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EDITORIAL NOTE

The Journal of Corporate and Financial Laws ('JCFL') has been both an exciting and challenging project. The idea for the journal began with a recognition of the necessity of sustained engagement with complex legal issues arising from changing commercial settings. Scholarly writing is particularly important to this process. It provides a space to examine laws and to evaluate their appropriateness against different commercial contexts.

It is with this objective that we present the inaugural volume of the JCFL. The establishment of a journal dedicated to commercial law is an opportunity to create a sustained forum for such scholarship, bringing together different approaches to questions arising across corporate law, securities regulation, insolvency, banking and finance, and other areas of commercial law.

The publication of this volume has taken considerably longer than originally anticipated. The journal underwent a number of administrative changes during this period. Bringing the journal to its first volume consequently required substantial work in establishing its editorial and administrative processes. We are grateful to those who contributed to this effort and to the authors and reviewers whose patience made the publication of this volume possible.

As an inaugural volume, this issue also provides the foundation for the journal's future volumes. We hope that the journal will develop into a forum for rigorous scholarship on commercial law, including both established areas of doctrine and questions emerging from changes in commercial practice and regulation. The articles in this volume reflect this breadth, addressing a range of subjects from insolvency law to green financing to stamp duty.

The first article, "The Need for Insolvency Clauses in Investment Treaties" by Dr. Ankeeta Gupta, examines the difficulties created by the territorial treatment of cross-border insolvency, particularly for foreign investors and creditors. It considers the interaction between cross-border insolvency regimes and investment treaties, and argues for incorporating insolvency protections into bilateral and multilateral investment agreements. The article proposes that such clauses could provide greater protection to creditors and investors while facilitating coordination between jurisdictions until a more uniform international insolvency framework develops.

"India's Green Finance Puzzle: Charting a Licensing Framework Between Lending Mandates and Market-Driven Solutions" by Debanshu Mukherjee and Varsha S. Banta considers the regulatory difficulties in expanding green finance in India. The authors argue that neither entirely voluntary measures nor mandatory lending requirements provide an adequate solution and instead propose a middle path that combines regulatory intervention with market-based incentives. They examine two possible institutional models: licensing specialised green banks under Section 22 of the Banking Regulation Act, 1949, and establishing an in-house green banking arm within the Reserve Bank of India.

"Reinventing and Reviving the 1937 Stamp Duty Notification: Exemptions for Intra-Group Mergers in Punjab" examines the continuing uncertainty surrounding the 1937 Notification and its application to intra-group corporate restructurings. Focusing particularly on Punjab, the article considers the interaction between constitutional continuity, divergent judicial decisions, administrative inaction, and the stamp duty consequences of mergers and demergers. It argues that the Notification can continue to operate, but proposes a substance-over-form framework, including a Five-Part Test and model clauses, to distinguish genuine intra-group restructurings from arrangements designed primarily to obtain a stamp duty exemption.

"A Critical Comparison of Extortionate Credit Transaction Avoidance Laws in Insolvencies in India and the UK" by Rebecca Parry and Sanjay Chapagain compares the treatment of extortionate credit transactions under the insolvency laws of the two jurisdictions. The article focuses on the need to prevent exploitative lending without making the law so restrictive that it limits the availability of credit to high-risk borrowers. It argues that the differences between the Indian and UK regimes reflect deliberate adaptation to their respective regulatory environments: the UK relies on a high statutory threshold against the background of a developed ex ante consumer-credit regime, while the Indian framework uses, among other mechanisms, a safe harbour for regulated financial institutions.

We are grateful to our Patron-in-Chief and Board of Advisors for their continued guidance, to the contributors for entrusting us with their scholarship.

Anushree Prasad and Abhinav Ravi
Deputy Editors-in-Chief
Journal of Corporate and Financial Laws (2025 - 2026)

A CRITICAL COMPARISON OF EXTORTIONATE CREDIT TRANSACTION AVOIDANCE LAWS IN INSOLVENCIES IN INDIA AND THE UK

*Rebecca Parry**

Abstract

The Insolvency and Bankruptcy Code 2016 marked a transformative moment in Indian insolvency law, introducing a consolidated framework of avoidance transactions that draws significantly on established common law traditions, including the extortionate credit transaction provisions modelled in part on their UK equivalents in the Insolvency Act 1986. This article examines the extortionate credit transaction provisions of both jurisdictions through the theoretical lens of legal transplantation, deploying Watson's framework of legal transplants alongside Duncan Kennedy's form and substance dichotomy to interrogate the fidelity and functionality of the transplant as it has taken root in Indian law.

The analysis proceeds by situating extortionate credit transactions within the broader PUFE framework of avoidance transactions under the IBC 2016, encompassing preferences, undervalue transactions, fraudulent transactions, and extortionate credit transactions, and mapping these against their UK counterparts under the Insolvency Act 1986. Whilst the formal structure of the Indian provision bears recognisable similarities to the UK model, this article argues that the substance of the transplant reflects significant adaptation, shaped by the distinct policy environment, creditor culture, and judicial infrastructure of India. Drawing on Kennedy's form and substance framework, it is argued that surface-level formal resemblance masks deeper substantive divergences.

A central concern of the article is the extent to which the extortionate credit transaction provisions function effectively within each jurisdiction. In the UK, sections 244 and 343 of the Insolvency Act 1986 have generated remarkably little reported case law despite nearly four decades in force, and this article draws on the predecessor provisions of the Consumer Credit Act 1974 to illuminate their intended operation. The Indian provisions, though more recently enacted, face their own challenges of judicial unfamiliarity and limited litigation.

The article concludes that the divergence between the UK and Indian extortionate credit transaction provisions is not reducible to a simple difference of threshold or stringency. Rather, as the Kennedy form and substance framework reveals, surface formal similarities conceal deeper substantive differences that reflect each jurisdiction's distinct regulatory ecology. The practical dormancy of section 244 of the Insolvency Act 1986 is argued to be not a sign of legislative failure but the expected consequence of a mature ex ante consumer credit regime.

The Indian provision, by contrast, must do more of the work in a lending environment where regulatory coverage remains less complete, and its explicit safe harbour for regulated financial institutions represents a coherent internal legislative substitute for the ex-ante infrastructure that was absent in India in 2016. The comparison yields a prescriptive lesson for jurisdictions undertaking insolvency system reform: following Watson, the transplantation of avoidance *provisions should be accompanied by careful attention to the regulatory ecosystem into which they are introduced, with threshold and safe harbour design calibrated accordingly. The two systems converge in practical effect, targeting exploitative unregulated lending whilst protecting commercially justified institutional credit, and that convergence is shown to reflect a shared underlying policy logic expressed through different legislative instruments.*

Keywords: Voidable transactions, Extortionate credit, Insolvency

I. Introduction

Extortionate credit transactions refer to lending arrangements where the terms – especially interest rates or charges – are grossly unfair, exorbitant, or unconscionable to the borrower.[1] Such transactions often exploit a borrower's desperate need for credit, saddling them with usurious interest or oppressive repayment conditions.[2] It is an example of what the United Nations Commission on International Trade Law ("UNCITRAL") Legislative Guide ("the Legislative Guide) describes as strategic action by creditors to achieve an advantageous position in its discussion of grounds for avoidance transaction laws.[3] Insolvency law in some jurisdictions responds to this through avoidance powers, which serve the *pari passu* principle of insolvency distribution by preventing any creditor from extracting a disproportionate return on the basis of exploitative terms. [4] They thereby prevent an unscrupulous lender from gaining an advantage over other creditors who have been reasonable in their dealings with the debtor.[5]

Although not expressly discussed in the Legislative Guide, laws that target extortionate credit bargains are relevant to the Guide's discussion of how avoidance transactions contribute to the promotion of fair commercial dealings.[6] These laws require optimal calibration, however, as if a borrower is charged a high rate this may simply reflect their objective risk of default. Too strict an approach to the avoidance of extortionate credit bargains results in over-inclusiveness,[7] which can undermine objectively fair dealings, reducing the availability of credit for high-risk debtors and creating uncertainty for fair lenders to this demographic.[8] Too lenient a law, however, can result in an underinclusive law, leading to exploitation by the unscrupulous. There are laws in both India[9] and the UK[10] to deal with these transactions in contract law and insolvency law. We focus on the insolvency laws , showing how they address this optimal balance in markedly different ways.

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* Professor, Nottingham Trent University and Sanjay Chapagain, Research Assistant, Nottingham Trent University. The author thanks Gauri Sidana and Srishti Gaur, both of National Law University, Delhi for their excellent research assistance.

[1] Anil Kumar Bansal, *'Undervalued' and 'Extortionate' Transactions under the IBC, 2016*, 10 IABJ 47, 47-50 (2024)

[2] Anmol Jain, *Extortionate Credit Transactions under the Insolvency and Bankruptcy Code, 2016: Deficiencies and Suggestions*, 31 ICCLR 526, 526-544 (2020).

[3] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW 148 (2d ed. 2019).

[4] L.S. SEALY & D. MILMAN, ANNOTATED GUIDE TO THE INSOLVENCY LEGISLATION 607 (24th ed. Sweet & Maxwell 2021).

[5] R. PARRY ET AL., TRANSACTION AVOIDANCE IN INSOLVENCIES 6.01 (3d ed. Oxford University Press 2018).

[6] *Id.*, para 6.01.

[7] Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

[8] John Armour, *Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law*, 63 MOD. L. REV. 355, 360 (2000).

[9] Insolvency and Bankruptcy Code, 2016, §§ 50, 167, No. 31, Acts of Parliament, 2016 (India).

[10] Insolvency Act 1986, §§ 244, 343 (U.K.).

Our central argument is that the Indian provision is best understood as an adapted legal transplant from UK law – sharing the same functional purpose – but one that has undergone deliberate adaptation in its new institutional environment. As Watson has observed, legal transplants rarely operate identically in their new setting, because the receiving system's existing legal infrastructure shapes how transplanted rules are optimally calibrated and applied.[11] The divergence between the two provisions is, therefore, not a matter of one jurisdiction having adopted a superior model, but rather each having reached the same optimal balance, limiting the scope of avoidance to genuinely exploitative lending, while protecting commercially justified high-risk credit. Both jurisdictions do this by different legislative routes. In the UK, the qualification "grossly" in Section 244 performs this limiting function, reflecting the existence of an already-mature consumer credit regulatory regime against the backdrop of which the 1986 Act was drafted. In India, where no equivalent *ex ante* regulatory infrastructure existed at the time of the Insolvency and Bankruptcy Code 2016, the limiting function instead came to be performed by the important explicit safe harbour for regulated financial institutions given in Section 50. Understanding the provision as a transplant-with-adaptation, rather than simply a broader version of the UK rule, demonstrates the relationship between insolvency avoidance law and the surrounding regulatory landscape .

In our comparison we draw upon comparative law methodology, including legal transplants literature and Duncan Kennedy's framework of rules and standards in private law adjudication. Kennedy's approach illuminates the over- and under-inclusiveness problem inherent in any legislative choice of threshold. In a climate in which debtors can face an inequality of bargaining power leading to high-cost credit these laws are important, not only as part of efforts to promote fair practices in lending but also to prevent any creditor gaining an unfair advantage over other creditors through an excessive claim for interest, or other unfair terms. In Part II we outline the two systems, in Part III we consider the rationale of the laws, and in Part IV we consider how the laws have developed.

II. Overview of current insolvency laws in the UK and India

The Insolvency and Bankruptcy Code 2016 is a consolidation instrument which replaced several fragmented laws on insolvency in India,[12] which had previously lacked effective resolution options. The enactment of this law followed a thorough review on an exacting timescale[13] and led to the flagship corporate insolvency resolution process, ("CIRP").[14]

[11] ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. University of Georgia Press 1993). For the adaptation of transplanted rules, see also MATHIAS SIEMS, COMPARATIVE LAW ch. 3 (3d ed. Cambridge University Press 2022).

[12] The Sick Industrial Companies (Special Provisions) Act, 1985, No. 1, Acts of Parliament, 1986 (India); the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, No. 51, Acts of Parliament, 1993 (India); the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, No. 54, Acts of Parliament, 2002 (India); the Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).

[13] T.K. Viswanathan, *Introduction*, in BANKRUPTCY LAW REFORMS COMMITTEE, REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE, VOLUME I: RATIONALE AND DESIGN 7 (2015).

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

Although the law consolidated insolvency laws for corporations, individuals and partnerships, the insolvency laws for individuals are not yet fully operational.[15] Rehabilitation and bankruptcy proceedings are only available for personal guarantors and only where they have given a guarantee for the debts of a corporate debtor which is now in resolution or liquidation.

UK insolvency laws are primarily contained in the Insolvency Act 1986 ("the Act"),[16] which, in its initial form, had been influenced by the report of the Cork Committee.[17] The Act introduced administration as the main alternative to liquidation,[18] although only initially as a supplement to administrative receivership, prior to reforms in the Enterprise Act 2002. The 1986 Act has been considerably amended in the years since it was enacted,[19] normally by adding new layers and leaving the old ones in place.[20] The insolvency toolkit now contains a great variety of laws including liquidation and resolution options, as well as upstream options.[21]

The UK also has a well-developed system of personal insolvency laws, based on bankruptcy[22] and statistically more common alternatives, including debt relief orders[23] and individual voluntary arrangements.[24] The range of options again reflects an approach of adding new options while leaving the existing ones available, thereby resulting in a complex system.[25]

Both countries have a similar approach to avoidance transactions. These laws, however, differ in approaches to achievement of optimal balance. In comparative law terms, although these laws are broad functional equivalents, they are a good example of what Watson described as transplants being calibrated[26] and applied to the local context, particularly in India's use of a safe harbour for financial institutions and a broader basic provision where the UK's "grossly

[15] *See further* Renuku Sane, *The Way Forward for Personal Insolvency in the Indian Insolvency and Bankruptcy Code*, SSRN (Jan. 3, 2019), https://ssrn.com/abstract=3309470.

[16] Separate legislation sets out the insolvency options for insolvent partnerships.

[17] REVIEW COMMITTEE (CHAIRMAN: SIR KENNETH CORK), INSOLVENCY LAW AND PRACTICE, Cmnd. 8558 (HMSO 1982).

[18] The Act also introduced the company voluntary arrangement.

[19] The 1986 Act was in fact a consolidation of the initial reforms in the Insolvency Act 1985.

[20] Examples are that the revised administration procedure appears in Sch B1, inserted by the Enterprise Act 2002 and the restructuring moratorium appears in Part A1, inserted by the Corporate Insolvency and Governance Act 2020.

[21] Companies Act 2006, pt. 26A (U.K.) (restructuring plan).

[22] Insolvency Act 1986, pt. IX (U.K.). Bankruptcy can be commenced voluntarily or by a creditor, after which the debtor's assets will vest in a trustee in bankruptcy, with non-exempt assets being sold to pay off creditors. Normally a person will be discharged from bankruptcy after one year.

[23] Insolvency Act 1986, pt. 7A (U.K.). A debt relief order is available for debtors with low income, low assets and debts below £50,000.

[24] Insolvency Act 1986, pt. 8 (U.K.). The IVA enables a debtor to agree an arrangement with creditors under which debts will be repaid over an agreed period in agreed amounts under supervision by an insolvency practitioner.

[25] For critical discussion of how reforms have progressed see IAIN RAMSAY, PERSONAL INSOLVENCY IN THE 21ST CENTURY, ch. 3 (Hart Publishing 2017).

[26] ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed., University of Georgia Press 1993).

exorbitant" is changed for merely "exorbitant". Although these laws, in each of their respective jurisdictions, are among the less commonly discussed avoidance provisions, it may be seen that with markedly different levels of practical engagement, they nonetheless provide rich material for a comparative framework, demonstrating an intelligent approach to legal transplants, achieving optimal balance.

Both countries share a broadly similar architecture of transaction avoidance law. The main transaction avoidance laws in the UK relate to preferences,[27] undervalue transactions,[28] transactions defrauding creditors, late executed floating charges,[29] and extortionate credit transactions, which will be the focus of this article. In India, avoidance transaction laws include laws for the avoidance of preferences, undervalue transactions, transactions defrauding creditors,[30] as well as extortionate credit transactions.[31] In both systems, extortionate credit transaction avoidance is less commonly litigated than the others. Although, as will be seen, with markedly different levels of practical engagement: the UK provision has generated no successful reported cases, while the Indian provision has produced a small but developing body of judicial interpretation.

Despite this structural similarity, the two extortionate credit provisions diverge in two analytically significant respects. First, the UK provision requires that payments be 'grossly exorbitant' or that the transaction 'grossly contravene' ordinary principles of fair dealing, whereas the Indian provision applies to transactions requiring merely 'exorbitant' payments, without the qualifying adverb. Second, the Indian provision contains an explicit safe harbour for debt extended by regulated financial institutions in compliance with applicable law, for which there is no direct UK equivalent. These divergences are not accidental. In comparative law terms, the Indian provision is properly understood, following Watson, as a legal transplant from UK law that has been deliberately calibrated to its institutional environment: the different threshold and the safe harbour together perform the same limiting function as the word 'grossly' does in the UK, but by a different mechanism suited to a credit market with a different regulatory ecology. Both provisions can therefore be understood as pursuing the same optimal calibration that targets genuinely exploitative lending while protecting commercially justified high-risk credit. The two jurisdictions do this via different legislative routes shaped by the regulatory infrastructure available to each drafter.

III. Rationale for avoidance of extortionate credit transactions

Avoidance transaction laws enable action to be taken in respect of transactions entered into in the period leading up to insolvency. The importance of these laws in addressing damage to creditor interests is well brought out in the UNCITRAL Legislative Guide on Insolvency Law

[27] Insolvency Act 1986, §§ 239, 340 (U.K.).

[28] Insolvency Act 1986, §§ 238, 339 (U.K.).

[29] Insolvency Act 1986, § 245 (U.K.).

[30] Insolvency Act 1986, § 423 (U.K.).

[31] Insolvency and Bankruptcy Code, 2016, §§ 50, 167, No. 31, Acts of Parliament, 2016 (India).

(“the Guide”), although extortionate credit transactions are not expressly discussed.[32] In its recommendations, the Guide highlights the need for optimal balance in the drafting of avoidance transaction laws. On the one hand the objective of avoidance is:

> (a) To reconstitute the integrity of the estate and ensure the equitable treatment of creditors; and on the other hand
> (b) To provide certainty for third parties by establishing clear rules for the circumstances in which transactions occurring prior to the commencement of insolvency proceedings involving the debtor...[33]

We take the optimal balance of these two as the key objective of avoidance transactions, including in respect of extortionate credit transactions.

This optimal balance can be achieved by jurisdictions in numerous ways. The Guide notes that the conditions for avoidance may include objective and/or subjective criteria. In some instances, the task of the office holder pursuing the transaction may be eased by a reversal of the burden of proof. This is particularly so where the counterparty was a related party, as voidable transactions are more likely in this context.

To consider the optimal balance further we draw upon Kennedy's analysis of rules and standards in private law adjudication for analytical vocabulary.[34] A rule-based approach to the avoidance threshold, such as the Indian safe harbour, accepts a degree of underinclusiveness in exchange for certainty, while a standard-based approach such as the concept of an ‘extortionate’ bargain accepts greater reach at the cost of predictability. The optimal calibration question is therefore, in Kennedy's terms, a question about which direction of error is less costly in a given regulatory environment. Optimal balance is achieved if the Legislative Guide’s point (a), above, can be achieved without underinclusiveness, leading to exploitation by creditors and at the same time the law is not overinclusive so that (b) can be achieved.

Similarly, Kristin van Zwieten identifies that avoidance transactions laws must be applied with precision to achieve this optimal balance. She warns that what we have termed overinclusive avoidance powers could restrict legitimate high-risk lending.[35] In her view, the law must distinguish between genuinely extortionate transactions and those which are merely commercially aggressive, with only the former violating normative standards of fairness. For example, consider a company borrowing at an interest rate of 25% per annum to fund a high-risk but innovative project. Although the rate is above typical market levels, the loan is fully disclosed, negotiated in good faith, and aligned with the borrower’s capacity to repay. Applying

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[32] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW 148-155 (2d ed. 2019).

[33] *Id.* 152.

[34] Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

[35] KRISTIN VAN ZWIETEN, GOODE ON PRINCIPLES OF CORPORATE INSOLVENCY LAW ch. 13 (5th ed. Sweet & Maxwell 2018).

avoidance powers to such a transaction would unfairly punish legitimate commercial risk-taking and could strangle the availability of finance for high-risk projects. The law would be overinclusive. By contrast, a loan charging 60% interest with no board approval, no commercial justification, and exploitative terms would clearly be extortionate and warrant avoidance. This distinction highlights the optimal balance required in applying avoidance powers: protecting fairness and equity without chilling legitimate lending practices. The laws in India and the UK achieve this in different ways.

