, 97–120.
[46] Rebecca Walker Reczek, *Targeted Ads Don't Just Make You More Likely to Buy-They Can Change How You Think About Yourself*, HARVARD BUSINESS REVIEW (Apr. 4, 2016), https://hbr.org/2016/04/targeted-ads-dont-just-make-you-more-likely-to-buy-they-can-change-how-you-think-about-yourself.
[47] Srivastava, A., & Kumar, D., *Digital Economy, Data, and Dominance: An Indian Perspective*, COMPETITION COMMISSION OF INDIA JOURNAL ON COMPETITION LAW AND POLICY, 97–120.
[48] Daniel Fagella, *Data Dominance-How Companies and Countries Win with AI*, EMERJ (May 27, 2019), https://emerj.com/ai-power/data-dominance-artificial-intelligence/https://emerj.com/ai-power/data-dominance-artificial-intelligence/.

In the context of predatory pricing, characteristics of digital markets such as economies of scale, economies of scope and big data, can have a significant impact on the analysis of such conduct. More specifically, the requirement of recoupment might become redundant as platforms can employ new strategies to earn back lost profits without detection. A digital firm that has once reduced the price of its product with a predatory intent and succeeded to eliminate competition or competitor might not even need to increase the price again significantly, to recoup its losses. Such a firm might be able to become profitable over time without the need to increase any price

In this context it is important to note that recoupment in platform markets might work in two phases: a. Loss minimization and b. Creeping recoupment.

Loss minimization works by decreasing the average variable cost which lowers the cost to sustain each user on the platform. Low prices attract customers, and network effects dictate that utility of a digital platform increases with the number of customers, therefore, it will set off a feedback loop leading to accrual of large numbers of customers. Now, economies of scale and, depending on the circumstances, of scope would kick-in lowering the average variable cost of the platform. Over time, it would become less costly for the platform to cater to each customer; thus, diminishing the losses. Algorithms might also play an important role in minimizing losses by allowing targeted price cuts during the predation phase. [49]

For example, Rs 10 lakhs is the cost of running a platform with 10,000 users. Therefore, the average cost per user is Rs 100. The platform sets its price at 90 rupees with a predatory intent. Due to the price cut, the number of users increased from 10,000 to 1,00,000 but, because of economies of scale, the cost did not increase proportional to the increase in users. Let us say, for example, that the cost of running the platform is now 80 lakhs. The average cost becomes 80 rupees. Therefore, what was originally a loss per user has turned into a profit without the need to increase the price.

The next part of the strategy can be termed as 'creeping recoupment' to emphasize that recoupment in the digital economy can take different forms than simply raising the prices in the same relevant market. To give an example, price discrimination tactics might be employed by the firm to offer different prices to users based on their ability and willingness to pay. It can help the firm maximize its post-predation recovery while keeping the risk of re-entry to a

[49] Christopher R. Leslie, *Predatory Pricing Algorithms*, 98 N.Y.U. L. REV. 49 (2023).

minimum.[50] Data collected from users can aid firms employ such strategies efficiently. Algorithms paired with frequent price fluctuations, that are characteristic to digital markets, can effectuate the scheme without detection.[51]

Creeping recoupment challenges the presumption that recoupment has to be direct. It capitalizes on the understanding that incidence of recoupment might be spread out over various markets and product lines. Since data is a valuable asset possessing humongous monetary value.[52] by itself, its role in recoupment cannot be disregarded. Data collected from users can be used to subsidize the low pricing during the predation phase.

Let us take the example of Reliance Jio. Initially, it made heavy losses to offer various services free of charge including 4G internet and VoLTE. This was clearly a loss-making strategy aimed to enter the market effectively. The user base of Jio expanded exponentially due to the low pricing and access to an array of digital services free of costs such as, *inter alia*, Jio Cinema, Jio Saavn, Jio Cloud etc.[53]. This means the fixed costs could be spread over a large number of customers, diminishing the losses incurred.

However, over the course of time, Jio stopped offering the above-mentioned services free of cost. Meanwhile, it also started showing advertisements in free versions of these services to subsidize them. Further, it might also be true that the free versions of these services have been intentionally designed poorly to induce users to subscribe.[54] This scheme resembles what has been described as creeping recoupment above.