Both provisions, as a starting point, adopt what Kennedy would characterise as a standard rather than a rule. The word “extortionate” implies a strong element of unfairness in price, or other aspects of a lending arrangement but it is largely a subjective standard devoid of bright lines. Judges therefore must identify the facts in each case[36] and assess them in the light of the purposes or social values embedded in the standard.[37] Neither country has a prescribed maximum interest rate, beyond which a transaction is automatically extortionate. Instead, both direct the court to assess whether the terms were exorbitant (India) or grossly exorbitant (UK), leaving the content of that judgment to be developed through case law. This carries the characteristic advantages and disadvantages that Kennedy identifies in standards: the flexibility to respond to the facts of individual cases, but at the cost of the *ex ante* certainty that a rule-based approach would provide.[38]

The two jurisdictions have responded to this inherent indeterminacy in different ways. The UK modulates the standard by adding the qualifier 'grossly', raising the threshold and thereby reducing the risk of overinclusiveness at the expense of greater underinclusiveness. India, by contrast, adopts a lower standard threshold, ‘exorbitant’ but attaches a clear rule-based safe harbour for regulated institutional lending. In this way it creates a hybrid structure in which the standard governs the general case while a bright-line exclusion restores certainty for the most significant category of institutional creditors. Both approaches represent defensible responses to the optimal calibration problem identified by the Legislative Guide, but they distribute the risk of error differently: the UK tolerates greater underinclusivity to achieve greater certainty, while India tolerates greater indeterminacy in the general case while protecting institutional lenders through a clear and categorical exclusion.

The need for an optimal balance in extortionate credit transactions in insolvencies has been discussed in literature, although not under the framework outlined above. Tiwari discusses how avoidance arises from a core need to safeguard fairness and the equitable treatment of creditors, especially when exploitative lending has distorted the debtor’s liabilities.[39] As Finch and Milman observe, insolvency law functions not only as a mechanism for distributing assets

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[36] Although the UK’s former Consumer Credit Act 1974, § 138 had listed factors relevant to a credit bargain this approach has not subsequently been taken.

[37] Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976).

[38] *Id.* 1710.

[39] Varendyam Jahnawi Tiwari, *A Critical Analysis of Transaction Avoidance in Insolvencies with Special Reference to Extortionate Credit Transactions Under the Insolvency and Bankruptcy Code, 2016*, 14 NLSJ 28, 28-533 (2018).

but also as a tool for correcting distortions caused by pre-insolvency market failures, including exploitative credit practices that prey on a debtor's desperation for liquidity when under financial distress.[40] Unfair or extortionate transactions strike at the heart of the collective process and must therefore be subject to scrutiny and potential reversal to uphold insolvency's redistributive ideals.

Building on this, Sealy and Milman argue that extortionate credit provisions reinforce the *pari passu* principle, under which creditors in the same category are to receive returns on a rateable base. The laws do this by preventing disproportionate extraction by opportunistic creditors, who would otherwise gain an advantage inconsistent with the collective nature of insolvency.[41]

Outside the insolvency context, Kempson and Whyley discuss that allowing extortionate terms to stand post-insolvency would distort the credit market.[42] Creditors would be incentivised to impose oppressive terms if they could be assured of their enforcement regardless of subsequent insolvency. Avoidance transaction laws, therefore, serve a deterrent function by enforcing pricing discipline and fairness in credit allocation.

In sum, the rationale for avoidance is multi-dimensional as it preserves fairness, promotes efficient lending, deters exploitation, and enhances the legitimacy of the insolvency process. An approach that achieves optimal balance, drawing on both normative and practical considerations, is vital to ensuring that extortionate transactions are avoided without stifling genuine credit innovation. We have seen that India has adapted the UK system, aiming to achieve optimal balance through novel use of the safe harbour.[43] Having considered how optimal balance is achieved in different ways we now consider the drafting of the two countries' laws in more detail.

IV. Overview of how the extortionate credit avoidance provisions have developed

[40] VANESSA FINCH & DAVID MILMAN, CORPORATE INSOLVENCY LAW: PERSPECTIVES AND PRINCIPLES 472-475 (3d ed. Cambridge University Press 2017).

[41] L.S. SEALY & D. MILMAN, ANNOTATED GUIDE TO THE INSOLVENCY LEGISLATION 607 (24th ed. Sweet & Maxwell 2021).

[42] ELAINE KEMPSON & CLAIRE WHYLEY, EXTORTIONATE CREDIT IN THE UK: A REPORT TO THE DTI (Personal Finance Research Centre 1999).

[43] Safe harbours are however widely used to protect capital markets in Europe and finance more generally in the US under 11 U.S.C. § 546(e). The EU safe harbours are in Article 1(3)(a); Insurance and Reinsurance — Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II). Article 1(3)(b) and (c); Credit Institutions and Investment Firms — Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (the Capital Requirements Regulation, commonly known as CRR); Article 1(3)(d); Central Counterparties — Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (commonly known as EMIR — the European Market Infrastructure Regulation); Article 1(3)(e); Central Securities Depositories Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories (commonly known as CSDR — the Central Securities Depositories Regulation); Article 1(3)(f); Other Financial Institutions — Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (commonly known as BRRD — the Bank Recovery and Resolution Directive).

UK: The Insolvency Act 1986 contains avoidance actions in respect of extortionate credit transactions, both for corporate and individual debtors in sections 244 and 343 respectively. Although, as noted, there are various personal insolvency laws available in the UK, section 343 is only available in bankruptcy.

As discussed, the need for balance identified in the UNCITRAL Legislative Guide is reflected in the UK Law. The broad standard 'extortionate' is modified with the word 'grossly'. It not only requires an assessment of whether a credit transaction is 'extortionate' under section 244(3), it also requires cognizance of the 'risk accepted by the person providing the credit' and whether,

> (a) the terms of it are or were such as to require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of the credit, or
>
> (b) it otherwise grossly contravened ordinary principles of fair dealing',

Section 343 is in similar terms. It will be noted that the word 'grossly' appears in both elements, so that not only must payments be extortionate, but they must be 'grossly' so; or if the terms contravene the ordinary principles of fair dealing, they must do so 'grossly'. The terms must also be considered in context and the risk that the loan presents for the lender is an important factor. In this way the law aims to achieve optimal balance.

Provisions of the Insolvency Act 1986 therefore reflect a long-standing approach in the UK to limit unfair credit bargains, including outside the insolvency context, although strategies to achieve this have varied. Initially, what would be a more rules-based approach under Kennedy's framing was taken. An interest capping provision appeared in the Bankruptcy Act 1890 and restricted the dividend rights of creditors whose debts carried an interest rate of five per cent or more, which seems a low threshold in the modern context. Any amount of interest exceeding this ceiling rate would only be admissible as part of a claim for a dividend once other claims had been settled. Under the Bankruptcy Act 1914,[44] this provision was extended so that accounts which had been settled up to three years previously could be re-opened. This provision appears to have been incorporated by reference to the Companies Acts of 1929 and 1948. There was no element of discretion under the rule-based approach in those laws as to whether a transaction could be challenged. Although the provision enabled assets to be recouped for distribution to creditors, the efforts entailed in re-calculating the accounts and interest rates could be an expensive burden.

Provisions of the 1986 Act are based on and related to sections 137-140 (now repealed) of the Consumer Credit Act 1974, which enabled scrutiny of transactions where there had been 'a

[44] Bankruptcy Act 1914, § 66 (U.K.).

substantial imbalance in bargaining power of which one party has taken advantage',[45] although the approach taken under that law was again much more generous in its scope for avoidance than sections 244 and 343. More recently there have been concerns that laws may be overinclusive and too strict an approach in regulation of consumer credit can limit options for consumers who are regarded as presenting a high risk of default and this can give rise to illegal lending.

The relationship between section 244 and the 1974 Act is significant for understanding the qualifier "grossly" in the insolvency provision. When Parliament enacted the Insolvency Act 1986, it did so against the backdrop of an already-functioning ex ante regulatory regime governing credit bargains outside insolvency. The 1974 Act itself used the language of "grossly exorbitant" in its extortionate credit bargain provisions (sections 137–140), and this formulation carried into the 1986 Act. The insolvency provision was therefore designed as a residual backstop, intended to catch only those exploitative transactions that survived or fell outside the *ex ante* consumer credit filter, not to replicate it. This legislative context explains why section 244 has always had a high threshold: the primary regulatory work was being done elsewhere in the UK legislation. That function was further strengthened when the Consumer Credit Act 2006 replaced the "extortionate credit bargain" test with the broader "unfair relationship" test under sections 140A–140C, which lowered the bar for intervention in consumer credit relationships considerably. Similarly, the Financial Conduct Authority's 'consumer duty' establishes a higher standard of care for financial firms in the UK, requiring them to act in good faith, avoid causing foreseeable harm, and enable consumers to achieve good financial outcomes.[46] A trend towards more qualitative, standards-based approaches is evident.

Moreover, consumer law in recent years has also been more proactive in addressing the fairness of credit relationships, with policies which favour responsible lending and controls on unfair terms.[47] The main emphasis has however been on empowering consumers to borrow responsibility.[48] In this context, high cost credit is still available but on terms that reflect the risk, rather than having any additional exploitative element.

The insolvency provision was not correspondingly updated, confirming that section 244 was intended to operate in a different register by catching the most egregious cases involving insolvent debtors, rather than replicating consumer credit regulation within insolvency proceedings.[49]

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[45] *Wills v. Wood* [1984] CCLR 7.

[46] Financial Conduct Authority, *Consumer Duty*, FCA, https://www.fca.org.uk/firms/consumer-duty (last visited May 8, 2026).

[47] Consumer Rights Act 2015, § 62 (U.K.).

[48] Jodie Gardner, Karen Rowlingson & Lindsey Appleyard, *Responsible Borrowing and Lending in UK*, 6 INT'L J. CONSUMER L. & PRAC. 14, 14 (2018).

[49] JODIE GARDNER, THE FUTURE OF HIGH-COST CREDIT § 4.5.2 (Hart Publishing 2022).

As identified in *Jackson v Casey*,[50] '"extortionate" comprehends not "exorbitant" payments, but "grossly exorbitant" payments; and not just contravention of ordinary principles of fair dealing, but gross contravention of those principles. The section requires a comparison with the risk assumed by the person giving the credit. The claim in this case was unsuccessful, with account being taken of a lack of available credit at the time of the 2008 credit crunch, as well as the unproven nature of the new company, and the inexperience of the company director and another loan to the company being unsecured. In *White v Davenham Trust Ltd,*[51] it was emphasised that the test for an extortionate transaction would be very stringent in a commercial case, where the terms were made clear in advance.

Given that there have only been two reported cases brought under section 244,[52] both unsuccessful, and none under s 343. Does this indicate that it is a dead letter provision? Three main reasons explain the position.

The first is that transactions that would present grounds for avoidance under this section simply do not arise commonly, due to the consumer credit regulatory structure discussed above. Elaine Kempson and Claire Whyley's 1999 review of extortionate credit under the former Consumer Credit Act 1974 found that only a small number of people in their survey had credit agreements that would be regarded as extortionate.[53] Moreover, 'while most lending was deemed to be unproblematic, extortionate credit was identified as a concern in a very narrow sector of the credit market and for a fairly small group of consumers'.[54] Consequently, examples of extortionate agreements are likely to be even rarer in the context of companies. Indeed, in earlier research by one of the authors,[55] none of the 20 insolvency practitioners or 10 solicitors who were interviewed had ever used section 244, nor did they know of any practitioner who had. It is therefore unsurprising that there has been very little case law. Although these interviews were conducted in the mid 1990s it is likely that the position has not changed significantly. The relevant sections had been in force for almost ten years at the time of that research. More recently it has again been noted, although not based on empirical findings, that extortionate credit transactions are rarely encountered in practice.[56]

Secondly, it is likely that it would be difficult to establish grounds for avoidance where agreements were made in arm's-length dealings.[57] The test will also be stringent in a

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[50] *Jackson v. Casey*, [2019] EWHC 1657 (Ch) para. 48.

[51] *White v. Davenham Trust Ltd.*, [2010] EWHC 2748 (Ch), para. 3.

[52] *White v. Davenham Trust Ltd.* [2010] EWHC 2748 (Ch), [2011] BPIR 280; *Jackson v. Casey* [2019] EWHC 1657 (Ch).

[53] ELAINE KEMPSON & CLAIRE WHYLEY, EXTORTIONATE CREDIT IN THE UK: A REPORT TO THE DTI (Personal Finance Research Centre 1999).

[54] *Id.*

[55] Rebecca Parry, *Preferences and Other Transaction Avoidance Provisions in Insolvency* (Ph.D. thesis, University of Manchester 1997).

[56] *TOTTY, MOSS AND SEGAL: INSOLVENCY LAW* D3-17 (PETER WALTON ed., Sweet & Maxwell looseleaf).

[57] *White v. Davenham Trust Ltd.* [2010] EWHC 2748 (Ch), [2011] BPIR 280.

commercial context where the terms are spelled out from the outset.[58] The threshold for avoidance is also, as noted, high, requiring gross examples of extortionate terms or contraventions of ways of dealing. It is also probable that the sums involved in any transaction may not be of a sufficiently high value for the transaction to merit action being taken by the insolvency office holder, as litigation is expensive.[59]

The third reason is that, although there would seem to be the best potential to challenge an extortionate credit transaction in the consumer context, it is notable that the numbers of bankruptcies have declined in recent years, as other debt resolution options have gained favour. As previously noted, extortionate credit transactions can only be attacked in bankruptcy and not in these other procedures. Moreover, the fairly small group of consumers identified by Kempson as having extortionate credit agreements would now be likely to take the debt arrangement approach rather than becoming bankrupt.

India: The Insolvency and Bankruptcy Code, 2016 ("IBC") explicitly addresses extortionate credit arrangements in the context of corporate insolvency. Section 50 of the IBC empowers the resolution professional or liquidator to avoid a credit transaction involving the receipt of financial or operational debt[60] within the two years preceding the insolvency commencement, if the terms required the debtor to make 'exorbitant payments'.[61] Regulation 5 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, specifies that a transaction will be considered "extortionate" if (a) it required the debtor to make exorbitant payments in respect of the credit, or (b) the terms are unconscionable under principles of contract law. This aligns with general contract law notions of unconscionability, indicating that the tribunal will look at factors like the effective interest rate, hidden charges, and the debtor's bargaining position to judge if the bargain was grossly one-sided. In practice, resolution professionals ("RPs") scrutinize whether the cost of credit far exceeds market norms or reasonable risk-return parameters; if so, the transaction can be challenged as extortionate.

Where an extortionate credit transaction is found, Section 51 of the Insolvency and Bankruptcy Code (IBC) empowers the adjudicating authority to restore the pre-transaction position. Remedies may include setting aside all or part of the associated debt, modifying the transaction terms, directing repayment by parties involved, or requiring the relinquishment of security interests in favour of the resolution professional or liquidator, as appropriate.[62]

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[58] *Id.* para. 50.

[59] Kempson and Whyley, supra note 34, found that extortionate credit was typically held by people on very low incomes or people with poor credit histories who had entered into debt consolidation agreements. The former would not be likely to use bankruptcy, as it has associated costs and alternatives are available.

[60] V.S. WAHI, TREATISE ON INSOLVENCY AND BANKRUPTCY CODE 465 (2018).

[61] Insolvency and Bankruptcy Code, 2016, § 50, No. 31, Acts of Parliament, 2016 (India).

[62] Insolvency and Bankruptcy Code, 2016, § 51, No. 31, Acts of Parliament, 2016 (India).

In neither the Companies Act 2013 nor its predecessor, the Companies Act 1956, was there a specific provision directly addressing extortionate credit transactions.[63] The closest way to address such transactions was Section 535 of the Companies Act 1956 and its successor, Section 333 of the Companies Act 2013, which provided for the disclaimer of onerous property or obligations by the liquidator. These provisions allowed a liquidator to renounce burdensome contracts, assets, or liabilities that would disadvantage the company's estate,[64] and are closely aligned in language and purpose with Section 62 of the Presidency-Towns Insolvency Act 1909, which similarly empowered the official assignee to disclaim onerous property in personal insolvency proceedings.

The IBC now targets credit arrangements with terms "significantly unfavourable" to the debtor, applying a two-year lookback period. In essence, any loan or credit facility given to the company on unusually high interest or unfair terms shortly before insolvency can be set aside as extortionate.[65] The provision clarifies that debts extended by regulated financial services providers in compliance with law are not treated as extortionate, underscoring that only truly excessive or unconscionable arrangements are targeted.[66] There is therefore an effective safe harbour where debt was extended in a financial services context in compliance with laws in that sector.

This safe harbour merits sustained analysis as a design choice, because it reveals the underlying logic of the Indian provision and illuminates the contrast with the UK approach. The IBC drafters faced a structural challenge that did not present itself to the UK Cork Committee in the same acute form: India in 2016 lacked the dense *ex ante* regulatory architecture governing lending conduct that existed in the UK by 1986. The Reserve Bank of India ("RBI") regulates scheduled commercial banks and non-banking financial companies ("NBFCs"), but significant segments of the Indian credit market, including informal lenders and private moneylenders, operate with considerably less oversight than their UK counterparts. Adopting a lower threshold for avoidance ("exorbitant" rather than "grossly exorbitant") was therefore a purposive choice: without a mature *ex ante* consumer credit filter, the insolvency provision needed to do more of the regulatory work of identifying and correcting exploitative lending. The safe harbour then performs the function of protecting the lending that the regulatory system has already validated: debt from entities whose conduct is supervised and whose pricing reflects legitimate risk assessment within a framework of prudential oversight. In the UK, that validating function is performed by the consumer credit regime itself, external to the insolvency provision. The two systems therefore achieve the functional outcome of insulating legitimate high-risk institutional lending from avoidance, while remaining available against exploitative

[63] Varendyam Jahnawi Tiwari, *A Critical Analysis of Transaction Avoidance in Insolvencies with Special Reference to Extortionate Credit Transactions Under the Insolvency and Bankruptcy Code, 2016*, 14 NLSJ 28, 28-533 (2018).

[64] UK law also has powers of disclaimer for liquidators in Insolvency Act 1986, §§ 178-182 (U.K.).

[65] Deepansh Bhatti, *Extortionate Transactions in Insolvency – Evaluating the Effectiveness of the IBC 2016*, 2 WBLILJ 1, 1-17 (2024).

[66] ADITYA SHIRALKAR, THOMSON'S COMMENTARY ON THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (Thomson Reuters 2021).

unregulated lenders through different structural mechanisms. This is the clearest illustration of Watson's transplant-with-adaptation thesis: the Indian provision has not merely lowered the bar, but has redesigned the architecture to achieve the equivalent limitation by an internal mechanism of a clear safe harbour rather than by reliance on the surrounding regulatory environment.

Turning to how the section has developed, the Indian insolvency regime has gradually clarified the treatment of extortionate credit transactions through key judicial decisions under Sections 50–51 of the IBC. Courts have applied these provisions to credit arrangements with excessively high interest rates, notably holding that a 65% annual rate was patently extortionate as it significantly exceeded prevailing market norms.[67] While there is no statutory cap on interest, the National Company Law Tribunal ("NCLT") has observed that private loans not exceeding 24% per annum are generally not extortionate, reinforcing that substantially higher rates may be unconscionable.[68]

In *Anamika Singh v. Shinhan Bank*, the National Company Law Appellate Tribunal ("NCLAT") went beyond a literal reading of Sections 50–51 and implicitly relied on Regulation 5 of the IBBI Regulations 2016[69], which elaborates on what constitutes an extortionate credit transaction. Although Regulation 5 was not expressly cited, the reasoning in Paragraph 11, where Respondent No. 1 invoked Section 50 read with Regulation 5, shows that the Tribunal drew upon the regulatory framework to assess the fairness and proportionality of the transactions. Further, in Paragraph 25, the NCLAT exercised its inherent powers under Rule 11 of the NCLAT Rules 2016 to declare the impugned arrangements extortionate and set them aside.[70] This reasoning extended the application of Section 50 beyond the statutory two-year look-back, disallowing interest even on older loans that were unconscionable in substance, thereby reinforcing that fairness trumps form. The Tribunal also held rates of 45–60% per annum (without board approval or bona fide need) to be unconscionably high.[71]

In *Naveen Luthra v. Bell Finvest*, the NCLAT clarified that usurious terms or exorbitant interest rates cannot block the admission of an insolvency petition under Section 7 of the IBC. Such claims must instead be addressed through avoidance proceedings under Sections 50–51, ensuring that creditors cannot unjustly enrich themselves while preserving the integrity of insolvency processes.[72] The Supreme Court, while dismissing the appeal, left the issue of

[67] National Company Law Tribunal (New Delhi Bench, New Delhi), Shinhan Bank v. Sungil India Pvt. Ltd., (2019), aff'd, National Company Appellate Tribunal (2020).

[68] *Id.*

[69] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Gazette of India, (Nov. 30, 2016).

[70] National Company Law Appellate Tribunal (New Delhi Bench, New Delhi), Anamika Singh & Ors. v. Shinhan Bank & Ors. (2020).

[71] *Id.*

[72] National Company Law Appellate Tribunal (New Delhi Bench, New Delhi), Naveen Luthra v. Bell Finvest (India) Ltd. (2018).

usurious interest rates open for consideration by the NCLT during remand, reflecting a nuanced balancing of creditor rights and debtor protection.[73]

Similarly, in *Vineet K. Chaudhary v. JSC OGCC Kazstroy Service*, the NCLAT affirmed that a liquidator may challenge extortionate or preferential transactions during liquidation, even beyond the timelines prescribed for the CIRP. Filed under Section 43 of the IBC, this case underscores the liquidator's duty to ensure equitable treatment of creditors and prevent unfair advantages to certain parties.[74]

While the interpretational flexibility in these cases could potentially raise concerns about predictability and lending risk premiums, these concerns are mitigated by the courts' consistent reliance on objective indicators, such as prevailing market interest rates, the debtor's financial capacity, and the presence of a bona fide commercial purpose. This measured approach balances fairness and commercial equity, demonstrating that the IBC's evolving jurisprudence safeguards both debtor protection and creditor confidence. Collectively, these developments reflect a purposive and equitable application of insolvency law to prevent unjust enrichment through exploitative credit arrangements.

To sum up, the Indian approach to extortionate credit transactions has therefore evolved through a mix of statutory clarity and judicial refinement under the Insolvency and Bankruptcy Code, 2016. Unlike earlier Companies Acts or insolvency statutes, the IBC expressly empowers insolvency professionals and tribunals to address credit arrangements involving exorbitant payments or unconscionable terms within a defined two-year look-back period. While there is no fixed statutory interest cap, courts have recognised benchmarks—such as 24% per annum in private lending—as indicative of reasonable commercial practice, with significantly higher rates (e.g., 45% to 65%) treated as prima facie extortionate.

Notably, Indian tribunals have adopted a flexible and equitable approach. They have refused to enforce usurious interest even beyond the statutory window, emphasised substance over technicalities, and allowed liquidators to pursue avoidance actions post-resolution. Unlike the UK, where the use of extortionate credit provisions remains largely theoretical, for reasons discussed, India has seen active application and enforcement. These judicial approaches, combined with the regulatory "safe harbour" for law-compliant financial institutions, contribute to a balanced framework, discouraging abusive lending while preserving legitimate credit flows. Together, the Indian regime arguably reflects a modern insolvency system responsive to the realities of credit exploitation in distressed settings, yet grounded in fairness, proportionality, and commercial sensibility.

V. Key Elements for Comparison

[73] *Id.*

[74] National Company Law Tribunal (Mumbai Bench, Mumbai), Vineet K. Chaudhary (Liquidator) v. JSC Ogcc Kazstroy Service (2018).

Having introduced the background and development of the extortionate credit transaction laws in the UK and India, we now compare the key points of the statutory provisions.

	India	**UK**
Lookback period	2 years	3 years
Transaction	Receipt of financial or operational debt	A transaction for, or involving, the provision of credit
Meaning of "extortionate"	A transaction which requires exorbitant payments to be made by the debtor.	A transaction whose terms are "grossly exorbitant" or which otherwise "grossly contravenes the ordinary principles of fair dealing".
Interest Cap	Subject to judicial discretion (the lowest level that we could find as having been found to not be extortionate is 24 percent)[75]	Judicial discretion (we have not been able to find any case law establishing a minimum level that would be regarded as extortionate).
Debtor	A corporate debtor (s 50) or an individual debtor (s 167).	A corporate debtor (s 244) or an individual debtor (s 343).
Avoidance action brought by	Liquidator or resolution professional	Administrator or liquidator (s 244),[76] or trustee of the bankruptcy estate (s 343)
Burden of proof	Office holder	Party defending the transaction
Safe harbour	Financial services	None, although a high bar is set for challenging transactions in a commercial context.[77]
Range of orders	The court can choose from the following options: (a) restore the position as it existed prior to such transaction; (b) set aside the whole or part of the debt created on account of the extortionate credit transaction; (c) modify the	The court can choose from the following options: (a) setting aside the whole or part of any obligation created by the transaction, (b) otherwise varying the terms of the transaction or varying the terms on which any security for the purposes of

[75] *Id.*

[76] The office holder can, however, assign the action: Insolvency Act 1986, § 246ZD (U.K.). *See further below.*

[77] White v. Davenham Trust Ltd., [2010] EWHC 2748 (Ch), [2011] BPIR 280, para. 50.

	terms of the transaction; (d) require any person who is, or was, a party to the transaction to repay any amount received by such person; or (e) require any security interest that was created as part of the extortionate credit transaction to be relinquished in favour of the liquidator or the resolution professional, as the case may be.	the transaction is held, (c) requiring any person who is or was a party to the transaction to pay to the office-holder any sums paid to that person, by virtue of the transaction, by the company, (d) requiring any person to surrender to the office-holder any property held by him as security for the purposes of the transaction, (e) directing accounts to be taken between any persons.
Role of Contract Law	Explicitly tied to contract principles (unconscionability)	Informed by equity and fairness but not directly tethered to contract law doctrines

Definition and Scope: We can immediately see differences in how each jurisdiction defines "extortionate" transactions. The Indian provision is notably broader, applying to “exorbitant” payments, whereas the 1986 Act restricts the scope of avoidance to transactions whose terms are “grossly exorbitant”. The addition of the word “grossly” adds a significant limitation to the scope of avoidance.

Standing: Both the UK and Indian laws give the power to bring avoidance proceedings to resolution or liquidation office holders. In India, these are either the resolution professional or the liquidator. In UK, the liquidator or the administrator can bring the action in a corporate case and the trustee in bankruptcy in a personal case. Recognising that few cases had been brought by office holders in the UK, extortionate credit transactions were among the provisions where powers were granted for an administrator/liquidator to assign the action to a third party.[78] This reform, which addresses a possible lack of funding as a barrier to bringing proceedings, does not however seem to have generated any additional case law.

Time Periods: There are differences in the lookback periods for transaction scrutiny, with a longer three-year window in the UK, compared with the two-year window in India.

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[78] Small Business, Enterprise and Employment Act 2015, § 118 (U.K.). For discussion of the general aim of this reform see Asertis Ltd v. Melhuish [2024] EWHC 2819 (Ch), paras. 38-41; and Blanca Mamutse, *Balancing Unequal Trading Relationships: Transaction Avoidance Precepts as a Route to a New End?*, [2018] JBL 512, 512-536.

Burden of Proof: Whereas Indian law requires the office holder to prove that the transaction was an extortionate credit bargain, UK law places the burden on the party defending the transaction, perhaps reflecting that the office-holder may lack knowledge of the circumstances in which the credit was granted.[79] As we have noted, the scope for avoidance in the UK is however narrow, particularly in arm's length dealings with corporate debtors, so that discharging the burden of proof will not be difficult in commercial transactions.

Remedies Available: There are also differences in the interventions that courts can make. Whereas an Indian court has a menu of options that include the ability to restore the position as it existed prior to the transaction there is no equivalent power for the UK court. In the event that there was a successful case under s 244 or 343, the court would have a menu of options enabling it to adjust the terms but not set aside the transaction itself, even in effect. The UK court can additionally require accounts to be taken between any persons.

VI. Conclusion

The extortionate credit transaction provisions examined in this article occupy a specialised and relatively obscure corner of insolvency law in both the UK and India, yet they repay comparative analysis with insights of broader significance for the design of avoidance regimes and the relationship between insolvency law and its surrounding regulatory environment.

There is a clear nexus between provisions that tackle extortionate credit transactions in the context of insolvencies and laws outside of insolvency that protect consumers in the context of relationships of unfair bargaining power with lenders. Contract law and consumer law may limit the potential for bad bargains in the interests of the debtor but some extortionate transactions will slip through the net and appear in insolvency proceedings. The more effective consumer law is, the fewer the number will be. In insolvency, the focus will be on the impact on the interests of creditors and if one creditor has been able to charge an extortionate rate of interest this will reduce the debtor's funds available to meet the claims of other creditors. The courts in the UK and India have therefore been given avoidance powers in relation to extortionate credit transactions.

We have demonstrated that a high interest rate can however be reflective of a high-risk borrower. There would be a danger if too strict a line was taken to the avoidance of extortionate credit transactions in insolvencies that there could be negative impacts on the availability of credit for risky or speculative business ventures. It could also feed business for nefarious and shadowy lending practices, as they might be left as the options for high-risk borrowers.

Our comparison of the extortionate credit transaction avoidance provisions in the insolvency laws of the UK and India reveals that the divergence between them is not a simple matter of

[79] ADAM DEACOCK & JOSH LEWISON, INSOLVENCY LITIGATION: A PRACTICAL GUIDE 14-028 (3d ed. Sweet & Maxwell 2021).

one jurisdiction having set the threshold higher or lower than the other. Rather, each has responded to the same functional challenge of the need to deter exploitative lending while protecting commercially justified high-risk credit. They have achieved this through different mechanisms suited to their own regulatory environment. The Indian provision is properly understood as a legal transplant from UK law that has undergone deliberate adaptation, with the explicit safe harbour for regulated financial institutions substituting, as an internal legislative mechanism, for the *ex ante* consumer credit regulatory infrastructure that existed in the UK at the time of drafting but was absent in India in 2016.

The practical dormancy of section 244 of the Insolvency Act 1986 , based on this analysis, is not a sign of regulatory failure but the expected consequence of a deliberate legislative ecology. The provision was designed to operate at the margins of a comprehensive consumer credit regime, catching only the most egregious transactions that survived or fell outside that regime. The subsequent strengthening of the unfair relationship test in the Consumer Credit Act 2006 further reduced the space in which section 244 could operate, progressively outflanking the insolvency provision rather than complementing it. The provision's effective dormancy is therefore itself a finding of significance: it reflects the success of the *ex ante* regulatory architecture in preventing the most egregious lending practices from reaching insolvency in the first place, rather than the redundancy of insolvency avoidance as a concept. The consumer credit regime has continued to develop in the four decades since the Insolvency Act 1986 was enacted, most recently through the FCA's Consumer Duty. This raises the questions whether section 244 any longer serves a meaningful independent function and whether it should be repealed in the next revision of insolvency law. This diagnosis, supported by the comparative analysis, argues not for precipitate repeal but for a clearer understanding of the relationship between insolvency avoidance law and the surrounding regulatory environment in which it operates, and for a periodic reassessment of whether a provision designed for one regulatory landscape remains fit for its designated purpose as that landscape evolves.

For jurisdictions considering how to design extortionate credit transaction provisions as part of broader insolvency system reform, as India did in 2016, the comparison yields a prescriptive insight. Where a mature *ex ante* regulatory framework governing lending conduct already exists, a high threshold in the insolvency provision (requiring gross extortion) is appropriate and can be expected to produce relatively few cases. Where, as in India, regulatory coverage of the lending market is less complete, the insolvency provision must do more of the work, and the safe harbour mechanism is a coherent design response that protects institutional lending while remaining available against unregulated exploitative creditors. The two systems converge in their practical effect. Both target exploitative unregulated lending; both protect commercially justified institutional credit. The comparison demonstrates that this convergence reflects a shared underlying policy logic expressed through different legislative instruments. Neither system is superior to the other in the abstract: what the comparison reveals is that optimal balance between avoidance and commercial certainty can be achieved through different combinations of rules and standards, calibrated to the regulatory context in which the insolvency provision must operate. The lesson for law reformers is, as counselled by Watson, not to transplant a provision in isolation but to understand the regulatory ecosystem into which it is being introduced, and to design accordingly.

THE NEED FOR INSOLVENCY CLAUSES IN INVESTMENT TREATIES

*Ankeeta Gupta**

Abstract

The world is becoming a global economy and corporatisation of the global economy is the most effective method for securing economic growth and sustainability amongst nations in the form of job creation, impetus to entrepreneurship, equitable utilisation of resources, building resilient economic infrastructure and promoting innovative industrialisation. It is imperative to note that investments and flow of credit in all their myriad forms are the lifeblood of sustained corporate growth, productivity, and development, essential for sustained job creation and economic peace within the nations.

However, globalisation has come with its own set of challenges primarily in the form of unfavourable municipal laws pertaining to investment, credit delivery, insolvency and bankruptcy. Ineffective insolvency and bankruptcy laws lead to limited exit options for the corporate debtor as well as creditors and the investors, impacting realisation of dues by the creditors as well as the investors leading to extreme trust deficit in foreign jurisdictions. It is pertinent to note that the lack of credit delivery sentiment within the economy ultimately resonates with the rate of credit realisation, unless the latter is certain the former cannot flourish. Lack of equitable and robust insolvency regimes also impacts a company's chance of revival and rehabilitation on foreign soil. The number of arbitrations pending before the International Centre for Settlement of Investment Disputes ("ICSID") and other challenging actions of governments bear a living testimony to the fact.

It is thus imperative that a study be carried out to develop a global legal framework whereby insolvency clauses recognising rights of various creditors and investors be incorporated in the bilateral/multilateral investment treaties with the States being made a party to global corporate challenges with the intention of improving economic efficiency as envisioned in sustainable development goals (Sustainable Development Goals). Thus, by contracting international investment agreements with easy entry and exit options for companies, a globally conjoint corporate economy may be envisioned allowing for resource pooling and monetary dexterity allowing for faster decision making. The bilateral and multilateral agreements tend to work as laws between the parties, thus providing adequate legal protection without violating any State laws. Creating this global framework will help develop uniform, transparent, and predictable rules for dealing with foreign corporations in the event of insolvency and bankruptcy. It is thus proposed that global insolvency principles be studied in tandem with the international investment, taxation and arbitration treaties so as to develop an efficient framework to resolve corporate debts as envisioned in the forgoing study.

Key words: Insolvency, Arbitration, ICSID, Universalism, Treaties

I. Introduction

The world is moving towards becoming a global economy with companies spreading their areas of operations across borders, contributing to economic development and sustained growth and development in different countries. Corporatisation of the global economy is the most effective method for securing economic growth and sustainability amongst nations, especially the developing and least developed nations. They help in job creation, provide impetus to entrepreneurship, allow for equitable utilisation of resources, build resilient economic infrastructure and promote innovative industrialisation. It is imperative to note that investments and flow of credit in all their myriad forms are the lifeblood of sustained corporate growth, productivity, and development, essential for sustained job creation and economic peace within the nations.

With increasing globalisation, trans-jurisdictional corporations have also increased, creating space for running businesses without borders. Even though cross-border multinational companies have become the order of the day, the legal systems governing these structures continue to be territorial without the slightest of regard for global best practices. While there exist many treaties, model laws, and reciprocal promises amongst countries, multinational companies find themselves struggling in case of bankruptcy in foreign jurisdictions. The focus on building territorial rules with regard to insolvency and bankruptcy circumstances has resulted in renewed difficulties for multinationals in terms of ease of exit in case of financial distress. Territorial insolvency and bankruptcy laws tend to create a sentiment in the minds of the foreign investors that the state would prefer to protect the rights of the local creditors and investors as against the rights of the foreign investors. There have been instances across the globe where it was found that the foreign partner was forced to give up rights over assets located in the host country in order to settle the debts of the local creditors. While these actions of the host country can be justified, the host country ended up becoming an unfavourable destination for foreign investment.

In the current paper, the researcher evaluates the possibility of incorporating the rules pertaining to insolvency within the investment treaties executed between countries amongst themselves after negotiating the rights of both the local and foreign collaborators, keeping in mind the UNCITRAL Model Law in the unlikely event of an insolvency or bankruptcy. The paper has been divided into seven parts wherein Part II discusses the importance of creditors in the global financial economy, Part III discusses the cross-border insolvency laws in different jurisdictions, Part IV discusses the concept of investment treaties, Part V discusses the need for insolvency laws in investment treaties and finally Part VI discusses the methodology that may be followed for integration discussed in Part V, followed by a Conclusion in Part VII.

II. Importance of Corporates and Creditors in the Global Economy

The role played by companies cannot be over-emphasised in terms of their ability to carry out large-scale investments throughout various economic sectors and to organise resources, financial, human, and social, for promoting manufacturing and supply of goods and services respectively. Demands of social empowerment and economic growth have firmly placed corporate structures at the center of contemporary society as the economic prosperity directly translates into social prosperity and growth.[1] While corporations have been recognised as central economic institutions, there exists a plethora of corporate jurisprudence writings which indicate evolutionary failings in terms of the rights of various stakeholders within the legal systems across the world. It is a well-established theory that no country's economy can function without a constant supply of credit and investment, which fuels economic growth and development, drives research and technological innovation, promotes manufacturing, and skill development, etc. Establishment of private corporations helps generate employment opportunities, which in turn help social upliftment of the communities. In this regard it is pertinent to note that cross border investments support the host country' s economic growth trajectory with far greater impetus than local funding.[2]

In an international, multi-jurisdictional scenario it is pertinent to note that the credit and investment have been defined differently by various legal instruments.[3] Thus creditors, investors and shareholders become financial stakeholders with differing stakes, rights and liabilities. Their treatment is varied in terms of domestic compliances and international recognition so accorded. Historically the treaties have been used to protect the owner in a host country against the excesses of the host country, while insolvency laws protect the creditors within the local jurisdictions where they are located.[4] The central argument therefore of the current paper is that cross border insolvency rules protecting creditors of native state, host state and others but related to the corporate debtor must be included within the treaties so as to accord them similar protection as accorded to the owners and investors of the entity concerned. The creditors though funding in the short term as part of interim measures continue to be important for structuring finances and working capital requirements including human resources, at local level allowing for foreign infrastructure to develop and function without delay or loss of resources. Thus a commercial entity cannot be seen as purely the functionality

* The author is an Assistant Professor of Law, at Faculty of Law, University of Delhi and has a teaching experience of over five years. She was previously teaching at National Law University Odisha, India. Her research is focussed around Insolvency Laws having completed research projects from IIIPI, IBBI etc. She has completed her PhD from Faculty of Law, University of Delhi in the area of Insolvency Laws. She has been teaching various subjects under the umbrella of corporate and insolvency laws.

[1] OECD, OECD BUSINESS AND FINANCE OUTLOOK 2016, CHAPTER 8, THE IMPACT OF INVESTMENT TREATIES ON COMPANIES, SHAREHOLDERS AND CREDITORS, https://www.oecd.org/daf/inv/investment-policy/BFO-2016-Ch8-Investment-Treaties.pdf. Also See: OECD, INTERNATIONAL INVESTMENT PERSPECTIVE (2006), https://read.oecd-ilibrary.org/finance-and-investment/international-investment-perspectives-2006_iip-2006-en#page3.

[2] Matleena Kniivilä, *Industrial development and economic growth: Implications for poverty reduction and income Inequality*, (January 1, 2007). Trade openness is also likely to bring foreign investment into the country. This is often vital, and especially so at early stages of development. It is also likely to increase productivity as domestic companies are facing external competition. The higher the proportion of credit-constrained people, the lower the level of investment and the rate of growth are. Also see: G.A. Cornia & S. Kiiski, *Trends in income distribution in the post-World War II period: evidence and interpretation*, UNU-WIDER, Discussion Paper No. 2001/89 (2001).

[3] The UNICTRAL, NAFTA agreement, ICSID Rules have defined investment as a long-term contribution which entails ownership in the corporate. Loans have been specifically excluded from the definitions.

[4] Hosna Sheikhattar & Mansour Vesali Mahmoud, *Domestic Insolvency Proceedings before the Investment Treaty Arbitration*, 41 ARB. INT'L 349 (2025).

of the shareholders or the owners. Further the international treaty obligations must incorporate creditors as stakeholders in order to allow the commercial entities to file claims against States mis-applying or violating their insolvency principles while applying them on foreign entities at international fora and resolving it with the help of arbitration or negotiation.