Because Jio has an exponentially large customer base, it also possesses a large amount of data on customer preferences and behavior. The website of JioAds flaunts its 400 million users and 267 million shoppers to advertisers. This is lucrative for advertisers as they get access to a large number of customers, further, data on customer preferences helps them show their ads to potential customers increasing the chance of selling the goods or services. This essentially

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[50] Thomas K. Cheng & Julian Nowag, *Algorithmic Predation and Exclusion*, 25 U. PA. J. BUS. L. 41 (2023).
[51] Robert D. Atkinson*, The Flawed Analysis Underlying Calls for Antitrust Reform: Revisiting Lina Khan's Amazon's Antitrust Paradox*, INFO. TECH. & INNOVATION FOUND. (Mar. 1, 2023), https://itif.org/publications/2023/03/01/flawed-analysis-underlying-calls-for-antitrust-reform-revisiting-lina-khans-amazons-antitrust-paradox/.
[52] Vishal Thirani & Ankit Gupta, *The Value of Data*, WORLD ECON. F. (2017), https://www.weforum.org/agenda/2017/09/the-value-of-data/.
[53] Neil Shah, Deep Dive: *How Will Facebook Recoup Its US$ 5.7 Billion Investment in Reliance Jio?*, COUNTERPOINT (Apr. 22, 2020), https://www.counterpointresearch.com/insights/deep-dive-will-facebook-recoup-us5-7-billion-investment-reliance-jio/.
[54] Karan Siddhartha, *Play and Miss: Bittersweet Experience with Jio Cinema's Free IPL Streaming*, MEDIUM (May 31, 2023).

means Jio can leverage its user base in the advertisement market to earn good profit, which it has done. Therefore, it would not be wrong to conjecture that Jio's alleged recoupment of initial losses might have taken place in the form of subscriptions and advertising fees, rather than an increase in price.

To conclude this part, recoupment might not be the right approach for predatory pricing analysis, at least not in the current form. We need to evolve our understanding of the role of recoupment in digital markets to capture conduct that would otherwise be outside the purview of inquiry.

C. Algorithms and the Death Of "Predatory Intent"

Along with price-cost data and the possibility of recoupment, predatory intent is another important consideration in predatory pricing analysis. Evidence of intent is useful in cases where the price, by itself, is not a clear indication of predatory pricing. For example, prices below AVC are presumed to be predatory, but if the prices fall above AVC, it could be due to certain efficiency-based advantages, and predatory intent is required to be proven.[55]

Evidence of intent can be direct or circumstantial. Direct evidence includes evidence relating to mental state such as internal memoranda and minutes of meetings which reveals the scheme of predation. Circumstantial evidence might include any document that does not directly reveal the scheme, but gives hints that such conduct was probable. Plans of pricing below cost, surveillance of competitors, sham litigation, blocking rivals' credit, etc. might help the authorities come to a conclusion that predation was being considered by the firm.[56]

However, the requirement of intent is anachronistic in the digital age, marked by algorithms, artificial intelligence, and machine learning. Intent was relevant in traditional markets because pricing decisions were made by humans. Whereas digital firms often employ algorithms to assist in pricing decisions. Algorithms might be categorized in two ways: algorithms that require human intervention and algorithms that do not.

Monitoring algorithms are a good example of the former category. These algorithms help collect data relevant for pricing such as buyer preferences or behavior of competitors. The final

[55] AKZO Chemie BV v. Commission, C-62/86, Eur. Ct. Justice.
[56] Steven R. Beck, *Intent as an Element of Predatory Pricing Under Section 2 of the Sherman Act*, 76 CORNELL L. REV. 1242 (1991), http://scholarship.law.cornell.edu/clr/vol76/iss6/3.

decision-making, however, is done by a human.[57]The inquiry of intent would be relevant in cases involving such algorithms.[58]

However, there are also algorithms that can make pricing decisions independently. These algorithms do not require human intervention for implementation of prices, which it can do in real time. These algorithms are either rule based or self-learning.

A rule-based algorithm operates on clear rules encoded in it by the programmer. For example, an algorithm might be programmed to increase price in proportion to the demand. The rules are very clear, if demand increases, price also increases proportionately. It is just a reflection of computation, which is mechanical. Therefore, the question of intent does not arise. An example of such algorithms can be seen in the airline industry which is utilized to offer different prices to customers based on various variables.

Conversely, self-learning algorithms also exist which employ machine learning. These do not necessarily work based on rules. Rather they mimic how humans learn by analysing data and identifying patterns. Though real-life examples of such algorithms are lacking, the trend is towards their adoption for real time pricing strategies.

The problem of intent arises when these algorithms, designed for profit maximization, on their own accord formulate a predatory strategy because it might perceive it to be an effective way of profit maximization in the long term. Since machine learning algorithms are essentially a "blackbox", meaning its decision-making cannot be predicted based on the data being fed, such algorithms cannot be reverse-engineered to reveal what led to the particular decision being made. This becomes a problem as algorithms by themselves cannot be held liable for predation. Imputing the conduct of the algorithm to the programmer is also impractical as conduct of such algorithms cannot be foreseen or predicted. This is what will lead to the death of "predatory intent" in the digital markets if the current technological trends related to pricing continue and novel enforcement mechanisms are not developed.

[57] C. Sean Hutchinson, *Tacit Collusion on Steroids: The Potential Risks for Competition Resulting from the Use of Algorithm Technology by Companies*, 13 Sustainability 951 (2021), https://doi.org/10.3390/su13020951.
[58] Christopher R. Leslie, *Predatory Pricing Algorithms*, 98 N.Y.U. L. REV. 49 (2023).

V. PREDATION IN INDIAN DIGITAL MARKETS

India is the third largest digital market in the world, bolstering around 800 million users in 2024. India's e-commerce market is projected to reach $350 billion in value in gross market value by 2030, and the digital economy is expected to reach $1 trillion by then. When compared to other economies, this is a substantially large number of internet users, and an immense potential for growth.

In this paper, we hypothesize that the risk of predation increases manyfold in digital markets because it is relatively more lucrative, easier to implement, and harder to detect compared to that in bricks and mortar markets. We also argue that Indian markets are more vulnerable to predatory conduct because: (a) Price sensitivity of Indian customers can help predators capture markets faster and (b) Rural markets offer predators the opportunity to expand manyfold.

A. Price Sensitivity

Indian consumer is highly price sensitive (Saha, 2016), which makes them more susceptible to predatory strategies. The aim of a predator is to capture the market by offering prices lower than its cost of production, with the knowledge that competitors and potential new entrants cannot meet such a low price. In India, consumers favor lower prices and are willing to shift to sellers that offer lower prices (Saha, 2016). This has multiple implications for predatory pricing:

Firstly, predators can quickly increase their market share in Indian markets before the predatory strategy is even detected and/or litigation commences.

In September of 2016, Reliance Jio entered the telecom market offering services free of cost including unlimited LTE data and national voice, video and message services.[59] It continued offering free services till 31st March 2017. During this stint, it managed to capture more than 50 million subscribers in exactly 83 days of launch (Shastri, 2024),[60] with nearly 16 million

[59] Joseph Waring, *India's Reliance Jio Launches Free Nationwide 4G*, MOBILE WORLD LIVE (Sept. 5, 2016), https://www.mobileworldlive.com/top-three/indias-reliance-jio-launches-4g-nationwide-today/.

[60] Ashna Shastri, *Case Study on Reliance Jio – Marketing & Business Strategy*, *IIDE*, (Aug 10, 2025), https://iide.co/case-studies/reliance-jio-marketing-strategy/ (last visited Aug. 13, 2025).

subscribers enrolling within the first month itself (Business Standard, 2016).[61] Over the six months of offering free services, 100 million users subscribed to the network (Financial Express, 2017).[62] Within these six months, Reliance Jio became the fourth largest telecom provider in India (Sahu & Perepu, 2020),[63] surpassing the growth rates of Facebook and Whatsapp (Mimnagh, 2017).[64]

In February 2017, an information was filed in the CCI against Jio alleging predatory pricing by Airtel. However, by that time Jio had already captured about 10% of the market (Financial Express, 2017).[65] Even though no anti-competitive conduct was attributed to Jio, the description of events seeks to emphasize on the fast market-grasping power of enterprises leveraging deep-discounting. Similarly, in cases pertaining to online cab-hailing services (Ola/Uber) and Food Aggregators (Zomato/Swiggy), the allegations of abuse only arose after they had already captured a large number of customers.[66]

Secondly, after the initial market capture, even if penalties are imposed on the predators for their conduct, they will be in net profit.

Penalties are aimed to deter the anti-competitive conduct and deprive the competitors of profits made through such conduct. However, penalties might not be as effective if the market power of the company has been entrenched due to said conduct. This has greater implications in digital

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[61] Anjana Kumar, *E-Commerce Market to Hit $325 Billion by 2030*, RURAL INDIA TO LEAD GROWTH, BUS. STANDARD (Apr. 29, 2024), https://www.business-standard.com/article/companies/e-commerce-market-to-hit-325-billion-by-2030-rural-india-to-lead-growth-124042900338_1.html.

[62] Indian E-Commerce Market to Grow to $325 Billion; *Digital Economy to Reach $800 Billion by 2030*, FIN. EXPRESS (Apr. 27, 2024), https://www.financialexpress.com/business/industry-indian-ecommerce-market-to-grow-to-325-billion-digital-economy-to-reach-800-billion-by-2030 3470164/#:~:text=At%20present%2C%20the%20e%2Dcommerce,accessing%20the%20internet%20in%202022.

[63] Bikash Sahu & I. Perepu, *Reliance Jio: Marching Towards Monopoly*, IBS CTR. FOR MGMT. RESEARCH, https://www.thecasecentre.org/products/view?id=168499 (2020).