The World Bank states in its report on economic growth that "Credit is an important link in money transmission; it finances production, consumption, and capital formation, which in turn affect economic activity." The World Economic Forum has time and again insisted that it is the private sector that will help in sustained economic growth and development over a long period of time. In order to be able to ensure such growth, a continued investment impetus in the form of a steady supply of capital is necessary. In this scenario a steady supply of credit has been compared with a constant supply of blood in the human body, without which the deprived body part will be unable to perform its functions to its fullest and thus, will not help the body grow. In a similar vein the economic commentators are of the view that any delay, slowdown, or interruption in the seamless flow of credit would hamper investment, consequently impacting capital formation and further growth of the industry in particular and economy in general.[5] In a globalised scenario, this relationship becomes more profound as survival of many economies depends on supplies from other countries in terms of raw materials, technological know-how, labour including a ready market for supply of finished goods. With neo-classical economic theory taking over the classical economic theory countries developed strategies to maximise on their strengths and collaborate with others to minimise losses on account of weaknesses.[6] This picture of globalisation and liberalisation ensured that no country was self-sufficient and that all were involved either directly or indirectly in developing products and services for each other. In the light of this collaboration and cooperation, it is likely that the lack of credit and investment would lower the rate of growth significantly, not only in the country directly affected but also in others having remote trade linkages.[7] It is also pertinent to note that finance is also being dealt with by institutions, leading to its commodification bearing far-reaching ramifications for the production of goods and services, the movement of people and goods, and supporting further technological innovation, research, and development. In the current paper the researcher emphasises the importance

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[5] Kath Weston, *Lifeblood, liquidity, and cash transfusions: beyond metaphor in the cultural study of finance*, The Journal of the Royal Anthropological Institute, S24–S41 (2013), https://www.jstor.org/stable/42001727. Adam Smith, Sun Lijian, Davidson, Fergusen and many others accepted the analogy that credit is to the economy what blood is to the human body. Their discussions ranged from micro to macro-economic models, credit building to nation building, formal banking channels to informal and parallel channels of finance all working with the single point agenda to promote economic growth and development. Barak Obama in the aftermath of the global financial crisis of 2007-08 promised to infuse as much blood in the economy as was needed to bring it back on its feet. The modicum of such infusion was bailout packages and increasing lines of credit to banks and private corporations respectively. Paul Davidson, *The Case for Regulating International Capital Flows*, (Nov. 17, 1998) Paper presented at the Social Market Foundation Seminar on Regulation of Capital Movements, London, https://doi.org/10.1007/978-1-349-14991-9_10.

[6] Geoff Tilly, *Keynes's monetary theory of interest*, BIS Papers No. 65 (2012), https://www.bis.org/publ/bppdf/bispap65c_rh.pdf.

[7] Sy Hoa Ho & Jamel Saadaoui, *Bank Credit and Economic Growth: A Dynamic Threshold Panel Model for ASEAN Countries* (International Economics, Vol. 170, 2022), https://ssrn.com/abstract=3861675.

of credit and investment in order to underscore the need for parity in global insolvency and bankruptcy laws.[8] At this juncture it is worthwhile to discuss the cross-border insolvency laws at play at present in the world.

III. Cross Border Insolvency Laws

Insolvency laws form part of the weaponry economic protection accorded by the States in safeguarding the collective interests of creditors within its jurisdiction. While finance develops nationally it grows globally spreading its tentacles, linking itself to any and every form of commercial viability. Thus the former Governor of the Bank of England, Sir Mervyn King, correctly commented that "*global banks are international in life but national in death.*" Multinational companies spread their operations and network across the world while riding on the expansionist wave of global trade.[9] This surge of foreign collaboration and cooperation has also resulted in the increased instances of disputes and insolvencies emanating out of business failures, not always malafide, yet causing stir and trouble in multiple jurisdictions. Micula et al. v. Romania, S PNB Banka and others v. Latvia,[10] Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan,[11] bear a living testimony to the fact that failure of commercial entities is as routine an event as their setting up, and it is up to the States to develop favorable laws allowing for an easy exit plan in case of insolvency or bankruptcy of the said economic entity.[12] It is to be noted that the laws pertaining to insolvency and bankruptcy have failed to develop at the desired pace at which global financial cooperation has developed, leading to various loopholes susceptible to misuse by unscrupulous members of the corporate economy. The international insolvency law, or the cross-border insolvency law, is primarily governed by laws of the country having stronger negotiating skills or enjoying a comparative power over the other. As on date, the insolvency laws across the world follow the principle of *lex fori concursus* leaving fewer or no provisions benefiting the foreign investor. The cross-border insolvencies are more often than not dealt with by application of model laws or jurisdictional theories[13] applicable on a case-by-case basis. International Commercial Cooperation has always been considered a specialised field enough for most international bodies as well as nation states, leaving it to the corporates to settle the dispute that may arise, and thus we find

[8] Chandrajeet Banerjee, *What the private sector can do for India's economic growth*, WORLD ECONOMIC FORUM (Oct. 1, 2019), https://www.weforum.org/agenda/2019/10/private-sector-investment-in-india/ (last visited June 18, 2026).

[9] Barry E. Adler, *A Re-examination of Near Bankruptcy Investment Incentives*, 62 U.CHI.L.REV. 575 (1995).

[10] Danilo Ruggero Di Bella, *Bankrupt Claimants in Investment Arbitration: Who's in Charge?*, COLUMBIA JOURNAL OF TRANSNATIONAL LAW, (Jan. 5, 2022), https://www.jtl.columbia.edu/bulletin-blog/bankrupt-claimants-in-investment-arbitration-whos-in-charge (last visited June 18, 2026).

[11] Unionmatex v. Turkmenistan, ICSID Case No. ARB/18/35 (2018).

[12] Douglas G. Baird, *The Uneasy Case for Corporate Reorganisations*, 15 JOURNAL OF LEGAL STUDIES 127 (1986).

[13] Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach* 84 CORNELL L. REV. 696 (1999).

that the prevalence of contractual obligations[14] pertaining to the resolution of disputes in case of cross-border insolvency amongst these entities has been very high. It is pertinent to note that Hague Convention,[15] the European Union regime[16] for enforcement of judgments in civil and commercial matters, have made no mention of application or execution of the insolvency and bankruptcy laws.

Over the years, the States have often found themselves faced with 'choice of law'[17] questions in applying strict territorial rule or adopting universal legal principles governing commercial disputes, with some help being accorded by the Model Laws on Cross-Border Insolvency Laws by United Nations Commission on International Trade Law. Today the insolvency issues are tangled in multiple jurisdictions. Cross border insolvency involves corporate entities, shareholders, domestic adjudicating authorities and States powers wanting to keep a bigger part of the pie for themselves. The corporate entity in this scenario would operate in at least two States having assets, resources and management therein. There is a possibility that the shareholders may be located in a third jurisdiction. This simple scenario will give rise to multiple judicial proceedings in different States. A commentator has commented that, *"The insolvency law has been termed as a type of meta-law that '...swoops in and trumps baseline legal relationships in unusual circumstances of general default."*[18] The internationalisation of insolvency law thus multiplies the existing complexities. It is thus pertinent to note that there exist different styles for application of the insolvency laws at international forum as listed below:

1. Universalism: The theory of envisions a predictable transnational insolvency procedure whereby the on declaration of bankruptcy of a corporate debtor the courts in one jurisdiction transfer all the assets to the jurisdiction of the corporate debtor so as to provide a singular insolvency system allowing for a pro-rata distribution[19] of assets amongst all the creditors irrespective of the national rules of the countries from where the proceedings may have moved.[20] This is a far simpler process, as collection and collation of claims happens in the parent jurisdiction of the corporate debtor. This allows the corporate debtor and the stakeholders to consider the various possibilities

[14] All the International Investment Treaties, commercial agreements, and conventions signal cooperation and coordination amongst nations have very skilfully allowed insolvency and bankruptcy measures to remain with the States according to their respective agreements. (More discussion in forthcoming sections).

[15] Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters art. 2(1)(e), July 2, 2019. Bankruptcy matters were also excluded from the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb.1, 1971 and from the Convention on Choice of Court Agreements, June. 30, 2005.

[16] Council Regulation 1215/2012, 2012, O.J. (L 351) 1.

[17] Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV 873 (1987).

[18] Dr. Anirudh Rajput, *Cross Border Insolvency and Public International Law,* 19 ROMANIAN JOURNAL OF INTERNATIONAL LAW 7 (2018).

[19] The emphasis on pro-rata distribution arises primarily on account of the fact that there are far too many creditors and funds available with the corporate debtor are limited.

[20] Anne Nielsen, Mike Sigal, & Karen Wagner, *The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies*, 70 AM. BANKR. L. J. 533 (1996).

aside from the liquidation viz, reorganisation and restructuring, since it is a well-known fact that a going/ continuing economic enterprise is far more valuable than a liquidated company. The stakeholders are also estopped from initiating any parallel proceedings in other courts, thus ensuring one systematic and coordinated insolvency proceeding which in turn will help preserve and maximise the value of the assets of the corporate debtor and protect it from unnecessary dilution or destruction.[21] However, the concern surrounding the universal approach is the favouritism[22] or bias which the judicial institution may develop against a lesser developed judicial system or economy primarily using the principle of comity[23] as was witnessed in the matter of In re Culmer,[24] Hilton v. Guyot,[25] and In re Papeleras Reunidas, S.A.,[26] where the US courts allowed movement of the insolvency proceedings back to their respective jurisdictions only on the condition that the American creditor's interest would be fully protected.[27]

2. Territoriality: The Principle of Territoriality mandates that the adjudication pertaining to assets of the company undergoing liquidation must take place in the territory in which they are located.[28] Territoriality emphasises the use and application of the municipal or the national law against the foreign law applicable to the corporate debtor in its home country. While this theory helps protect the interest of the local creditors, investors, and other stakeholders, it results in significant loss of foreign revenue and alteration of the investment patterns the host country would have been delivered with by other foreign affiliates. It results in what is commonly known as the grab rule,[29] without working the proportions and distributing assets on a pro-rata basis. While countries may argue in favour of it on grounds of public policy, rights of citizens, as well as growth on domestic

[21] The Universal theory entails single pecking order/ ranking of claims for the creditors and the stakeholders.

[22] Jay L. Westbrook, *Theory and Practice in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L. J. 457, 466 (1991).

[23] Jay Lawrence Westbroke, *Comity and Choice of Law in Global Insolvencies*, UNIVERSITY OF TEXAS SCHOOL OF LAW, *Public Law and Legal Theory Research Paper Series Number 700*.

[24] In re Culmer, 25 B.R. 621 (Bankr. S.D.N.Y. 1982).

[25] Hilton v. Guyot, 159 U.S. 113 (1895).

[26] In re Papeleras Reunidas, S.A., 92 B.R. 584 (Bankr. E.D.N.Y. 1988).

[27] While allowing movement of the proceedings the American Courts made the following observations: *"Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition that one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."* Also see: In re Toga, 2 28 B.R. 165 (Bankr. E.D. Mich. 1983).

[28] Lucian Arye Bebchuk & Andrew T. Guzman, *An Economic Analysis Of Transnational Bankruptcies*, 42 THE JOURNAL OF LAW & ECONOMICS, 775, (1999).

[29] *"[G]rab rule proceedings yield inequitable results. Creditors appearing before the courts that have grabbed the most assets fare better than creditors generally.* Todd Kraft & Allison Aranson, *Transnational Bankruptcies: Section 304 and Beyond*, COLUM. BUS. L. REV. 329 (1993); Lucian A. Bebchuk, *The Effects of Chapter 11 and Debt Renegotiation on Ex Ante Corporate Decisions* (Discussion Paper Ser. No. 104, HARVARD LAW SCHOOL PROGRAM IN LAW AND ECONOMICS, 1994); Lucian A. Bebchuk & Randall C. Picker, *Bankruptcy Rules, Managerial Entrenchment, and Firm-Specific Human Capital* (JOHN M. OLIN PROGRAM IN LAW AND ECONOMICS Working Paper No. 16, 1992); Douglas G. Baird, *The Uneasy Case for Corporate Reorganisations*, 15 J. LEGAL STUD. 127 (1986).

economy, it makes the country an unfavourable destination for the foreign investor in terms of protection of its capital, resources, and assets, leading to an extreme trust deficit internationally.[30]

3. Modified Universalism: The theories of Universalism and Territorialism appear at the extreme end of the spectrum governing insolvency rules which tend to make regulation of insolvency proceedings rigid. Thus, a new theory, "Modified Universalism" has been envisioned which is nearer to the centre attempts to establish an efficient system based on fairness and recognition of rights of all the stakeholders.[31] This theory also primarily attempts to reduce the costs and efforts of majority of stakeholder and is thus dependent on the principle of Country of Main Interest (COMI)[32] wherein the corporate debtor's effective business operations and location of assets decide the place of insolvency. This theory is not dependent on residency of the corporate debtor but on the functionality and working thereof. Many countries have adopted this theory as allows flexibility to all the stakeholders to decide where the insolvency proceedings should be initiated. Modified Universalism assumes significance as it attempts to read the rule of private international law into public law by promoting global collective process for an optimal transnational insolvency regime focusing on maximizing asset value and protecting the interests of all the stakeholders.

4. UNCITRAL Code: With growing disquietedness surrounding the choice of law and forum of law for cross-border insolvency disputes the UNCITRAL made an attempt to develop the Model Code for cross border insolvencies, making it an exhaustive Code with a discussion on almost all insolvency related matters. As a model law it allows the states to make their own modifications suiting their local commercial and economic needs as well as for compatibility with pre-existing state laws. It is however to be noted that in the garb of allowing flexibility the Model Law has strayed from its original path of providing a singular unified law capable of application in all the States. The modifications so permitted have allowed numerous different interpretations by various courts, thereby going back to territoriality and uniquely worded State specific laws. Some of the controversial issues pertain to definition of establishment, reciprocity, creditor rights, enforcement of the foreign awards and judgements etc. In order to clarify the issue of award enforceability UNCITRAL developed the Model Law on Implementation of foreign judgments with the sole intention of allowing a space and modicum of enforcement of foreign insolvency awards and judgments.

[30] Lucian Bebchuk in the same article offers a further explanation against territorial law in the following words, *"Rules designed to protect the interests of local creditors in the adjudication of bankruptcies may have harmful results on the allocation of capital across countries by causing suboptimal investment by multinational firms. Because territorial rules make the outcome of a bankruptcy (from the point of view of a creditor) depend on the distribution of debt and assets across countries, the interest rate demanded by creditors in exchange for loans will depend on that distribution".*

[31] José M. Garrido, *No Two Snowflakes the Same: The Distributional Question in International Bankruptcies*, 46 TEX. INT'L L.J. 459 (2011).

[32] Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276 (2000).

It is pertinent to note that cross-border insolvencies raise complex questions for owners, investors, creditors, and the jurisdictions involved. As noted earlier an entity's insolvency is most likely to initiate multiple claims in multiple jurisdictions amongst multiple forums for protection of multiple stakeholders. The idea of modified universalism for insolvency rules is most suitable. It allows for flexibility in terms of applicability of rules and rights of host state vis-à-vis the rights of all the stakeholders.

Thus, in the event of limited or lack of favourable legal systems supporting the foreign corporations, the investors and the debtors as the case may be are likely to impact the host country's economy negatively. The absence of adequate safeguards essentially stalls growth prospects impacting future investments and foreign collaborations.[33] These are fundamentally likely to alter the credit availability and credit delivery mechanisms supporting the industry. With countries now forging closer ties and the world becoming a global village, collaborations in terms of investment treaties and cross jurisdictional agreements safeguarding interests of stakeholders within the globalized economy is the need of the hour. In the foregoing sections the researcher will discuss the concept and importance of investment treaties.

IV. Investment Treaties

In Part II, the researcher attempted to analyse the importance of credit and investment in economic growth in an era of globalisation and liberalisation. The importance of overseas finance cannot be over-emphasized in terms of its contribution to economic growth and development, it is found in all operational sectors of the given economy either directly or indirectly and involves state officials from almost all departments in different capacities.

The overseas investment may involve amongst other things technological know-how, research and development, labour etc. and essentially helps strengthen the domestic economy vis-à-vis the world economy. The cooperation and coordination thus witnessed helps integrate the economy[34] with the world, with increasing contractual obligations between parties while forging such relationships. The public law ritual for the such integration has been via International Investment Treaties, Free Trade Agreements, Bilateral Investment Treaties, and economic organisations established for the purpose viz: Organisation of Economic Cooperation and Development, Association of South East Asian Nations, North American Free Trade Agreement etc. for the purpose of giving the investors a safe and predictable environment for investors by setting clear rules.[35] These have been given a further impetus by the World Bank through the International Finance Corporation and International Centre for Settlement of Investment Disputes. As mentioned above these foreign collaborations are part of the cross-

[33] UNCTAD, *World Investment Report, 2025: International Investment in Digital Economy*, UNCTAD/WIR/2025 (June 19, 2025).

[34] UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, UNCTAD/DIAE/IA/2009/5 (Sept. 2009).

[35] Irit Mevorach, *Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?*, 22 EUR BUS ORG LAW REV, 283 (2021).

border investment patterns being supported by the customary international public law. However, much to our dismay we find that commerce, insolvency, taxation have become such specialized sectors which are heavily regulated by the State's Private or the Municipal laws leaving a gaping hole in execution of global commercial rules and regulations. In the current paper the researcher has made an attempt to analyse implementation of global/cross border insolvency laws via mutual cooperation and coordination amongst the nation states using bilateral investment treaties, in a manner to the execution of the double taxation avoidance treaties. As per the latest data on the ICSID website there are more than 6000 bilateral investment treaties executed by 170 countries amongst themselves. While some countries have executed less than ten (10), there are countries viz: Germany at 160, Czech Republic at 113, United Kingdom at 116. This data indicates a positive inclination of the Nation States towards developing bilateral commercial and investment ties amongst each other allowing scope for flexibility in terms of legal processes, compliances as well as rights and obligations.

A Bilateral Investment Treaty ("BIT") is an agreement between two countries for protecting and promoting economic ties and investment by creating rights and obligations amongst themselves as well as ensuring equal treatment in the host country vis-à-vis the local investors.[36] The policy decisions of the States as well the judicial tolerance and economic execution are decided upon factors based on negotiations between the States, which may result in unique agreements between different states as has been witnessed in some double taxation avoidance agreements, investment protection agreements.[37] The BITs involve clauses ensuring non-discrimination, fair and equitable treatment, security, protection and free transfer of investments and prohibition against illegal expropriation. These fundamental clauses are incorporated with the sole intention of establishing an investment climate inviting foreign capital and permitting exposure to foreign markets. The BITs are thus also able to create amicable dispute resolution mechanisms without prejudicially impacting neither the investment nor the relationship between the nations.[38]

The biggest benefit of a BIT is that the Nation States without compromising on their fundamental ethos, Constitution, and legal framework can develop a mutually acceptable temporary legal framework.[39] This freedom in commercial space is of immense value as many times local municipal rules may not be well developed and defined, and yet a strong foot hold may be provided to the contracting parties. Specialized subjects viz: commercial investments,

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[36] Witold J. Henisz, *The Institutional Environment for Multinational Investment*, 16 JOURNAL OF LAW, ECONOMICS & ORGANISATION, 334 (2000).

[37] Some Investment Protection Agreements executed by European Union may be found here: https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/be5be10c-b63e-4144-a0c1-a3f8de5be2a0.

[38] Douglass G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 WASH. U. L. Q. 931 (1994). Also See: Mihir A. Desai, C. Fritz Foley & James R. Hines Jr., *A Multinational Perspective on Capital Structure Choice and Internal Capital Markets*, 59 THE JOURNAL OF FINANCE, 2451 (Dec. 2004).

[39] Jennifer Tobin & Susan Rose-Ackerman, *When BITs have some bite: The political-economic environment for bilateral investment treaties*, 6 THE REVIEW OF INTERNATIONAL ORGANISATIONS (2011); Also See: Beth A. Simmons, Andrew T. Guzman & Zachary Elkins, *Competing for capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60 INTERNATIONAL ORGANISATION, 811 (Oct. 2006).

setting up of industry, taxation agreements, bankruptcy laws can be simplified by adding contractual clauses[40] along with a broad legal framework. The BITs are thus those flexible legal instruments which bear contractual clauses, consensual relationship, freedom to choose and flexibility to modify the terms in case of any dispute, disagreement or change of circumstance. It is further to be pointed out that the case of SGS Société Générale de Surveillance S.A. v. Philippines,[41] the tribunal has observed as follows:

"The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble, it is intended "to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other". It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments".

This statement is indicative of the powers that the tribunal accords to the investment treaty in terms of protecting the commercial entities, the investors etc. However, the biggest flaw in these agreements has been reduced definition of investments and systematic removal for anything remotely bearing a semblance to the concept of creditors or loans as part of protection accorded to the investors. It is presumed that the domestic laws shall protect the creditors in the event of a fall-out including cross- border debts. As stated in the previous sections the inability of the States and the international to make this distinction between ownership and debt i.e. investor and creditor respectively is major gap and lacunae in the BIT, Investment Protection Agreement and Cross Border Insolvency universe.

V. Integration of Insolvency Laws in Bilateral Investment Treaties

It is the case of the researcher that global insolvency laws have yet to develop a following and the theories surrounding the international insolvency laws leave a lot of room for discretion by the State authorities. Applicability of UNCITRAL MODEL Laws on insolvency have been amenable to significant interpretative issues. These debates surrounding the insolvency law have propelled the researcher into suggesting that Investment Treaties in general and Bilateral Investment Treaties in particular are the perfect option for incorporating these clauses. The hypothesis of the researcher is, *"that the Corporatisation of the global economy is dependent on strong insolvency and investment laws. Realisation of debt and investment by creditors and investors respectively, can be ensured by incorporating insolvency clauses and exit options within the international investment treaties framework thereby allowing sustained economic growth across the globe."*

It is pertinent to note that while the application of the investment treaties are governed by public international law, the investment and debt contracts fall under the purview of municipal law.[42]

[40] *Insolvency Arrangements and Contract Enforceability - Contact group on the legal and institutional underpinnings of the international financial system*, BIS, (Dec. 9, 2002), https://www.bis.org/publ/gten06.pdf (last visited June 18, 2026).

[41] SGS v. Philippines, ICSID Case No. ARB/02/6 (2002).

[42] Andrea K. Bjorklund & Lukas Vanhonnaekar, *Applicable Law in International Investment Arbitration*, THE CAMBRIDGE COMPANION TO INTERNATIONAL ARBITRATION 225, 226 (2021).

Meaning thereby that the investors will become subject to the municipal laws, which is essentially constrained by the protection granted by the investment treaties. This is also at variance for the laws applicable to the creditors of the host as well as native state.

In the preceding sections the researcher has analysed the importance of credit in the economy. It is an accepted theory that any economy desirous of growth and development needs a steady flow of credit and investment much like blood in the human body. Thus, the providers of these fundamental resources in the form of credit and investment need an assurance that their finances are well protected and the debts would be realized in a timely fashion along with interest. This view prima-facie emphasizes that the States need to develop controls in which neither the domestic creditors nor the foreign creditor are prejudicially affected on account of losing principal or interest amount.[43] This faith ensures a continued supply of finances to the economy which then helps aid sustained socio-economic growth and development in the long-run, irrespective of the jurisdiction in which the investment is being made. This long-term growth and development solution has been provided for in the United Nation's Sustainable Development Goals. It is pertinent to note that in commercial matters a quid-pro-quo exists at all times, even when foreign investors invest outside their home country, benefits from the host country reach the home country albeit indirectly. In order to generate a proper circle of finance the researcher is of the view that rather than relying on international broad spectrum legal instruments, investment agreements may be made use of to provide a one-on-one protection of the rights of the investors and creditors in the concerned countries. It is further suggested that the concept of sustained economic growth is meaningless if in the presence of global economic markets countries are unable to provide uniformity in rules and a general intention to allow companies to function as a going concern rather than being liquidated in piecemeal fashion. This grab policy needs to be done away with. Many times the value of the company as a going concern is much more than as a liquidated enterprise on account of its intangible assets and research and division wing.

The insolvency and bankruptcy laws essentially allow a fledgling commercial entity to either come to an end peacefully or be reconstituted and restructured to transform into a going concern. It has been a generally accepted rule that a commercial entity has more value as a going concern than as a liquidated entity. Most investment agreements tend to focus only on establishing a commercial entity according rights to the shareholders and other investors without keeping any room for any discussion for closure of the company on account of insolvency.[44] Any laws so mentioned limit their understanding of investors to only shareholders who are then allowed to protect their interests using various measures including entity shielding.[45]

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[43] Stratos Pahis, *BITs & Bonds: The International Law and Economics of Sovereign Debt,* 115 AM. J. INT'L L. 242 (2021).

[44] Ian Fletcher, *Cross-Border Cooperation in Cases of International Insolvency: Some Recent Trends Compared,* TULANE CIVIL LAW FORUM, 171 (1991–92).

[45] Entity shielding in effect helps establish the corporation's legal personality which in turn is used to protect interests of the creditors by allowing a certain category to have priority of claims over the others.

UNCITRAL Model rules on insolvency and bankruptcy law have time and again proven to be amenable to significant interpretative debates as was witnessed by the Committee on Cross Border Insolvency in India, the Committee had to keep certain aspects of the Model Law at bay on account of the confusions it was likely to create rather than abate. In this scenario focusing squarely on the Model law is incorrect and would not yield the desired results. Similarly, the applicability of theories of territoriality, universalism and modified universalism has been questioned time and again in the face of applicable identifiable municipal laws resolving insolvency disputes.[46] It is pertinent to note that when municipal laws are varied the professionals manning the law are also subject to local rules of conduct which may or may not be in consonance with the global rules.

It has been witnessed over the past cases that in case of cross-border commercial dispute the tribunal will accord all importance to the owner of the body corporate thereby allowing the shareholders the first preference.[47] The creditors are in no way recognized as primary stakeholders. Further lack of powers with the arbitrators also dissuaded them from taking a positive stance in distinguishing between firm assets and debt of the firm. Once this recognition is made and clear identifiable terms of reference provided to the adjudicators, resolution of insolvency will be simpler than most other cases. With adequate protection granted via bilateral investment agreements the tribunal for resolving the disputes amicably would have no hesitation in adding the name of the creditor i.e. financial institution, bank etc. as an interested party and thus no decision pertaining to the corporate debtor would be made without consulting the creditors.

There may arise issues in qualifications, ethical considerations, powers, functions and accountability. In this scenario rather than having a modified, semi-territorial rule of insolvency a coordinated cooperation amongst the professionals by way of a contract or clause in investment agreement would help better regulate and control the cross-border insolvency process. Insolvency Law can be identified as a unique aspect of the economic and commercial laws which is linked to interest of multiple groups and having wide ramifications to social development and public interest attempting harmonisation[48] of civil and international law. In keeping with the fundamental principles the normativity associated with the value maximisation of business rescue, cross-border efficiency, assistance to and from foreign

[46] Sudhaker Shukla & Kokila Jayaram, *Cross Border Insolvency A Case to Cross the Border Beyond the UNCITRAL*, INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (2020) https://ibbi.gov.in/uploads/resources/c3593c9f41984c6f31f278974de3cf37.pdf.

[47] *Micula, Viorel Micula*, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20 This is a significant case as the arbitrators for the first time disagreed with the view that creditors need not be on board and be represented and secondly agreed that due to lack of valuation powers they tend to accept the easier approach of pro-rata protection to shareholders in priority and then the creditors.

[48] Thomas M. Gaa, *Harmonization of International Bankruptcy Law and Practice: Is It Necessary? Is It Possible?*, 27 INT'L L. 881 (1993).

collaborators cannot be justified unless a further impetus in the form of a harmonised framework is established for international insolvencies.[49]

There are number of cases worth emulating wherein the judicial authorities[50] supported the cause of the creditors and using its discretion applied universalist principle to promote a coordinated approach[51] in streamlining the insolvency process.

1. The case of Jet Airways: When Jet Airways suffered insolvency proceedings, having been declared bankrupt in a Netherlands court appointed an administrator. Similar proceedings had also been initiated in India as well. The Tribunal allowed the Dutch administrator to attend the COC meetings in line with the universalist principles.

2. Rubin v. Euro Finance:[52] After a long murky battle in the UK in a tussle between application of territorial rule vs. universalist approach the courts decided to settle the matter with coordination and cooperation outside of the courts, thereby promoting a stance of cooperative agreement between the two sides to minimize the losses so suffered by the two sides.

These are illustrative cases[53] wherein the courts have adopted a lenient stance and by way of single agreement agreed to settle the matter amicably.

When focusing on the benefits of the applying cross-border insolvency laws it has been witnessed that rule of reciprocity,[54] varied understanding of establishment, debt, investment and credit may be incorporated based on the requirement of the nation state in question, thereby permitting flexibility unknown and unpractised so far. The idea here is to develop a mechanism whereby debtors and the creditors be accorded a level playing field in terms of their needs and requirements rather than simply according them a straightjacket formula by way of statutory provisions.[55] The benefit of integrating Insolvency laws with the both the bilateral and

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[49] Adrian Walters and Irit Mevorach, *The Characterization of Pre-insolvency Proceedings in Private International Law*, 21 EUR BUS ORG LAW REV, 855 (2020).

[50] Guzman, Andrew T, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VIRGINIA JOURNAL OF INTERNATIONAL LAW 38 (1998); Also See: Guzman, Andrew T, *Capital Market Regulation in Developing Countries: A Proposal*, 39 VIRGINIA JOURNAL OF INTERNATIONAL LAW 607 (1999).

[51] Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 333 Bankr. S.D.N.Y. 2008; In re Metcalfe & Mansfield Alt. Inv., 421 B.R. 685 Bankr. S.D.N.Y. 2010); In re Qimonda AG, 462 B.R. 165, 185 (Bankr. E.D. Va. 2011).

[52] Leonard Hoffman, Cross-Border Insolvency: A British Perspective, 64 FORDHAM L. REV. 2507 (1996).

[53] In re Betcorp, Ltd., 400 B.R. 266 (Bankr. D. Nev. 2009).

[54] An assessment made by the Committee on Cross Border Insolvency Committee with regard to Reciprocity essentially sums up the debate pertaining to it as follows: *universal insolvency law is depicted in the cross border insolvency report prepared by India where an attempt has been made to ensure that the rights of the foreign creditors in India are protected in the following words. "Therefore, foreign creditors will still be able to initiate, participate in and file claims in proceedings under the Code regardless of reciprocity".*

[55] Countries should not be required to defer to a foreign system that falls below international standards (i.e. where it does not follow a collective system, which treats creditors equitably), and should be able to protect creditors against discrimination (i.e. the unfavourable treatment of local creditors, whose claims would otherwise be

multilateral investment treaties would also allow one to keep a scope of situation when the corporate debtor operates out of multitude of jurisdictions[56] as well as creditors operate from multiple jurisdictions. This scenario accounts of parent versus subsidiary issue emanating in the insolvency proceedings. The idea of a flexible agreement between two economies desirous of commercial collaboration and pooling of resources would allow significant room for negotiated arrangements necessary for mid-term course correction in terms of insolvency and bankruptcy processes.

VI. Challenges in Implementation

The researcher is aware that there exist certain challenges in implementing the above stated integrated approach with the biggest hurdle being the time lag between signing and executing of the bilateral investment treaty. Since it is a contractual obligation certified by the legislative body of the state being given the status and position of a legal document having full force of law. Secondly, the details in which each investment agreement will have to be drafted will require a thorough understanding of the laws of both (all) jurisdictions in order to draft an exhaustive agreement which will be a time-consuming exercise. Thirdly, the issues are likely to arise when the corporate debtors and creditors have multi-jurisdictional operations which may make the agreement redundant unless an overarching umbrella model law is put in place to deal with such a situation. Fourthly, these agreements will also have to pass the muster of political cooperation[57] and conciliation. In various negotiations the failures have been high on account of lack of political will to continue with the concerned economic cooperation. In case of India all of the bilateral investment treaties expired in 2017 have since not been renewed, while the repercussions are understandable, the lack of political will and support has left a great void in India's international commercial position. Lastly, the investment agreements have traditionally protected the interests of the shareholders in the face of illegality by the host country. The reconciliation of the rules to incorporate creditors as one of the stakeholders will be a challenge as corporates will have to be convinced to sit on the negotiable table with representation from creditors themselves. As per a recent discussion paper by the OECD, a further issue has arisen in the issue of implementation of the treaty obligations which questions the right to regulate that exists with the countries.[58] While these are general exceptions and provide for the safety net for protection of and exercise of regulatory powers, they often result in the breach of treaty obligations, even though fair and equitable treatment has been promised. The idea of using investment treaties to protect the rights of creditors may face the ultimate

similarly ranked under foreign and local law, in the foreign proceeding) and against breaches of due process.24 Ordinary private international law rules, such as consent, residency, presence in, or submission to, the foreign forum, which apply to commercial judgments generally, would not be determinative to the recognition and enforcement process when insolvency-related judgments/orders emanate from a main proceeding.

[56] Irit Mevorach & Adrian Walters, *The Characterization of Pre-insolvency Proceedings in Private International Law*, 21 EUR BUS ORG LAW REV, 855 (2020).

[57] Andrew Kerner & Jane Lawrence, *What's The Risk? Bilateral Investment Treaties, Political Risk And Fixed Capital Accumulation*, 44 B. J. POL. S. 107, (Jan. 2014).

[58] OECD, *The interaction between investment treaty obligations and the 'right to regulate': A scoping paper*, Directorate for Financial and Enterprise Affairs Investment Committee, DAF/INV/TR2/WD(2025)10/REV1 (Mar. 2, 2026).

challenge in terms of countries' sovereign right to regulate. In this scenario it will be useful to evaluate the option of modified universalism with stronger cross border insolvency laws coupled with standard acceptable investment terminologies according enough protection to all stakeholders.

VII. Conclusion

It is not incorrect to state that the insolvency regime internationally is composed of various model laws and principles, yet there is a dichotomy in the acceptance by one against the other by the states. Whether it is laws relating to Centre Of Main Interest, Model Law on Cross Border Insolvency or UNCITRAL Model Law on Recognition and Enforcement of Insolvency related Judgements, the natural instinct of the state courts/judicial mechanism to protect interests of their own citizens and economy using their own specific state laws more often than not takes precedence over the greater good of promoting continued economic collaboration and growth. Most of the states and local stakeholders tend to take a myopic view of protecting the existing assets rather than looking for a viable long-term solution in which the corporate can be seen as a going-concern while at the same time allowing for preservation of rights of the stakeholders. In this scenario the view taken by some commentators of agreements between the countries on a one-on-one basis is likely to be very fruitful. With each country having a unique economic, legal and political landscape it is essential that till such time universalistic approach or a semi-universalistic approach may be uniformly adopted, the territorial rules may be reconciled through bilateral investment treaties and subsequently through multilateral investment treaties eventually paving the way for uniform international insolvency law. Thus, the researcher rests her case that incorporating insolvency clauses within the investment agreements would help drive economic growth while protecting and preserving the rights of the stakeholders.

INDIA'S GREEN FINANCE PUZZLE: CHARTING A LICENSING FRAMEWORK BETWEEN LENDING MANDATES AND MARKET-DRIVEN SOLUTIONS

*Debanshu Mukherjee and Varsha S. Banta**

Abstract

India faces a critical climate investment gap because private capital is deterred by the high-risk, long-term nature of green projects. While voluntary actions have fallen short, rigid mandatory targets risk distorting the financial market.

This paper advocates for a regulatory "middle path" that de-risks green investments to "crowd-in" private capital, evaluating the legal feasibility of two distinct implementation models under the Reserve Bank of India ("RBI"). The first model proposes a licensed "green bank" category under Section 22 of the Banking Regulation Act, 1949, creating a bespoke regulatory framework. The second model proposes an in-house green banking arm within the RBI, drawing precedent from the UK's former Green Investment Bank and the European Investment Bank.

The paper is structured to systematically build this case across five sections. Section I argues that erratic international climate finance makes a domestic, RBI-led "middle path" essential to balance regulation with business freedom. Section II maps India's current legal landscape for green debt, analysing existing RBI guidelines, Securities & Exchange Board of India ("SEBI") regulations, and landmark judicial rulings. Section III establishes the core regulatory pillars necessary to build a viable green banking framework, while Section IV evaluates the structural design of the two proposed models. Finally, Section V outlines a practical reform roadmap for the RBI to implement differentiated banking for climate finance, drawing inspiration from India's successful rollout of "payments banks" following the 2014 Nachiket Mor Committee recommendations.

Keywords: Reserve Bank of India, Green Banking, Climate Finance, Central Banks, Banking & Finance Law

I. The Climate Investment Imperative and India's Challenge

The United Nations Framework Convention on Climate Change ("UNFCCC") defines 'climate finance' as local, national or transnational financing, drawn from public, private and alternative sources of financing that seeks to support mitigation and adaptation actions that will address climate change.[1] Alternatively, multilateral financial institutions such as the International Monetary Fund ("IMF") do not offer standalone definitions of 'climate finance', but look to inculcate it within their practices to ensure their broader mandate of promoting global macroeconomic and financial stability.[2] Some argue that 'climate finance' is a narrower subset of the broader concept of 'sustainable finance', which leans to a three-pronged measure of sustainability for financial investments, namely environmental, social and governance (ESG) considerations.[3]

Irrespective of nomenclature and its corresponding scope, the recognition of the need for *climate-positive investments* remains universal. Notably, this recognition is rooted in international conventions and multilateral agreements such as the UNFCCC, the Kyoto Protocol and the Paris Agreement.[4] These are global acknowledgements of the effects of climate change and the need for a systematic response, through, among others, global financial commitments.

	UNFCCC (1992)	**Kyoto Protocol (1997)**	**Paris Agreement (2015)**
Objective	To stabilize greenhouse gas concentrations at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system	To *operationalise* the UNFCCC; by committing industrialized countries and economies in transition to limit and reduce greenhouse	To provide a specific threshold for GHG emissions; to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels"

* Debanshu is one of the Co-founders of the Vidhi Centre for Legal Policy. He led the Vidhi team that advised the government on designing and drafting India's Bankruptcy Code and its subsequent implementation. He also recently advised the government on the drafting of India's Securities Markets Code, a law proposing to harmonize and consolidate the laws relating to India's securities markets. He has deposed before four Parliamentary committees examining financial sector legislation and business reforms. Varsha is an India-qualified lawyer, and currently, an LL.M. candidate at Columbia Law School. She is a former Senior Resident Fellow at the Vidhi Centre for Legal Policy, where she advised the Government on economic legislation, such as, the Corporate Laws (Amendment) Bill, 2026 and the Insolvency & Bankruptcy Code (Amendment) Bill, 2025. Prior to Vidhi, Varsha practiced as a transactional attorney. The views expressed in this article are personal.

[1] United Nations Climate Change, *Introduction to Climate Finance*, https://unfccc.int/topics/introduction-to-climate-finance.

[2] Zeineb Ben Yahmed et al, *Primer for Climate-related Engagement with the IMF: Realizing the Potential of the Resilience and Sustainability Facility*, CLIMATE POLICY INITIATIVE (2025) https://www.climatepolicyinitiative.org/publication/primer-for-climate-related-engagement-with-the-imf/

[3] World Bank Group, *Sustainable Finance*, (Aug. 5, 2021) https://www.worldbank.org/en/topic/financialsector/brief/sustainable-financ

[4] Introduction to Climate Finance, *supra* note 2.

	UNFCCC (1992)	**Kyoto Protocol (1997)**	**Paris Agreement (2015)**
		gases (GHG) emissions in accordance with agreed individual targets	and pursue efforts "to limit the temperature increase to 1.5°C above pre-industrial levels
Nature of commitment	**Article 4, Paragraph 5**. The developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, **facilitate and finance**, as appropriate, the transfer of, or access to, environmentally sound technologies and knowhow to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention. In this process, the developed country Parties shall support the development and enhancement of endogenous capacities and technologies of developing country Parties. Other Parties and organisations in a position to do so may also assist in facilitating the transfer of such technologies.	**Article 10, Paragraph (c)**: Cooperate in the promotion of effective modalities for the development, application and diffusion of, and take all practicable steps to promote, **facilitate and finance**, as appropriate, the transfer of, or access to, environmentally sound technologies, know-how, practices and processes pertinent to climate change, in particular to developing countries, including the formulation of policies and programmes for the effective transfer of environmentally sound technologies that are publicly owned or in the public domain and the creation of an enabling environment for the private sector, to promote and enhance the transfer of, and access to, environmentally sound technologies;	**Article 9, Paragraph 3**: As part of a global effort, developed country Parties should continue to **take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions**, **including supporting country-driven strategies**, and taking into account the needs and priorities of developing country Parties. Such mobilisation of climate finance should represent a progression beyond previous efforts.
Nature of signatory to whom commitment applies	Developed country parties	All parties	Developed country parties

	UNFCCC (1992)	**Kyoto Protocol (1997)**	**Paris Agreement (2015)**
Whether India a signatory	Yes	Yes	Yes

Table 1*. *Climate commitments under international legal instruments

These international commitments to support climate finance needs are well-intentioned given that they place obligations on developed economies to overcome historical economic inequalities as frequently highlighted by TWAIL scholars of international law.[5] However, there remain 2 (two) key gaps in their actualisation towards the intended recipients, i.e., emerging markets and developing economies ("EMDEs") such as India.