[64] Lisa Mimnagh, *Reliance Jio's Free Trial Strategy: Are "Free" Models the Future?*, *STL PARTNERS*, https://stlpartners.com/articles/consumer/reliance-jios-free-trial-strategy-models-the-future/ (last visited Aug. 13, 2025).

[65] *Indian E-Commerce Market to Grow to $325 Billion; Digital Economy to Reach $800 Billion by 2030*, FIN. EXPRESS (Apr. 27, 2024), https://www.financialexpress.com/business/industry-indian-ecommerce-market-to-grow-to-325-billion-digital-economy-to-reach-800-billion-by-2030-3470164/#:~:text=At%20present%2C%20the%20e%2Dcommerce,accessing%20the%20internet%20in%202022.

[66] Meru Travel Solutions v. ANI Technologies, Case Nos. 25–28 of 2017 (CCI 2017); In re National Restaurant Association of India & Zomato Ltd., Case No. 16 of 2021 (CCI 2021).

markets, where once a company has been entrenched, it would be extremely difficult to rid its market power, due to network effects.

In digital markets, capturing market share is not a means to an end, as traditionally thought. Rather, it might be an end in itself. As already argued above, recoupment is natural on digital markets and increase in prices is not required. As of now, penalty regulations around the world are not developed enough to predict all the advantages incurred by an incumbent through predation in digital markets. Therefore, imposing penalties effectively is a challenge.

There is literature on effects of penalties on shareholders' value; however, it is restricted to traditional markets and explored penalties for collusion.[67] There are still gaps in our understanding of the effects of penalties on anticompetitive conduct. Predators might perceive penalties as added business costs or investment for entrenching their market position, which they will be able to recover over a long term. Similarly, Investors' might perceive the penalty as a one-time expense and the legal certainty created thereafter might boost investors' confidence in firm performance. That is why the share value of most of the large companies remains relatively unaffected when penalties are imposed on them.

Thirdly, Indian consumers might perceive price as the sole consideration.

For a large section of the Indian consumers, price is the 'king'. This has implications for predatory pricing strategies, as a predator can focus its strategy solely around price. In 2016, Ringing Bells launched a smartphone called "Freedom 251" with a price tag of just 251 rupees. The promotional plan was offered for a short window of three days between 18-21 February 2016. The demand was so high that the website created for selling the product crashed on the first day. By the end of the offer, Ringing Bells had managed to sell products worth Rs. 1.75 Cr.[68] However, it was later uncovered that it was an elaborate scam.

The key takeaway is that predatory pricing might be easier to execute in India because of the price sensitivity, even at the expense of other considerations such as product integrity or quality.

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[67] Johannes Strydom, Michael Ward & Corné Muller, *The Impact of Regulatory Fines on Shareholder Returns*, 46 S. AFR. J. BUS. MGMT. 85 (2015); Jean-Claude Bosch & E. Woodrow Eckard, *The Profitability of Price Fixing: Evidence From Stock Market Reaction to Federal Indictments*, 73 REV. ECON. & STAT. 309 (1991).

[68] *Ringing Bells Now Accepting Cash on Delivery for Freedom 251*, INDIAN EXPRESS (Feb. 29, 2016), https://indianexpress.com/article/technology/tech-news-technology/ringing-bells-freedom-251-cash-on-delivery/.

Similarly, Indian consumers are more open to sharing their data for lower prices on products and services,[69] making them a prime target for data-hungry companies.

B. Potential to Expand in India

Despite having one of the largest numbers of internet users in the world, internet penetration in India is still low at around 50-55%. There still lies immense potential for development of the digital market in India, mainly in rural areas. The potential has been recognized by some of the biggest tech-players in the world with them willing to spend billions of dollars to tap into India's unexplored potential.

In 2020, both Facebook and Google invested \$5.7 Billion and \$4.5 Billion respectively in Jio.[70] The announcement of collaboration to develop "low-cost, entry-level smartphones" hinted at a larger plan of increasing internet usage in rural areas. In fact, after the launch of the device, Google expressed that it expected the phone to be priced cheaper. The digitalization of rural areas would likely benefit the two players the most as they would be able to acquire millions of new users on their platforms, substantially increasing their advertisement audience and thus, revenue.

As internet penetration increases in India, it will become more lucrative for platforms to operate. Thus, the possibility of predation also increases as the main aim of platforms will be to acquire more customers, even at a loss. They would, in return, be able to boast of a larger audience to potential advertisers, exponentially increasing their revenue. Further, data unconsciousness of the Indian population makes it easier for such firms to harvest data from them.

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[69] Accenture, Seven Out of Ten Indian Consumers Willing to Share Personal Data with Banks for Lower Pricing, ECON. TIMES (Apr. 11, 2019), https://economictimes.indiatimes.com/news/economy/indicators/people-happy-to-share-personal-data-for-better-pricing-service-survey/articleshow/68831610.cms?from=mdr.