First, signatory commitments as envisaged under conventions such as the UNFCCC, Kyoto Protocol, and Paris Agreement are often critiqued for being paper tigers,[6] as there are no common enforcement agents, or hard sanctions for failures to comply with such agreed commitments. As a result, financial support as 'committed' towards climate change mitigation remains sporadic and inadequate at the global stage, without enforceable and actionable legal anchors to ensure such financial flows.

Second, a lion's share of these commitments is required to be fulfilled by *developed country parties*. Unfortunately, the inflow of foreign investments from one signatory party (here, a developed economy) to another signatory party (here, an EMDE) does not occur in a silo. A number of considerations such as foreign investment policy, domestic investment mandates and funding priorities, geopolitical risk, and returns on investment (which some would argue to be the most crucial investment block) are relevant for low-carbon and climate-resilient projects.[7] *It is also relevant to note that financing decisions are always preceded by a financing opportunity cost*. Therefore, in order for the developing country to meet such financing commitments (through public or state funding), it is crucial that contributions rank as a high priority. However, if state funds are earmarked for domestic funding requirements *or other* higher-ranking international contributions, commitments may not be met.

Alternatively, such international funding may even arise from private sources within such investor country parties, such as through private debt or equity investments[8] into the EMDE.

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[5] James Thuo Gathii, *The Agenda of Third World Approaches to International Law (TWAIL) in* INTERNATIONAL LEGAL THEORY: FOUNDATION AND FRONTIERS 153-173 (JL Dunoff and M.A Pollacks eds, 2022).

[6] Frederick L. Kirgis, *Enforcing International Law,* 1 AM. J. IL (1996)

[7] Jan Corfee- Morlot et al, *Towards a Green Investment Policy Framework: The Case of Low-Carbon, Climate Resilient Infrastructure* (Organisation for Economic Co-operation and Development, Environment Working Paper No. 48, 2012)

[8] Climate Policy Info Hub, *The Diverse and Extensive Global Landscape of Climate Finance Flows*, https://climatepolicyinfohub.eu/node/77/pdf.

However, even if the investment climate and regulatory framework for the investee EMDE is open and free to obtain this climate-positive funding, the buck stops with the investment goals of the private investor and overall investment policy (and permissibility) of the investor's country. For example, India's foreign direct investment policy permits automatic (i.e., without government approvals) investments in centrally registered power exchanges, with a cap of 49% equity ownership, subject to attendant investment conditions.[9] *However, this in itself is not sufficient to attract investments from investor country X, if the domestic investment policy appears to incentivise local investments over foreign investments into their renewable electricity sector.*

Arguably, therefore, complete reliance on international sources of climate finance (whether public or private) is not a sound option. Simultaneous to such sporadic sources of climate finance, India's financing needs continue to rise. Per the Comptroller and Auditor General of India, the country's annual climate finance needs are estimated to increase substantially, reaching well beyond $10 trillion by 2050. Domestically, climate finance requirements are currently met through domestic public finance (climate-focussed funds, budgetary allocations, and concessionary schemes and subsidies), and domestic private finance (debt finance, risk guarantee facilities, and equity contributions).[10]

The problem that arises, therefore, is a gap in climate financing levels primarily due to the erratic nature of international grants and private investments due to investor (state) policy and priorities. Additionally, domestic flows of climate finance are mired particularly by (private) investor reticence arising due to a lack of regulatory mandates and completeness. Accordingly, this paper will propose the adoption of a "middle path" approach that balances regulatory impetus with market-based mechanisms to bridge the green finance gaps through mobilisation of greater debt.

II. Deep Diving into India's Current Legal Landscape for Climate Debt Finance

A. Approach of RBI

The RBI's approach to climate finance is anchored on the twin pillars of managing the financial risks stemming from climate change and facilitating the flow of credit to green and sustainable activities. The framework is evolving to align with global best practices while being tailored to the specific needs and developmental priorities of the Indian economy.

The current approach of the RBI to understanding and regulating climate finance is largely elaborated in its Discussion Paper on Climate Risk and Sustainable Finance released in July

[9] Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Government of India, Consolidated FDI Policy Circular of 2020 (Oct. 15, 2020)

[10] DIVYA SINGH, CENTRE FOR BUDGET AND GOVERNANCE ACCOUNTABILITY, CLIMATE FINANCE ARCHITECTURE IN INDIA (2017)

2022.[11] This paper laid out the RBI's initial thinking on the subject, identifying two primary types of climate-related financial risks for regulated entities:

- *Physical Risks:* Arising from the direct impact of climate and weather-related events, such as floods, droughts, and cyclones, which can damage assets and disrupt economic activity.
- *Transition Risks***:** Stemming from the process of adjustment towards a low-carbon economy, including changes in policy, technology, and consumer preferences that can impact the valuation of carbon-intensive assets.

Building on this, the RBI has introduced several key measures:

Framework for Acceptance of Green Deposits

In April 2023, the RBI issued a comprehensive Framework for Acceptance of Green Deposits ("Green Deposit Framework")[12], providing a fillip to the mobilisation of resources for green financing. This framework allows regulated entities to accept interest-bearing deposits with the specific mandate of deploying the proceeds towards green projects and activities. The guidelines aim to protect the interests of depositors, prevent "greenwashing", and augment the flow of credit to the green sector. Further, it specifies eligible green activities and projects, requires board-approved policies and a financing framework, and mandates third-party verification of the use of funds.

(i) Draft Guidelines on Disclosure Framework on Climate-related Financial Risks, 2024

A significant step towards enhancing transparency and accountability was taken in February 2024 with the release of the Draft Guidelines on Disclosure Framework on Climate-related Financial Risks ("Draft Disclosure Guidelines")[13]. These guidelines, applicable to a wide range of regulated entities including banks and non-banking financial companies (NBFCs), are aligned with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD).[14] The proposed framework mandates disclosures across four key thematic areas:

- *Governance***:** The board's oversight and management's role in assessing and managing *climate*-related risks and opportunities.
- *Strategy***:** The actual and potential impacts of climate-related risks and opportunities on the entity's businesses, strategy, and financial planning.

[11] RESERVE BANK OF INDIA, DISCUSSION PAPER ON CLIMATE RISK & SUSTAINABLE FINANCE (2022).

[12] RESERVE BANK OF INDIA, FRAMEWORK FOR ACCEPTANCE OF GREEN DEPOSITS (2023..

[13] RESERVE BANK OF INDIA, DRAFT DISCLOSURE FRAMEWORK ON CLIMATE-RELATED FINANCIAL RISKS (2024).

[14] Task Force on Climate-related Financial Disclosures, *Recommendations*, https://www.fsb-tcfd.org/recommendations/ (last visited Sep. 5, 2025).

- *Risk Management*: The processes for identifying, assessing, and managing climate-related risks.
- *Metrics and Targets***:** The metrics and targets used to assess and manage relevant climate-related risks and opportunities.

These disclosures are intended to provide stakeholders, including investors and regulators, with a clearer understanding of the climate-related financial risks faced by regulated entities.
(ii) Sovereign Green Bonds

The RBI has also been instrumental in the issuance of Sovereign Green Bonds on behalf of the Government of India. These bonds are a crucial tool for raising funds from the market to finance public sector projects that contribute to reducing the carbon intensity of the economy. The proceeds from these bonds are earmarked for projects in renewable energy, clean transportation, sustainable water and waste management, and other green initiatives. This not only provides dedicated financing for sustainable development but also helps in developing a domestic market for green instruments.

(iii) Other Statutory Anchors for RBI Powers

The RBI's authority to frame regulations and issue guidelines on climate financing and risk management is derived from its broad powers under the BR Act. While the BR Act does not explicitly mention "climate change" or "sustainable finance", several sections provide the legal basis for the RBI's actions in this domain.

- *Section 21: Power of RBI to control advances by banking companies*: This section empowers the RBI to determine the policy in relation to advances to be followed by *banking* companies. This power can be utilized to direct lending towards green and sustainable sectors and to stipulate conditions for financing activities that may have adverse environmental impacts.

- *Section 35A: Power of the RBI to give directions*: This is a crucial provision that allows the RBI to issue directions to banking companies in the public interest, in the interest of banking policy, or to prevent the affairs of any banking company from being conducted in a manner detrimental to the interests of the depositors or the banking company itself. The growing recognition of climate-related risks as a threat to financial stability brings such regulatory actions well within the ambit of "public interest" and sound "banking policy".

- *Section 36: Further powers and functions of RBI*: This section grants the RBI a wide range of powers to ensure the proper management of banking companies, including the power to caution or prohibit banking companies against entering into any particular transaction or class of transactions. This can be invoked to mitigate exposure to high-risk, carbon-intensive sectors.

Green banking in India is evolving from a secondary corporate responsibility into a fundamental regulatory and structural imperative. Conceptually, it represents a departure from traditional "sector-agnostic" banking toward a specialized lending mandate designed to bridge the chasm between the supply of green credit and the high-risk, long-term nature of climate transition projects. This framework is built upon the statutory foundations of the Banking Regulation Act, 1949, which allows for "differentiated banking" to serve specific economic objectives. By utilizing the licensing authority under Section 22, the legal architecture aims to move beyond voluntary measures toward a "middle path" that provides a formal regulatory anchor. This approach is intended to "de-risk" green investments and "crowd-in" private capital, effectively transforming the banking sector from a passive observer of climate risk into an active facilitator of India's fundamental right to a clean and healthy environment.

B. Approach of SEBI

In 2023, the SEBI introduced a series of regulatory reforms aimed at strengthening the green finance ecosystem. These measures encompassed amendments to the regulatory framework governing green debt securities,[15] primarily targeting commercial issuers, regulatory guidance for Environmental, Social, and Governance (ESG)-oriented mutual funds, which incorporate ESG considerations into investment decisions,[16] and a revised Business Responsibility and Sustainability Reporting (BRSR) framework, mandatorily applicable to the top 1000 listed companies by market capitalisation.[17]

In continuation of its efforts, SEBI issued a Consultation Paper in August 2024 titled "Expanding the Scope of Sustainable Finance",[18] proposing the inclusion of new categories of debt instruments, namely social bonds, sustainable bonds, and sustainability-linked bonds, to be collectively classified as ESG debt securities, alongside existing green debt securities. Additionally, SEBI proposed the introduction of a novel category of Sustainable Securitised Debt Instruments (SSDIs). The Consultation Paper also emphasised post-issuance external verification for ESG debt instruments and SSDIs, aligning with the Government of India's Sovereign Green Bond (SGB) Framework, to mitigate risks of greenwashing from the investor's perspective.

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[15] Securities and Exchange Board of India (Issue and Listing of Non-Convertible Securities) Regulations, 2021, Regulation 2(1)(q).

[16] Securities and Exchange Board of India, Circular SEBI/HO/IMD/IMD-I–PoD1/P/CIR/2023/125 (July 20, 2023).

[17] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Regulation 34(2)(f).

[18] SECURITIES AND EXCHANGE BOARD OF INDIA, CONSULTATION PAPER ON EXPANDING THE SCOPE OF SUSTAINABLE FINANCE (2024).

Subsequently, in December 2024, SEBI operationalised the framework by introducing a unified classification of ESG debt securities,[19] encompassing green debt securities, social bonds, sustainability bonds, sustainability-linked bonds, and analogous instruments, irrespective of nomenclature. The proposal concerning SSDIs remains under active consideration.

C. *Supreme Court of India: Right against Climate Change as a Fundamental Right under Articles 14 & 21*

On March 21, 2024, the Supreme Court of India ("SC") delivered a landmark ruling in the case of *MK Ranjitsinh & Others v. Union of India & Others,*[20] which dealt with a conflict between two important but competing environmental goals: promoting solar power and protecting an endangered species.

The case focused on the Great Indian Bustard (GIB), a critically endangered bird found mainly in Rajasthan and Gujarat. Conservationists argued that overhead power lines, especially those connected to solar and wind energy projects, were a major threat to the bird's survival, as they often led to deadly collisions. They requested that these lines be moved underground in key habitats. On the other hand, the government and power companies warned that undergrounding all power lines would be extremely expensive and technically difficult, especially for high-voltage lines. They stressed that such a move could slow down India's shift to renewable energy, which is crucial for fighting climate change.

The SC observed that India, as a signatory to international environmental agreements such as the Kyoto Protocol and the Paris Agreement, has undertaken binding commitments to mitigate climate change by reducing greenhouse gas emissions and transitioning to renewable energy sources. A key component of these obligations includes achieving approximately 50% of its cumulative installed electric power capacity from non-fossil fuel-based sources by the year 2030. Most significantly however, in reliance on its earlier jurisprudence in *MC Mehta v. Kamal Nath,*[21] *Karnataka Industrial Areas Development Board v. C. Kenchappa,*[22] and *Bombay Dyeing & Co. Ltd v. Bombay Environmental Action Group,*[23] the SC reaffirmed that the right to a clean and healthy environment is an integral part of the fundamental right to life under Article 21 of the Constitution. It further held that climate change poses a serious threat to this right, and may also result in a violation of Article 14, as its adverse impacts are disproportionately borne by vulnerable populations. Arguably, the ruling is a watershed moment underscoring India's legal and policy stance on climate change mitigation – and by

[19] *The Securities and Exchange Board of India ("SEBI"), in December 2024, amended the Securities and Exchange Board of India (Issue and Listing of Non-Convertible Securities) Regulations, 2021 ("NCS Regulations") to introduce a new asset class of 'ESG debt securities' that includes green debt securities, social bonds, sustainability bonds and sustainability-linked bonds*

[20] M.K. Ranjitsinh v. Union of India, (2024) INSC 280.

[21] M.C. Mehta v. Kamal Nath, (2000) 6 SCC 213.

[22] Karnataka Indus. Areas Dev. Bd. v. C. Kenchappa, (2006) 6 SCC 371.

[23] Bombay Dyeing & Mfg. Co. v. Bombay Envtl. Action Grp., (2006) 3 SCC 434.

extension the significance of economic support to secure these rights subsumed within Article 14 and 21 of the Constitution.

III. A "Middle Path" Solution: Balancing Regulation and Market Mechanisms

Two key challenges emerge from the above outline of India's climate finance framework:

First, <u>the above frameworks are entirely voluntary in nature</u>. Similar to the nudging effect of international commitments under the UNFCCC, Kyoto Protocol, and Paris Agreement, the regulatory frameworks in India encourage climate financing, but do not mandate it with consequences for failures to comply. A point of distinction must be made here in terms of the nature of the instrument. International conventions or treaties serve as a source of international law and are guided by the *bona fide* commitments of signatory states to comply with provisions of such treaties. The principle of *pacta sunt servanda (agreements must be kept)* is enshrined in Article 26 of the Vienna Convention on the Law of Treaties,[24] and requires that "every treaty in force be binding upon the parties to it and must be performed by them in good faith".

In contrast, the regulatory frameworks noted in Section II above derive their authority from relatively harder sources of law, particularly statutes passed by the houses of parliament. Regulatory instruments are ordinarily characterized by four pillars:[25]

- *Pillar 1:* The regulatory instrument must be aimed at a specified *target*, which is the subject of the regulation and bearer of non-compliance costs.
- *Pillar 2:* Such instruments must be framed and enforced by a *regulator*.
- *Pillar 3:* Such instruments must make positive or negative *commands*, i.e., regulatory directions to do or not do certain acts.
- *Pillar 4:* The instrument must set out *consequences* for non-adherence to commands.

For green banking, the target (*regulated entities under the aegis of RBI*) and regulator (RBI) are clear. Arguably, what remains ambiguous is the regulatory command and consequences for non-adherence to such command. Due to this lack of regulatory clarity, green lending flows to meet climate finance needs are sporadic at best. For example, the RBI's (regulator) Green Deposit Framework intends "to encourage regulated entities (REs) (*target*) to offer green deposits to customers, protect interest of the depositors, aid customers to achieve their sustainability agenda, address greenwashing concerns and help augment the flow of credit to green activities/projects". However, the framework does not set out a regulatory mandate or consequences for failure. *It is important to note here that even mandatory frameworks may be non-starters and face resistance from regulated entities in the absence of sufficient regulatory cushion and adoption guidance.* Per news reports from earlier this year, the RBI is nearing finalisation of the Draft Disclosure Guidelines basis stakeholder consultation. Further

[24] Vienna Convention on the Law of Treaties, May 23, 1969 1155 U.N.T.S. 331

[25] Cary Coglianese and Evan Mendelson, *Meta-Regulation and Self-Regulation, in* THE OXFORD HANDBOOK OF REGULATION 146-148 (Robert Baldwin ed., 2010).

regulatory support may also be expected as the RBI is considering the issuance of a guidance note for lenders.[26] There is, therefore, a palpable move towards a more 'complete' regulatory model for climate lending.

Second, the scope of these regulatory frameworks remains limited to second order regulatory concerns, such as disclosures and reporting norms. The first order concern of good regulation must be a strong foundation rooted in the above pillars. At present, neither the RBI, nor other financial sector regulators provide a comprehensive licensing, governance, and reporting-disclosure framework to govern climate financing *for a class of regulated entities.*

Therefore, it is proposed that the RBI consider adopting a 'middle path' as a strategic approach to green finance, distinct from purely voluntary or mandatory frameworks. The objective is to use a regulatory anchor (through licensing or other eased investment entry norms in existing statutes (the BR Act), or through an internalised green financing wing as a part of its developmental function) to de-risk climate financing in the Indian debt markets.

IV. Legal Models for Implementing the Middle Path Solution for Green Banks in India

Green banks in India may be implemented through one of the following models:

A. Model 1: Creation of licensed 'green banks' under Section 22 of the BR Act

India enjoys a diverse banking ecosystem, comprising, *inter alia*, scheduled commercial banks, public sector banks, foreign banks, private sector banks, cooperative banks, and certain differentiated banks (payments banks, small finance banks, local area banks). However, these existing banks may be unsuited to meeting the specialised needs of green banking, due to a mismatch in lending objectives.[27] These are set out in ***Table 2***. below. Capacity issues may also arise as a result of such divergent objectives.

Nature of bank	Overview
Scheduled Commercial Bank (SCB)	An SCB is a commercial bank which has been included in the Second Schedule of the Reserve Bank of India Act, 1934 ("RBI Act"). Conditions for inclusion in the Second Schedule of the RBI Act are as stated in Section 42(6)(a) of the RBI Act.
Public sector banks (PSB)	PSBs are constituted under the State Bank of India Act, 1955 and Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970/Banking Companies (Acquisition

[26] Businessworld, *RBI Nears Final Climate Risk Disclosure Norms For Lenders* (Mar. 14, 2025) https://www.businessworld.in/article/rbi-nears-final-climate-risk-disclosure-norms-for-lenders-550705

[27] Department of Financial Services, Ministry of Finance, Government of India, *Banking FAQ* (Aug. 24, 2025), https://financialservices.gov.in/beta/en/banking-faq

Nature of bank	Overview
	and Transfer of Undertakings) Act, 1980.
Foreign banks	Foreign banks have their headquarters outside India but run their offices as a private entity at any other location in India. Such banks are under an obligation to operate under the regulations provided by the RBI as well as the rule prescribed by the parent organisation located outside India.
Private sector banks	Private sector banks are 'banking companies' licensed to operate in India under BR Act.
Cooperative banks	Cooperative banks are financial entities established on a co-operative basis and belonging to their members with the objective to provide rural financing and micro-financing. Cooperatives Banks are registered under the Cooperative Societies Act, 1912. These are regulated by the Reserve Bank of India and National Bank for Agriculture and Rural Development (NABARD) under the Banking Regulation Act, 1949 and Banking Laws (Application to Cooperative Societies) Act, 1965. Some state-specific laws are also applicable to the sector depending on the location..
Payments banks	Payment banks are public limited companies licensed under BR Act, with specific licensing conditions restricting its activities mainly to acceptance of demand deposits and provision of payments and remittance services.
Small finance banks (SFB)	SFBs are licensed under BR Act and created with an objective of furthering financial inclusion by primarily undertaking basic banking activities to un-served and underserved sections including small business units, small and marginal farmers, micro and small enterprises and other underserved sections.
Local area bank (LABs)	LABs were introduced in 1996 as new private local banks with jurisdiction over 2 or 3 contiguous districts to enable the mobilisation of rural savings and make them available for investments in the local areas and to bridge the gaps in credit availability & enhance the institutional credit framework.

Table 2. Overview of existing bank classes in India

Notably, the above existing banking categories are designed to cater to specific debt demands. Green banks, however, have a specific lending mandate. These kinds of banks provide an adaptable model to organize and mobilize funds for climate initiatives.[28] Specific reference to the blueprint for such adaptation may be made to SFBs, and most recently, to payments banks; both of which are licensed under Section 22 of the BR Act and have been established to cater to a limited-objective lending mandate.