[70] Manish Singh, Google Invests \$4.5 Billion in India's Reliance Jio Platforms, TECHCRUNCH (July 15, 2020), https://techcrunch.com/2020/07/15/google-invests-4-5-billion-in-indias-reliance-jio-platforms/; MIKE ISAAC & VINDU GOEL, Facebook Invests \$5.7 Billion in Indian Internet Giant Jio, *N.Y. TIMES* (Apr. 21, 2020), https://www.nytimes.com/2020/04/21/technology/facebook-jio-india.html.

VI. RECOMMENDATIONS

Our analysis above shows that predatory pricing in digital markets does not resemble its traditional counterpart. Further, the Indian population is at a heightened risk of predatory pricing due to price sensitivity and immense growth potential. This means we need to make our regulatory framework stricter to deter any such future conduct, but at the same time not denting innovation, access and inclusion A nuanced and calibrated approach is called for rather than an abrupt and drastic step towards ex ante regulation.

Naturally, the *ex-ante* approach comes up as a potential solution. However, it could have more disadvantages than advantages in India. India is in a peculiar position with respect to development of internet infrastructure. Despite having one of the largest number of users and the biggest e-commerce market, internet penetration remains low. An *ex-ante* approach might thwart innovation and slow down the digitization of India.[71]

We suggest that an effective defense against predatory pricing in India lies not in the formulation of new approaches. Rather, we should focus on broadening our understanding of elements that constitute predatory pricing - cost, recoupment and intent.

a. Cost

Cost evaluation in digital markets is elusive, mainly because the price-cost margins on the two sides are interrelated.[72] There is consensus that zero-pricing on one side of the platform should not be considered predatory as zero-pricing on the consumer side can be offset through revenue made on the seller/advertiser side.[73]

One way to approach this problem is by taking the average marginal cost from both sides, or any other available proxy such as AVC or LRAIC, and comparing it to combined revenue in the form of average return per user (ARPU).[74]

For example, suppose on a hotel booking platform, there are 50,000 customers and 500 hotels. The customers don't have to pay anything for the services but hotels pay 10% commission on

[71] Luca Radic, *India Should Question Europe's Digital Regulation Strategy*, TRUTH ON THE MARKET (Apr. 12, 2024), https://truthonthemarket.com/2024/04/12/india-should-question-europes-digital-regulation-strategy/.
[72] Stefan Behringer & Luca Filistrucchi, *Areeda-Turner in Two-Sided Markets*, 46 REV. INDUS. ORG. 287 (2015).
[73] *Supra* Note 9.
[74] *Supra* Note 26.

every booking. Total number of users in this case would be 50,500 (including business users). The average variable cost of the platform is Rs. 50 per user. Suppose, the platform raises Rs. 30 million in revenue in the form of commissions from the hotel. In this case, average return per user (ARPU) would be Rs. 59.40 per user. In this case the pricing does not appear to be predatory as the incumbent's revenue exceeds its cost.

However, suppose, if the platform made only Rs. 20 million, its ARPU would be around Rs. 40 per user, which is less than its revenue. In this case, the probability of predation is more. However, this is not the whole picture. Platforms collect data from its users, which is subsequently processed to derive revenue in various forms such as advertisements. Therefore, data has become a commodity for platforms potentially possessing immense value.[75] However, the issue is to determine what role the data collected from users plays in overall revenue generation. Direct usage of data is easier to value. For example, when a platform acquires valuable personal data, such as the medical history of the user, it can charge more from an advertiser who is advertising for a hospital. This increases the revenue for the platform in a quantifiable way.

The problem arises when data can be used to generate value or provide competitive advantage in a non-quantifiable way. For example, a company which has data on customer behavior or preferences might be able to offer better services or innovative products. It would give it a significant advantage over other competitors while not necessarily being reflected in the revenue.

The answer might lie not in methods to quantify data value, but in the process of acquisition of data. In 2016, the German Competition Authority initiated proceedings against Facebook for abuse of dominance.[76] It held that Facebook abused its dominant position by collecting excessive data from its users. The Bundeskartellamt categorized data collected from users in two ways: *firstly*, data gathered directly and, *secondly*, data that was gathered indirectly.[77] Under the first category is the data collected through Facebook and its related services such as WhatsApp and Instagram. This collection, according to the Bundeskartellamt, does not raise

[75] Margrethe Vestager, European Commissioner for Competition, Making Data Work for Us, Address at Data Ethics Event on Data as Power, Copenhagen (2016).