Section 22 of the BR Act[29] prohibits any 'banking company' from carrying on 'banking business' in India unless it holds a license issued by the RBI. The issue of such license may be subject to any additional conditions as the RBI deems fit. In terms of structure, 'banking companies' transacting in the business of banking must be those companies as defined under Section 3 of the Companies Act, 1956 (correspondingly, Section 2(20) of the Companies Act, 2013), and include foreign companies. It may be noted that Section 6 of the BR Act defines a 'banking business' in respect of permissibility of business operations. These include borrowing and lending money, dealing in negotiable instruments and securities, trading in foreign exchange, acting as agents, managing public and private loans, engaging in guarantee and indemnity business, managing properties and estates, executing trusts, supporting employee welfare initiatives, constructing or altering buildings for business purposes, and acquiring or merging with similar businesses. Banking companies may also perform any activity incidental to or supportive of their business.

Prior to the grant of a banking license, the RBI considers a number of factors to ensure soundness of the applicant's banking business. The RBI may consider, through inspections or through any other means, whether the company is or will be in a position to pay its present or future depositors in full as their claims accrue. From a governance point of view, it may also consider that the affairs of the company are not being, or are not likely to be conducted in a manner detrimental to the interests of its present or future depositors and that the general character of the proposed management of the company will not be prejudicial to the public interest or the interest of its depositors. It may also assess whether the company has adequate capital structure and earning prospects, and that the public interest will be served by the grant of a licence to the company to carry on banking business in India. *Most importantly in the context of green banks, it may consider that having regard to the banking facilities available in the proposed principal area of operations of the company, the potential scope for expansion of banks already in existence in the area and other relevant factors the grant of the licence would not be prejudicial to the operation and consolidation of the banking system consistent with monetary stability and economic growth*. The RBI may also consider any other condition, the fulfilment of which would, in its opinion, be necessary to ensure that the carrying on of banking business in India by the company will not be prejudicial to the public interest or the interests of the depositors.

As seen from ***Table 2***, green banks are a novel and developing concept in India. The existing classes of banks cater to specific lending needs such as serving un-banked and under-banked

[28] Green Finance Institute, *Green Bank Design Platform* (Aug. 24, 2025), https://www.greenfinanceinstitute.com/insights/green-bank-design-platform/

[29] The Banking Regulation Act, 1949, No. 10 of 1949, § 22 (India).

classes. While green lending may account for a sliver of the lending portfolio for private banks and SCBs, they may not account for the lender’s predominant loan profile. This may be attributed to the following market reasons:

- In terms of credit supply, there exists a sizable investment gap between current and projected investment levels. A study by the International Monetary Fund (IMF) shows that the private sector share of climate finance must rise from 40% to 90% of the total in emerging and developing countries by 2030.[30] Therefore, while much of the investment needed for a low-carbon transition will need to come from private financial sources, such as from capital market investors, it will also need to come from banks, including through the creation of new money and credit via lending. Notably, the lending risks under both private and public green credit are largely ring fenced by contractual terms due to the lack of an overarching ‘green finance’ regulatory framework. This creates a disincentive to increased green finance flows.

- In terms of credit demand, banks may be a more attractive funding option for green projects vis-a-vis private sector investors, due to the lower costs of capital, relatively higher standardisation of lending terms, certainty of fund availability, and ease of collateralisation. In contrast, private money may come with more strings attached. However, even with bank attractiveness, there is no real push for banks to engage in sustained green lending. According to a World Bank Group survey, climate financing is five percent or less of the lending portfolio for nearly 60 percent of emerging market and developing economies (EMDE) banks—with 28 percent providing no climate financing at all.[31] For India, this may be attributable to the fact that while there are enabling and voluntary frameworks formulated by the RBI, there is no specialised regulatory framework which tugs either at benefits or consequences for green lending, for banks to authentically shift credit flows to meet such demands for green finance.

Green banks are intended to cater to a specific financing gap in India’s climate funding journey. *The lending mandate for such banks, therefore, is not likely to overlap with that of existing banks*. Therefore, there is little scope for saturation of banking businesses in existing bank categories, leading to impetus for the RBI to consider a ‘no-prejudice’ effect in the event of grant of license to an Indian green bank. Additionally, this new bank class may address the dual market challenges stated above, which arise largely due to the lack of regulatory cushion and market incentives. ***Figure 1*** below illustrates the contours of Section 22 of the BR Act.

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[30] Simon Black et al., *World Needs More Policy Ambition, Private Funds, and Innovation to Meet Climate Goals,* IMF BLOG (Nov. 27, 2023), https://www.imf.org/en/Blogs/Articles/2023/11/27/world-needs-more-policy-ambition-private-funds-and-innovation-to-meet-climate-goals

[31] The World Bank, *Chapter 3. Acting on Climate Risk and Climate Finance through Banking Sector, Finance and Prosperity, 2024* https://www.worldbank.org/en/publication/finance-and-prosperity-2024

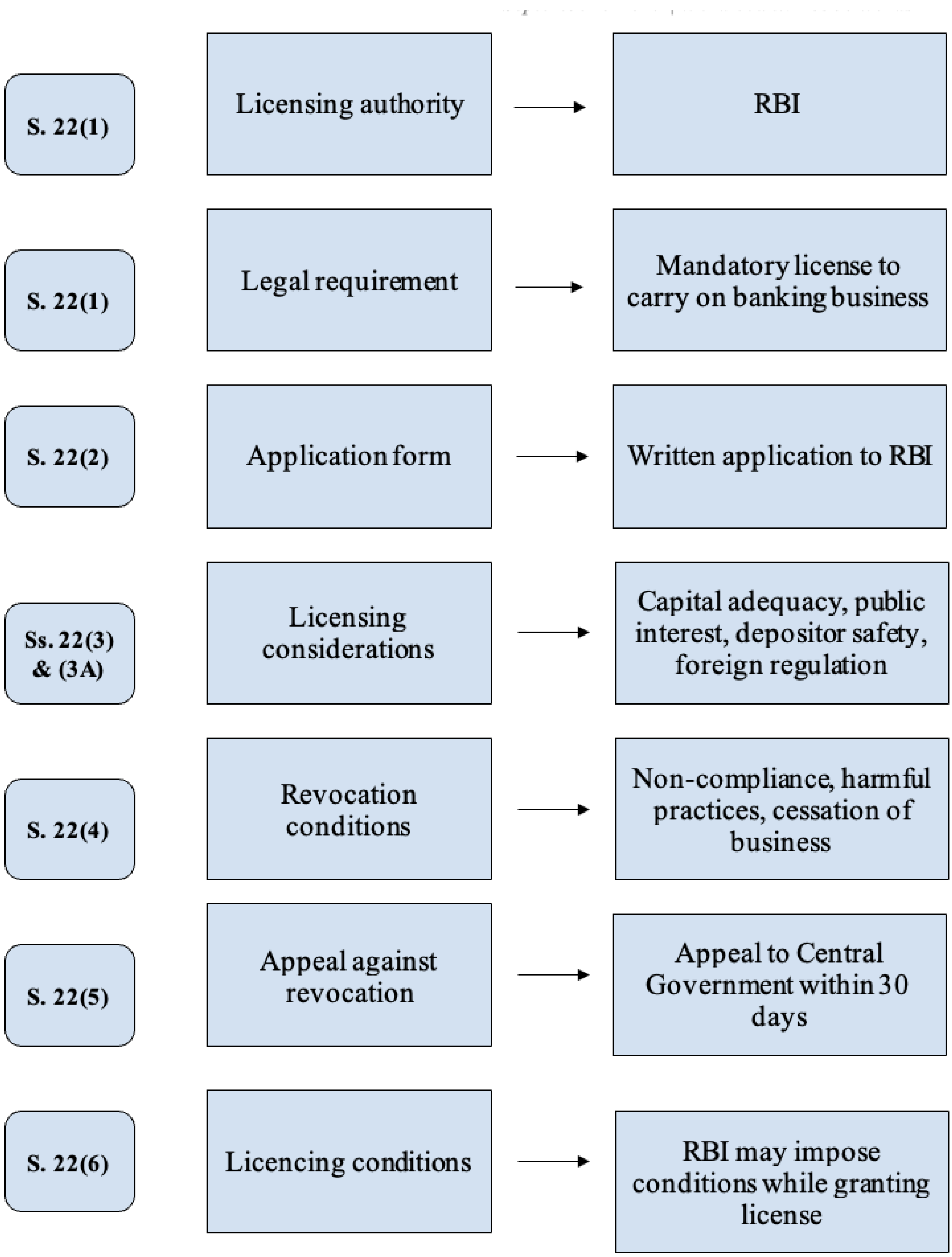

Figure 1: Scheme of Section 22 of BR Act

Therefore, Model 1 may be a more attractive option in terms of regulatory ease per existing licensing norms, and with limited legislative intervention.

Alternatively, certain policymakers argue that *green banking falls within the ambit of a central bank's developmental role*. Central banks are tasked with ensuring price and financial stability through monetary and macroprudential policies. Within these roles, they can also consider climate-related risks, which increasingly threaten economic and financial systems. A major issue in global markets is the mispricing of climate risks due to low carbon prices, slowing the shift toward a low-carbon economy. Without correction, this could hinder efforts to reach carbon neutrality. Although climate policy is primarily a governmental responsibility, central banks can support these goals by incorporating climate risks into their existing mandates, helping align financial systems with broader climate objectives and supporting a smoother transition.[32]

B. Model 2: Establishing an in-house green central banking arm within the RBI

This approach holds precedent in the United Kingdom ("UK") and the European Union ("EU"). Notably, the models in both the UK and EU lean towards either privatisation of the investing body, or private investments, to harness greater climate finance.

- **UK**: In 2012, the UK identified a GBP 330 billion investment gap in green infrastructure projects due to capital markets' illiquidity post-2008 financial sector crisis and limited investor appetite for such high-risk projects lacking a track record of results.[33] To bridge this specific gap, following Parliament-sanctioned committee reports and extensive consultations with stakeholders and industry experts, the government created the Green Investment Bank (GIB). The GIB was an incorporated public company with 100% government share-holding aimed to 'crowd-in' private investments by contributing a share from public funds, thereby substantially mitigating risk in green projects. The GIB recorded remarkable successes by backing 100 green infrastructure projects in the UK and committing over GBP 3.4 billion across energy efficiency, offshore wind, and onshore renewables. It also leveraged a further GBP 8 billion in private capital, equating to around GBP 2.50 for every GBP 1 invested. Interestingly, the UK government had envisaged from the beginning that the GIB would eventually be privatised.[34] In keeping with this intent, in 2017, the government sold its shareholding in GIB to the Macquarie Group (Macquarie). Presently, the GIB is functional under Macquarie as the 'Green Investment Group', with no government stake. This is indicative of long-term state intent to crowd-in and ultimately look to the private sector to lead green investments.

- **EU**: In the EU, the European Central Bank houses an investment arm, the European Investment Bank (EIB). The EIB is owned by the EU member states, with its capital provided by these states through shares (proportionate to the economic weight such member state carries in the EU),[35] and governed by a Board of Governors (consisting

[32] Sayuri Shirai, *Green Central Banking and Regulation to Foster Sustainable Finance*, (ADBI Working Paper, No. 136, 2023), https://doi.org/10.56506/JEMS1821.

[33] Vivid Economics, *The Green Investment Bank: Policy and Finance Context* (Oct. 2011), https://assets.publishing.service.gov.uk/media/5a74979be5274a44083b7e95/12-553-green-investment-bank-policy-and-finance-context.pdf.

[34] Global Infrastructure Hub, *UK - The Green Investment Bank (GIB),* https://cdn.gihub.org/umbraco/media/2630/uk-case-study.pdf.

[35] European Investment Bank Group, *Shareholders*, https://www.eib.org/en/about/governance-and-structure/shareholders/index.htm.

of finance ministers from member states), along with a Board of Directors (consisting of high level treasury officials from member states). In 2019, the EIB Board announced that it would act as the EU's *de facto* 'climate bank' and fully align all financing activities with Paris Agreement commitments. The EIB's climate banking activities manifest across a host of 'green' projects and banking activities. It carries out lending activities to a host of 'green' projects related to renewable energy, sustainable transport, and climate-resilient infrastructure. The EIB also leverages its financial strength to catalyse private investments, particularly in 'green' technologies, by providing loans, guarantees, and equity investments for projects that contribute to climate goals.

V. Conclusion

The RBI should consider replicating a regulatory model utilised most recently for novel, and differentiated banking in India, i.e., for payments banks. As noted above in ***Table 2***, payments banks are public limited companies licensed under the BR Act, with specific licensing conditions restricting its activities mainly to acceptance of demand deposits and provision of payments and remittance services. However, the conceptual genesis of a payment bank came from the findings of the *Committee on Comprehensive Financial Services for Small Businesses and Low-Income Households,* chaired by Dr. Nachiket Mor[36] ("Nachiket Mor Committee Report") and as constituted by the then RBI Governor, Dr. Raghuram G. Rajan. The key finding of the Nachiket Mor Committee Report was the lack of universalised credit and financial services access to low-income households and small businesses across India. Specifically, it recognised the operational difficulties being faced by the existing prepaid payment instrument ("PPIs") such as Airtel Money and Oxigen in India, and noted that these PPIs are, in effect, 'nested payment banks' which would need to partner with a bank (sponsor bank) to hold both the escrow account and to participate in the payments network. In contrast, an independent payments bank would be a direct participant in the payments system and instead of escrow balances with the sponsor bank would hold some combination of CRR and SLR directly with the Central Bank (here, the RBI). As a regulatory design fix, the Nachiket Mor Committee Report directed the existing and new PPI applicants to apply for a 'payments bank licence' under Section 22 of the BR Act, or become business correspondents. It also directed that no additional PPI licences be granted. Payments banks were set up to charter a path towards a cashless economy and bolster financial inclusion for under-banked classes. Per RBI reports, India's financial inclusion index ("FI-Index") shows steady improvement, as India's FI-Index for the year ending March 2025 stands at 67.0.[37] Significant leaps are visible since the conceptualisation and introduction of payments banks in 2014, to the present day. In 2015, a sizable segment of the population, particularly in rural areas, had limited access to formalised financial services. Cash was the preferred mode to conduct everyday transactions. At the time, the digital payments landscape was still in its early stages, with less than 2% of adults using

[36] Reserve Bank of India, *Comprehensive Financial Services for Small Businesses and Low-Income Households* (Jan. 7, 2014), https://rbidocs.rbi.org.in/rdocs/publicationreport/pdfs/cfs070114rfl.pdf.

[37] Press Information Bureau, *Press Note: Financial Inclusion Index of India reaches 67 in 2025,* https://www.pib.gov.in/PressNoteDetails.aspx?NoteId=154980&ModuleId=3 (last visited Sept. 17, 2025).

mobile money. Today, mobile banking penetration paints a different picture. Digital payments in India continue to surge, with a year-on-year (YoY) transactional volume growth of 42% in FY 2023–24, projected to triple by FY 2028–29.[38]

A similar parallel may be drawn to unlock the true potential of green banking in India. While banks have extended credit to climate-resilient sectors such as renewable energy as a part of their overall lending portfolio; lending growth in such sectors has remained slow. The Economic Survey (2024-2025) highlights that gross bank credit deployed towards the renewable energy sector increased from INR 20 billion to INR 70 billion between 2018-2025.[39] *This credit jump is low compared to sectors such as agriculture and industry which showed deployment increases by INR 14.5 trillion, and INR 30.92 trillion, respectively*. Arguably, therefore, green lending in India occupies a limited space under the umbrella of existing banks. The below reform roadmap may be adopted to provide green lending the regulatory nudge and cushion they require, to develop an independent and licensed category of 'green banks' in India under the aegis of Section 22 of the BR Act, akin to payments banks.

Step #1: *Formulation of a policy discussion paper on 'Green Banking Structure in India - The Way Forward' (Green Banking White Paper)*: The RBI could consider conducting policy and regulatory research and review, through the Department of Banking Operations and Development (DBOD) and Department of Economic and Policy Research (DEPR), to formulate a Green Banking White Paper on the state of green banking operations in India.

Step #2: *Constitution of a Committee on Comprehensive Green Banking Services to Support India's Transition to a Low-Carbon Economy (Green Banking Committee)*: The RBI could also constitute a Green Banking Committee composed of stakeholders from the banking sector, senior executives, lawyers and regulatory experts.

Step #3: *Publication of a final report by the Green Banking Committee*: The Green Banking Committee could then publish its report, further to consultations in line with the Terms of Reference, on the feasibility, principles and attendant conditions for the design of a new class of 'green banks' in India (Committee Report).

The constructive power of finance embedded in a well-designed green banking framework will go a long way in helping India meet its climate obligations.

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[38] Kabir Kumar & Dan Radcliffe, *2015 Set to be Big Year for Digital Financial Inclusion in India*, CGAP BLOG (Jan. 15, 2015), https://www.cgap.org/blog/2015-set-to-be-big-year-for-digital-financial-inclusion-in-india.

[39] DEPARTMENT OF ECONOMIC AFFAIRS, DEPARTMENT OF FINANCE, GOVERNMENT OF INDIA, ECONOMIC SURVEY 2024 73-75 (2025).

REINVENTING AND REVIVING THE 1937 STAMP DUTY NOTIFICATION: EXEMPTIONS FOR INTRA-GROUP MERGERS IN PUNJAB

*Manraj Singh Chandpuri**

Abstract

The 1937 Stamp Duty Notification ("Notification") is a colonial-era instrument that was intended to exempt internal mergers and acquisitions ("M&A") from stamp duty. It now survives ambiguously in Punjab under Article 372 of the Constitution, where it lies in administrative silence and judicial confusion. The Emaar MGF demerger in 2018 and original material gathered through a Right to Information ("RTI") inquiry show the ambiguity surrounding the Notification in Punjab. This article argues that the apparent conflict in the case law does not preclude the Notification's continued operation in Punjab. However, the latter judicial position preserves the need for a substance-over-form inquiry into beneficial ownership and the true character of intra-group restructurings. Building on this analysis, the article proposes a Five-Part Test, supported by two model clauses, to assess exemption eligibility. Drawing from comparative jurisprudence, the test seeks to distinguish bona fide restructurings from colourable arrangements without discarding the Notification itself. The colonial era fiscal instrument, conceived in the twentieth century, may be retained by reworking it for the corporate realities of the twenty-first century. In doing so, it responds to the objections presently raised in the Ambuja Cement appeal pending before the Delhi High Court.

Key Words: 1937 Stamp Duty Notification, Substance-over-Form, Intra-Group Corporate Restructuring, Beneficial Ownership Continuity, Anti-Avoidance Doctrine.

I. Introduction

Corporate restructurings have become commonplace in India. Yet, the question of payment of stamp duty with respect to intra-group mergers and demergers remains unsettled. The cause is the uncertainty surrounding the continued operation of the 1937 Notification. The Notification No. 1 dated 16 January 1937 and Notification No. 13 dated 25 December 1937, issued by the Finance Department (collectively, the "**1937 Notification**"),[1] exempts certain intra-group transfers from stamp duty where beneficial ownership remains substantially within the same corporate group.[2] The exemption was designed to facilitate internal corporate restructuring without imposing unnecessary burdens in cases where no external transfer occurs. Even though this exemption has existed for 89 years, its validity and scope remain ambiguous across India.

This ambiguity sits at the confluence of constitutional continuity and fiscal federalism. The 1937 Notification is a pre-Constitution instrument. Stamp duty now falls within the legislative competence of state assemblies. Article 372 of the Constitution preserves laws enacted before the Constitution unless they are officially repealed or modified by the competent legislative or executive authority.[3] The Notification is not automatically rendered void by the adoption of the Constitution. The issue is whether exemptions of this kind continue to subsist by default, or whether their survival depends upon subsequent adoption, repeal, modification, or supersession under the respective state's law.

Indian states have answered this inquiry in uneven practice. Some states have expressly repealed or replaced the Notification, while others have clarified its status through legislation or executive practice. However, the state of Punjab has done neither[4] which has left the Notification astray. This uncertainty in Punjab has multiple legal and commercial consequences.

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* The author is a third-year B.A. LL.B. (Hons.) student at the University Institute of Legal Studies, Panjab University, Chandigarh. The author thanks Mr. Udai Nanda, Mr. Siddharta Kumar, and Ms. Megha Chauhan, at Dua Associates, for their invaluable mentorship during his internship. He assisted them in preparing the RTI that served as a foundation for the empirical portion of this article.

[1] Notification No. 1, Gazette of India, pt. I sec. 1, Jan. 16, 1937 (India); Notification No. 13, Gazette of India, pt. I, sec. 1, Dec. 25, 1937 (India).