[76] BUNDESKARTELLAMT, *Bundeskartellamt Initiates Proceedings Against Facebook on Suspicion of Having Abused Its Market Power by Infringing Data Protection Rules* (2016) https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html

[77] *Id.*

competition concerns as a user using the services free of cost expects some amount of data to be collected.[78] On the other hand, under the second category is the data collected through the usage of Facebook's APIs which are a more invasive way of collecting data as it is done without user's consent and raise competition alarms.

The main takeaway from this case is that the cost of "free" service for a user is his information and attention. So, when a user is forced to give more information and attention than warranted or consented to, it should form a basis for excessive pricing. This observation is important in a predatory pricing context because a platform which is engaging in "excessive pricing" cannot engage in "predatory pricing" at the same time. Further, privacy concerns arising out of such a transaction might be grave.

In digital markets, price has become redundant because price is not the correct measure of consideration paid anymore. Revenue might be a better indicator of predatory pricing, as analyzed above. Further, we should also consider the amount of the data being collected as well as the method by which the data is collected. A firm which is offering free service but collecting a variety of data through various channels is less likely to be engaged in predatory pricing, as compared to a firm which is also offering free services without collecting huge amounts of user data.

Therefore, the test of cost should move towards a more structural approach, considering not only the costs and the revenue, but also data collected and methods employed in pursuance thereof.

b. Recoupment

Establishing the possibility of recoupment is less tricky than a cost-price analysis in digital markets. There are two major approaches to recoupment: direct approach and indirect approach.[79] Direct approach or conduct-based approach focuses on directly estimating the predation losses and expected profits to calculate the difference between the two.[80] Conversely, the indirect approach or structural approach focuses on analyzing the structure of the market to

[78] *Id.*
[79] Tsan-Kuo Cheng & Johan Nowag, *Algorithmic Predation and Exclusion*, 25 U. PA. J. BUS. L. 41 (2023).
[80] C. Scott Hemphill, *The Role of Recoupment in Predatory Pricing Analyses*, 53 STAN. L. REV. 1581 (2001).

calculate the probability of post-predation gains. We believe that the latter approach, when coupled with conduct, would be a better approach for recoupment analysis.

As described above, the test of predatory pricing should migrate its focus from cost to structure. When an incumbent lowers its price and the market structure created as a result is such that would lead to an increase in the probability of recoupment, it should support a presumption of predation. The proxies for market structure indicating higher probability of recoupment would be high barriers to entry and limited efficiency of competitors. In a digital context, other proxies can be employed such as the willingness of users to share data and acceptance towards advertisements.

Suppose, in an online video-streaming market there are 5 platforms. Each platform offers its services free of cost but collects personal user data and shows advertisements for not more than 30 seconds for every 10 mins spent on the platform. If one of the platforms decreases the duration of advertisement from 30 seconds to 5 seconds for every 10 mins, the user would prefer that platform over that of the competitors. To meet this, other platforms would also need to decrease the duration. However, it would decrease their revenue, forcing them to leave the market. After all the competitors have been eliminated, the incumbent can gradually increase the duration of the advertisement from 5 seconds to 1 minute with an intent to recoup the losses.

In another similar scenario, if a player stops collecting certain personal information from users, it could also lead to the same result as this practice would decrease the willingness of users to share that information with other platforms, effectively achieving the same result described above.

This is a prime example of how predatory pricing can take place on a platform. The lowering of advertisement durations or data requirements can change the market structure where users are less willing to pay with their data or attention. The above-mentioned examples show that effective predatory pricing analysis in the digital market should focus on market structure, as well as conduct, to better appreciate its predatory nature, rather than solely focusing on price and cost.

c. Intent

The requirement of intent is much trickier than the above two. With the advent of algorithmic tools that can automate pricing and potentially engage in predatory pricing without human interference, it would be quite difficult to arrive at a conclusive finding as to the intent. However, as of now, purely self-learning algorithms are not that common to find as businesses are aversive of delegating the price related decision-making entirely to algorithms.

Algorithms that are employed more commonly nowadays are more akin to rule-based algorithms which operate within a clear set of rules provided by the programmers. Unless these algorithms are given a clear direction, they cannot by themselves engage in predation. Therefore, the issue of intent can still be resolved in a traditional way through direct and circumstantial evidence as of now.

VII. CONCLUSION

The research paper explores the concept of predatory pricing in digital markets towards an inference that predation is relatively more likely to occur in digital markets as it is more lucrative and harder to detect. The traditional tests of predation are insufficient for effective enforcement in the digital realm due to three major reasons: *firstly*, calculating the cost and price in digital markets is complicated due to zero-pricing and cross-subsidization between various sides of the market; *secondly*, recoupment of predation losses can be achieved in various ways that traditional definition of recoupment does not take into account, and *thirdly*, the requirement of intent might become counterintuitive with the advent of algorithmic pricing. We further explore how the Indian population is more vulnerable to predatory pricing due to its price-sensitivity and growth potential.

To tackle this problem, we suggest broadening our understanding of fundamental components of predatory pricing such as cost and recoupment. For effective enforcement against predatory pricing in digital markets, we need to shift our gaze from an objective cost-price analysis to a more structure-conduct-based approach focusing on other considerations such as data and users' attention. Further, the importance of intent might see a gradual decline due to the rise of algorithmic pricing. However, since reliance on purely automated algorithms is a future prospect, as of now, intent in a traditional sense can be retained.

INTELLECTUAL PROPERTY RIGHTS IN SUSTAINABLE DEVELOPMENT OF BUSINESS: ISSUES AND CHALLENGES

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I. INTRODUCTION

Sustainable Business Development (SBD) typically refers to the practice of growing and operating businesses in a manner that meets present needs without compromising the ability of future generations to meet their own needs especially in relation to the environment. Intellectual Property (IP) has time and again proved to be the resource for fostering innovation, maintaining competitive advantage, and ensuring long-term relevance in dynamic markets. The core principle behind Intellectual Property Rights (IPR) is, fostering innovation, which is done by protecting the rights vested in these IPs with the innovators, thus incentivising such IP. Without the protection of IPR, companies may hesitate to invest in new technologies, fearing their ideas could be copied by competitors. For businesses striving for sustainability, leveraging these assets becomes essential for long-term success.

II. BRIEF HISTORY OF GLOBAL EFFORTS AT BUILDING SUSTAINABILITY IN BUSINESSES

Since the 1992 Earth Summit, the importance of IPRs has dramatically increased, with countries and businesses prioritising innovation in their policies and strategies. The 1992, Rio Earth Summit was the first global conference to address the need for SBD.[3]

In 1995, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) formally incorporated IP into the international trading system. IPR, as conceived by TRIPS, were intended to reward innovators and creators for their contributions to society for a statutory period of time, which provides incentives for the generation and dissemination of knowledge, in order to encourage the transfer of technology. TRIPS mandates that member countries provide patent protection for inventions for at least 20 years, and also specifies copyright terms and trademark protection standards. TRIPS acknowledges that countries have different socio-economic contexts and includes flexibilities for implementing the agreement. These

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[2] **Author is an Associate at Khaitan & Co.
[3] Ahmed Abdel Latif, *Intellectual Property Rights and Green Technologies from Rio to Rio: An Impossible Dialogue* ?, Policy Brief No. 14, ICTSD Programme on Innovation, Technology & Intellectual Property, at 1, 9 (2012).

flexibilities allow countries to adopt measures such as compulsory licensing, parallel imports, and research exemptions to address public health and developmental needs.[4]

III. INTEGRATING IP INTO THE VALUE MECHANISMS OF SUSTAINABLE BUSINESS MODELS

The key is to move beyond a purely profit-driven approach and integrate sustainability into all aspects of the business, using IP as a tool to support these goals. IP can be used to protect and promote green technologies and innovations that benefit people and the planet. Green IP (green inventions and trademarks) is a strategic resource for organisations working toward sustainable economic development and can contribute to maintaining a competitive advantage. It encompasses a range of IPRs applied to environmentally friendly technologies, products, and processes. It's a key element for organisations striving for sustainable development, as it allows them to protect their innovations while also potentially fostering wider adoption of green solutions. It can provide organisations with a competitive advantage, by enabling them to differentiate their products and services. Green IP may be of two types namely, Organic Green IP, which are primary resources such as the knowledge and experience of founders, market contacts, employee skills, trademarks, and organisational culture, and Acquired Green IP are secondary resources including new knowledge, copyrights, patents, utility models, industrial designs, trade secrets, and know-how.

For example, in the case of Ecofiltro, the company's open-access model of water filtration technology provides a social benefit, offering free access to its IP, allowing others to innovate and compete. Also, in the case of Unilever's Cool Farm, the company jointly developed and licensed its proprietary tool to the Cool Farm Alliance, allowing farmers to reduce their environmental impact.

IV. GREEN START-UPS

Green entrepreneurship is gaining momentum as the environmental awareness grows, with businesses increasingly prioritising sustainability alongside profit. The 'Sustainable Business' move is driven by consumer demand for sustainable products, stricter environmental regulations, and a desire to support businesses that are socially responsible.

[4] Pedro Roffe & Maximiliano Santa Cruz, Intellectual Property Rights and Sustainable Development: A Survey of Major Issues, U.N. Econ. Comm'n for Lat. Am. & the Caribbean (2006), https://www.unescap.org/sites/default/files/Pedro%20Roffe-Intellectual%20Property%20Rights%20and%20SD.pdf

Numerous sustainable business ideas are emerging, spanning various sectors. These include environment-friendly stationery, hemp products, bicycle rentals, farmers' markets, renewable energy solutions, electric vehicles and charging infrastructure, sustainable fashion, repair services, second-hand retail, and urban agriculture. For example, companies are producing stationery from recycled paper, using hemp to create building insulation, offering bike rentals as an eco-friendly transportation option, organising farmers markets to support local producers, and installing solar panels to create sustainable energy.[5]

Beyond specific business ideas, companies are adopting various sustainable practices. These practices include using biodegradable packaging, reducing paper consumption, conserving water, utilising renewable energy, investing in green projects, developing recycling programs, reassessing supply chains, educating employees, partnering with nonprofits, recycling office equipment, and incorporating plants into office spaces. Switching to biodegradable packaging, for example, reduces plastic waste, while transitioning to renewable energy can significantly reduce a company's carbon footprint.

Green entrepreneurship plays a crucial role in driving sustainable development by fostering environmentally friendly practices and innovative technologies. It involves creating eco-friendly products and services, using resources efficiently, and minimising environmental impact. Green entrepreneurs are motivated by a desire to contribute to sustainable development and combat climate change while also achieving economic growth. These entrepreneurs are developing products and models that meet market demands while addressing environmental and social concerns.

Governments are instrumental in supporting green startups through a variety of mechanisms. Financial assistance is a key component, with governments providing direct funding through grants, loans, and specific programs like the Clean Energy Fund. They also offer tax incentives and subsidies to encourage investment and reduce the costs of green products and services. For example, the US provides tax credits for electric vehicle purchases, while India offers tax exemptions for women-led startups. Furthermore, governments are establishing regulatory frameworks and streamlined processes that are favourable to green businesses, often including incentives for sustainable practices. They also set standards for web accessibility and the

[5] Emily Harper, 10 Sustainable Business Ideas & Practices for Eco-Success (2023), https://logo.com/blog/sustainable-business-ideas.

environmental impact of green bond projects. Collaborative partnerships and networking are also facilitated by government initiatives, which help startups connect with established organisations and access valuable resources. Governments also set up platforms to connect stakeholders and create market demand for circular products. Additionally, research and development is supported by governments through grants, funding for research initiatives, and by providing access to expertise and technology. They also support incubation and acceleration programs, such as CyLon in the UK, providing mentorship, resources, and networking opportunities.

Various specific initiatives like the National Action Plan on Climate Change, 'Make in India', Startup India, and the National Skill Development Mission also promote green entrepreneurship. Governments actively support sectors like Agtech and ethical cybersecurity, along with promoting smart mobility and female entrepreneurship through targeted programs and funding. Governments also use green auctions to promote renewable energy and environmental projects, and issue green bonds to fund sustainable projects.

Green bonds are a crucial financing tool for sustainable projects, enabling investments in renewable energy, energy-efficient buildings, afforestation, clean transportation, and water infrastructure. The European Investment Bank and the World Bank are major issuers of green bonds which are used to finance various sustainable projects around the world. Green bonds help finance projects such as solar power plants, wind farms, energy-efficient building construction and retrofitting, forest restoration, electric vehicle infrastructure, and upgrades to water treatment facilities. [6]

Few examples of companies in such space are Brisil which is an Indian company with a patented technology to transform rice husk ash (RHA), a byproduct of burning rice husks for energy, into precipitated silica and highly dispersible silica. The process developed by Brisil minimises environmental impact by reducing carbon emissions compared to traditional silica manufacturing methods. By converting RHA into valuable materials, Brisil contributes to the circular economy, where waste is repurposed as a resource. Brisil received funding from the Ministry of Micro, Small Medium Enterprises (MSMEs), Government of India.[7] Another example is of Zero Cow Factory which is an Indian biotechnology startup founded in 2020 by

[6] FasterCapital, Successful Green Startups Backed by Government Initiatives, https://fastercapital.com/topics/successful-green-startups-backed-by-government-initiatives.html.

[7] Recovery of Highly Dispersed Silica from Rice Husk Ash, India Sci. & Tech. Portal (India), https://www.indiascienceandtechnology.gov.in/innovations/industrial-innovations/recovery-highly-dispersed-silica-rice-husk-ash.

Sohil and Parini Kapadia, specialising in producing animal-free milk proteins and dairy products through precision fermentation of DNA.

The company uses a patented technology for the creation of animal-free dairy products that are ethical, safe, and identical to traditional cow's milk. Zero Cow Factory has received grants including a BIRAC grant of INR 50 Lakh and a MeitY grant of INR 40 Lakh.

Ultimately, the path to sustainable development lies in harnessing IPRs to strike a delicate balance between protecting innovation and ensuring inclusivity, sustainability, collaboration and access. By doing so, businesses can drive meaningful progress toward a sustainable future while maintaining their relevance and resilience in an evolving global landscape.

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