[2] *"To remit the stamp duty chargeable under Article 23 and 62 of Schedule 1 to the said Act on instruments evidencing transfer of property between companies limited by shares as defined in the Indian Companies Act, 1913, in cases—*

(i) where at least 90 per cent of the issued share capital of the transferee company is in the beneficial ownership of the transferor company, or

(ii) where the transfer takes place between a parent company and a subsidiary company one of which is the beneficial owner of not less than 90 per cent of the issued share capital of the other, or

(iii) where the transfer takes place between two subsidiary companies in each of which not less than 90 per cent of the share capital is in the beneficial ownership of a common parent company:

Provided that in each case a certificate is obtained by the parties from the officers appointed in this behalf by the Local Government concerned that the conditions above prescribed are fulfilled."

[3] INDIA CONST. art. 372 (1).

[4] *See also* Indian Stamp Act, 1899, § 9 (India) (as applicable to Punjab); Punjab Gov't Gazette, 1947–2024 (No repeal or modification of the 1937 Notification published).

In Punjab, the uncertainty arises due to the combined effect of judicial divergence and administrative silence. An earlier decision of the Punjab and Haryana High Court ("P&H HC") from 1957, treats the 1937 Notification as an instrument facilitating internal corporate reorganisations in which beneficial ownership remained substantially unchanged. A later decision, rendered in 2014, in the Haryana context, cast doubt upon the Notification's continued validity in light of modern company law. At the administrative level, the Emaar MGF demerger and the author's Right to Information correspondence with Punjab revenue authorities reveal the absence of any clear policy governing exemption claims. Together, they reveal the absence of a coherent framework for identifying which intra-group restructurings should be genuinely exempted.

The Indian Stamp Act, 1899 ("Stamp Act") levies duty on conveyances.[5] In *Hindustan Lever and Another v. State of Maharashtra,*[6] the Supreme Court held that NCLT-sanctioned mergers under Sections 230-232 of the Companies Act, 2013[7] are "*conveyances*" as defined under the provisions of the Stamp Act.[8] *Hindustan Lever* does not answer the question of the continued operation of the 1937 Notification, when it clearly exempts such payment.[9] The central issue, therefore, is whether the 1937 Notification still exempts qualifying intra-group mergers in Punjab.

The significance of this question is evident from recent litigation. In *Ambuja Cement Ltd. v. Collector of Stamps,*[10] the Delhi High Court held that a qualifying intra-group scheme fell within the 1937 Notification and rejected the argument that the Notification had been repealed. The judgment is presently under appeal, and underscores the continued vitality of this issue.

The article makes three contributions. *First*, it reconstructs the doctrinal position governing the 1937 Notification in Punjab by arguing that the apparent tension in the case law does not foreclose the Notification's continued operation, and that the governing doctrine warrants a substance-over-form inquiry into the true character of the restructuring. *Second*, it advances a framework for administering the exemption through a 'Five-Part Test' and supporting model clauses. *Third*, it shows the praxis of the framework by arguing that the difficulty does not lie in the historical survival of the Notification, it lies in the lack of a structured exemption regime that is able to address concerns regarding indirect duty avoidance, revenue protection, and public interest. The framework is not limited only to Punjab, it also addresses the issues arising in the pending *Ambuja* appeal.

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[5] Indian Stamp Act, 1899, § 3, sched. I, art. 23 (India).

[6] *Hindustan Lever & Anr. v. State of Maharashtra*, (2004) 9 SCC 438, ¶ 120 (India).

[7] Companies Act, 2013, §§ 230-232 (India).

[8] Indian Stamp Act, 1899, § 2(10) (India).

[9] Shanmuga Sundaram, Ushasi Das & Antara Roy, *Merger and Amalgamation: Stamp Duty on the Value of Immovable Properties in India*, 25 AUSTL. J. ASIAN L. 63 (2024).

[10] *Ambuja Cement Ltd. v. Collector of Stamps,* 2024 DHC 8541 (Del. HC) (India).

A. Various States and Their Responses to the Notification

The significance of Article 372(1) lies in the historic preservation of the 1937 Notification as a matter of constitutional continuity.[11] However, once stamp duty became a state subject in 1950,[12] the continued operation of the Notification depended less on survival and more on how various Indian states would choose to address it. The issue, therefore, shifts from mere survival to how different States choose to repeal, replace, clarify, or prefer to leave it untouched.

Various Indian states have addressed these concerns by introducing their versions of the Indian Stamp Act according to their needs.[13] States like Rajasthan and Gujarat have repealed all old notifications that were not issued under their newly enacted state-specific Stamp Acts.[14] Rajasthan's experience, however, shows that repeal alone does not eliminate all uncertainty. Since, administrative practice may continue to apply the logic of an exemption even after its formal withdrawal.[15]

Haryana has adopted a strict and clear statutory position by including M&A under conveyances in its stamp legislation, the Indian Stamp (Haryana Second Amendment) Act, 2017 ("Haryana Amendment").[16] Furthermore, the Haryana Amendment has excluded the applicability of the 1937 Notification.[17] A duty of 1.5% of the higher property value or consideration is also imposed, and caps the maximum duty payable at ₹7.5 crore.[18] Tamil Nadu has also adopted a similar approach and treats M&A sanctioned by National Company Law Tribunal ("NCLT") as a conveyance.[19]

Maharashtra applies duty on a case-by-case basis under Article 25(da) of the Maharashtra Stamp Act, 1958. Where a duty higher than 5% of the market value of the immovable property

[11] INDIA CONST. art. 372 (1).

[12] INDIA CONST. art. 268; sch. VII, list I, entry 91; list II, entry 63; list III, entry 44; *V.V.S. Rama Sharma v. State of U.P.*, (2009) 7 SCC 234 (India).

[13] A. Sri Hari Nayudu, *Tax Revenue Efficiency in Indian States: The Case of Stamp Duty and Registration Fees* (Nat'l Inst. of Pub. Fin. & Pol'y 2023).

[14] *See* Rajasthan Stamp Act, No. 14 of 1999, § 91 (India); Gujarat Stamp Act, No. 20 of 1958, § 76 & sched. II (India); Bombay Stamp Act, No. 60 of 1958, § 76(2), as applicable in Gujarat (India); *see also Delhi High Court Ends Uncertainty on Stamp Duty for Mergers of Wholly Owned Subsidiaries*, Bar & Bench (Apr. 17, 2024), https://www.barandbench.com/law-firms/view-point/delhi-high-court-ends-uncertainty-stamp-duty-mergers-wholly-owned-subsidiaries (last visited Mar. 9, 2025).

[15] Comptroller & Auditor General of India, *Audit Report on Stamp Duty and Registration Fees: Government of Rajasthan*, Report No. 4 of 2013, at 29 (2013).

[16] Indian Stamp (Haryana Second Amendment) Act, 2017, sched. 1-A, art. 23A (India), *inserted by* Haryana Notification No. Leg. 32/2017, Haryana Gov't Gazette (Nov. 22, 2017) (subjecting orders of amalgamation, merger and demerger under sections 232 and 233 of the Companies Act, 2013 to duty as a conveyance).

[17] *See* Indian Stamp (Haryana Second Amendment) Bill, 2017, Statement of Objects & Reasons (India); *see also* PRS Legislative Research, Bill No. 34 of 2017 (Haryana Legis. Assembly), https://prsindia.org/files/bills_acts/bills_states/haryana/2017/Haryana%20Bill%20No.%2034%20of%202017.pdf (last visited Mar. 10, 2025).

[18] The Haryana Notification No. Leg. 32/2017, art. 23A, Haryana Gov't Gazette (Nov. 22, 2017).

[19] Circular No. 49282/P1/2018, Inspector Gen. of Registration, Chennai (Nov. 20, 2018).

or 0.7% of the aggregate share value is payable.[20] The Maharashtrian approach can be better understood by the approach taken by the Bombay High Court in *Chief Controlling Revenue Authority v. Reliance Industries Ltd.*[21] Herein, the Court held that if a merger involves assets in different states and is sanctioned by each state, the stamp duty would remain payable separately on each state's order. Maharashtra's situation was further clarified by the Apex Court in *State of Maharashtra v. National Organic Chemical Industries Ltd.*,[22] which held that Maharashtra's stamp duty may even be levied on increases in share capital.

B. *Delhi's Approach Regarding The 1937 Notification*

In Delhi, the 1937 Notification has received more direct judicial treatment. In 2009, the Delhi High Court first upheld the validity of the Notification in *Delhi Towers Ltd. v. G.N.C.T. of Delhi.*[23] However, the Delhi government later withdrew the Notification.[24] Despite this, the authorities continued to levy stamp duty on such transfers due to a lack of clarity,[25] leading to numerous disputes.[26] Consequently, this existing confusion was later clarified by the Court in 2024.

The Court, in its judgment in *Ambuja Cement Ltd. v. Collector of Stamps,*[27] upheld the validity of the 1937 Notification, even though the Punjab Stamp (Amendment) Act was extended to Delhi in 1958. It was submitted that the Notification was no longer operative, as it was repealed when the Central Government extended Schedule I-A to Delhi. As a result, the older 1937 Notification allegedly "*did not survive*" as it was never expressly incorporated into the new stamp regime for Delhi.[28] However, the Court held that the Notification was still valid and it exempted stamp duty.[29] Since the Notification remains unrevoked at the central level, its applicability depends on whether individual states have repealed it.

The judgment of the Court in *Ambuja* was appealed in 2025 and is currently pending before a Division Bench.[30] Nevertheless, it continues to hold persuasive value in Punjab, where the

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[20] Maharashtra Stamp Act, 1958, sched. I, art. 25(da), explan. III (India).

[21] *Chief Controlling Revenue Authority v. Reliance Industries Ltd*., 2016 SCC OnLine Bom 1428 (India); *see* Levy of Stamp Duty on Merger Schemes, *CBCL Blog*, Nat'l L. Inst. Univ. (Jan. 3, 2019), https://cbcl.nliu.ac.in/company-law/levy-of-stamp-duty-on-merger-schemes/ (last visited Mar. 9, 2025).

[22] *State of Maharashtra v. National Organic Chemical Industries Ltd*., (2024) 8 SCC 687, ¶¶ 13, 15, 18 (India).

[23] *Delhi Towers Ltd. v. G.N.C.T. of Delhi*, (2010) 159 Comp. Cas. 129 (Del. HC), 2009 SCC OnLine Del 3959 (India).

[24] Notification No. F.1(423)/Regn.Br./HQ/Div.Com./10/266, Delhi Gov't Gazette (June 1, 2011) (India).

[25] *See* Delhi High Court Ends Uncertainty, *supra* note 14.

[26] *Id.*

[27] Ambuja Cement, *supra* note 10.

[28] *Id.* ¶ 10.2.

[29] *Id.* ¶ 10.4.

[30] *Collector of Stamps v. Ambuja Cements Ltd.*, LPA 236/2025 (Del. HC Apr. 2, 2025) (India); Ambuja Cements Gets Delhi HC Notice on Stamp Duty Row in Holcim Merger, Live Mint (Apr. 3, 2025), https://www.livemint.com/companies/news/ambuja-cements-delhi-high-court-notice-ambuja-cements-stamp-duty-case-holcim-merger-adani-group-company-acc-11743663750100.html (last visited Jun. 27, 2025).

Notification has neither been explicitly upheld nor repealed. Therefore, an argument can be made that the Notification is valid in Punjab under Article 372 of the Indian Constitution by leveraging the *Ambuja* precedent.

To gain clarity on the underlying issue, the author filed an RTI request to understand the Notification's applicability in Punjab. Although the authorities issued a formal response, they failed to provide any substantive clarification on the Notification's continued validity in Punjab. This continued silence has led to a negative impact on the ease of doing business and corporate restructuring in Punjab.

II. Juxtaposition of the Emaar Demerger, RTI Vacuum and Conflicting Judgments

The Emaar MGF demerger, the author's RTI correspondence, and the conflicting judicial position together reveal that exemption claims presently operate in a zone of judicial and administrative indeterminacy. This indeterminacy risks producing a *circulus in demonstrando*. Where administrative silence leaves the availability of exemption unclear, the resulting uncertainty produces dispute and litigation, and the absence of settled judicial positions, in turn, sustains further administrative silence.

A. How The Administrative Gaps Affect The Notification

(i) The Emaar MGF Demerger

In 2018, the Emaar MGF demerger involved an NCLT-sanctioned split of Emaar MGF Land Ltd.[31] The demerger included a transfer of 120 acres of land in Mohali (Punjab) to MGF Developers.[32] The stamp duty officials initially mutated the transaction, even though no stamp duty was paid on such a transfer. After an inquiry in June 2021, the Deputy Commissioner ("DC") of Mohali cancelled the mutation on the grounds of significant revenue loss to the state, due to non-payment of stamp duty. [33]

The cancellation was based on the fact that: (a) an NCLT order does not, *ipso facto,* exempt a transfer from stamp duty obligation and (b) to enforce the general stamp duty requirement. The officials noted that in Emaar's NCLT order, it was clarified that the order should not be

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[31] Letter from Bharat Bhushan Garg, Company Sec'y, Emaar MGF Land Ltd., to Listing Dep't, Bombay Stock Exch. Ltd. (Aug. 16, 2018), at 1, https://cdn.in.emaar.com/wp-content/uploads/2021/07/2-Disclosure-Regulation-51-aug-2018.pdf.

[32] Shailee Dogra, Stamp Duty Evasion: Mohali DC Cancels Transfer of Land After Demerger of Firms, *Hindustan Times* (June 11, 2021), https://www.hindustantimes.com/cities/chandigarh-news/stamp-duty-evasion-mohali-dc-cancels-transfer-of-land-after-demerger-of-firms-101623353720984.html (last visited Mar. 9, 2025); Sanjay Bumbroo, Mohali Administration Cancels Mutation of MGF Land Over Tax Evasion, *Tribune India* (June 11, 2021), https://www.tribuneindia.com/news/punjab/mohali-admn-cancels-mutation-of-mgf-land-over-tax-evasion-266520/ (last visited Mar. 9, 2025).

[33] *Id.*

interpreted to grant an exemption from stamp duty.[34] If entities wish to seek an exemption they must also fulfil the requisite compliances in addition to the order (such as getting a certificate issued under the 1937 Notification).[35] In the end, the mutation was cancelled to protect state revenue. [36]

Ultimately, the DC also noted that Punjab (unlike other states) had not established clear rules for the levy or exemption of stamp duty on such NCLT-based orders. In the absence of a predefined, clear mandate, the mutation was cancelled to enforce the general stamp duty requirement.[37] The DC stated that a report to frame a scheme to charge stamp duty fees for NCLT-sanctioned M&A was sent to the state government in 2021.[38]

The cancellation of the mutation assumes that no exemption is applicable. However, such an assumption is neither supported by a proper legal justification nor based on an explicit repeal of the Notification in Punjab. This position of confusion is further exemplified due to a lack of a substantive response by the government, as seen in the RTI request discussed in the next section.

(ii) The RTI Response

An RTI inquiry was sent out to seek clarity regarding the 1937 Notification. On 4 February 2025, a request for information under the Right to Information Act, 2005, was drafted and sent to the Department of Revenue, Punjab ("the Department").

The RTI request sought explicit answers on the continuing validity of the Notification in Punjab post-independence, the requisite procedural compliance, and whether the government had issued any official circulars, clarifications, or any other documents regarding its scope.[39] Despite the RTI request being very specific, the response was procedurally dismissed by the authorities.[40]

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[34] *See Emaar MGF Land Ltd.*, *In re*, CP No. 689/2016, Nat'l Co. L. Trib., New Delhi Bench, ¶ 8 (July 16, 2018), https://cdn.in.emaar.com/wp-content/uploads/2021/07/2-Disclosure-Regulation-51-aug-2018.pdf; *See also* Stamp Duty Evasion, *supra* note 32.

[35] *Emaar MGF Land Ltd., In re, supra* note 34, ¶8.

[36] *Implication of Stamp Duty on Scheme of Arrangement*, Corporate Professionals (May 15, 2023), https://www.corporateprofessionals.com/articles/implication-of-stamp-duty-on-scheme-of-arrangement/ (last visited Mar. 9, 2025).

[37] Barinderjit Saluja, Mohali Administration Impeded Over Recovery of Stamp Duty During Company Demerger, *Times of India* (July 14, 2021), https://timesofindia.indiatimes.com/city/chandigarh/mohali-admnistration-impeded-over-recovery-of-stamp-duty-during-company-demerger/articleshow/84402770.cms. (last visited Mar. 9, 2025).

[38] Stamp Duty Evasion, *supra* note 32.

[39] RTI Correspondence and Supplementary Communications (compiled by the author), at 3– 4, https://drive.google.com/file/d/1J-vJACDrhqBB9St9CTYlsmt90c4xX1aW/view?usp=sharing (last visited Apr. 23, 2025).

[40] *Id*. at 5.

The Department declined to provide a substantive clarification by invoking Section 2(f) of the RTI Act, 2005, which defines the term "*information*" under the Act.[41] In essence, the response indicated that the queries raised did not fall within the statutory meaning of "*information*" and, therefore, did not need to be answered under the RTI mechanism. The department further stated that the issue was "*questionable*" and redirected the matter to the DC office. Upon approaching the DC Office for further clarification, it merely reiterated that the applicable stamp duty rates were available on the Revenue Department's website.[42] This offered no clarification regarding the 1937 Notification. The RTI process thus yielded no substantive administrative guidance on the exemption's continuing operation in Punjab.[43]

(iii) Impact on Corporate Restructuring in Punjab

The Emaar demerger case study shows the cost implications arising from such uncertainty in Punjab. Companies might wrongly assume that no duty has to be paid or try to avoid it altogether, only to later face cancellation of the mutation. Authorities tend to adopt a conservative approach, favouring the State of Punjab's revenue interests over exemptions. It is also necessary to consider the administrative factors that may explain why the State of Punjab's revenue interests appear to be favoured.

One possible explanation may lie in Punjab's significant fiscal dependence on stamp duty for revenue. Historically, Punjab has been among the states with the highest dependency on stamp duty in India. At one point, it made up 16.35% of its total tax revenue in 2005 and was still significantly high at 8.17% in 2014.[44] Additionally, empirical data from Battese & Coelli's (1995) stochastic frontier model contends that Punjab's tax efficiency remained sub-optimal.[45] It had a technical efficiency score of only ~86.5% in 2014.[46] This 'tax frontier' efficiency score shows how much of a state's potential stamp duty revenue is collected. Punjab is inefficient due to policy gaps and weak enforcement measures, as signified by a score less than 1.[47] In 2014, nearly 10.1% of its potential revenue remained untapped due to administrative inefficiencies.[48] This shows that Punjab has operated far below its revenue potential.

Therefore, authorities may resist exemption claims, not purely on legal grounds but maybe due to revenue stress. The RTI response also shows that there has been no update or clarification for five years, when the DC filed a report for creating a new scheme for NCLT orders. Emaar

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[41] Right to Information Act, 2005, § 2(f) (India).

[42] RTI Correspondence, *supra* note 39, at 6.

[43] *See also* James Alm, Patricia Annez & Arbind Modi, *Stamp Duties in Indian States: A Case for Reform*, World Bank Pol'y Rsch. Working Paper No. 3413, at 7 (2004).

[44] *See* Nayudu, *supra* note 13, at 10, tbl. 4.

[45] *Cf.* George E. Battese & Tim J. Coelli, *A Model for Technical Inefficiency Effects in a Stochastic Frontier Production Function for Panel Data,* 20 Empirical Econ. 325 (1995).

[46] *See* Nayudu, *supra* note 13, at 20, tbl. 7.

[47] *Id*. at 17.

[48] *See* Nayudu, *supra* note 13, at 20, tbl. 7.

MGF, even if it wished to, cannot challenge the cancellation of the mutation at the P&H HC, as the question itself is unclear at the judicial level.

B. A Judicial Deadlock In The Punjab & Haryana High Court

(i) Associated Clothiers and Minder

The P&H HC does not have any definitive ruling regarding the scope and validity of the 1937 Notification. The P&H HC has issued two contradictory rulings, one upholding and the other striking down the Notification. The Court in *Associated Clothiers Ltd. v. Union of India,*[49] in 1957 upheld its validity. The dispute arose when Associated Clothiers transferred assets to its subsidiary in Delhi, and an exemption under the Notification was sought. This exemption was denied by the Collector of Stamps. The Court, in its Letters Patent Appeal, directed the requisite authorities to issue certification under the Notification if conditions were fulfilled.[50]

The Court took a purposive interpretation and held that the Notification was designed to help and promote corporate restructuring and M&A. Accordingly, it would be valid even if the ownership structure were established contemporaneously with the transactions.[51] The rationale here was to ensure that companies are not burdened by evaluating the Notification's purpose and setting. Once the requirements carved out under the Notification are satisfied, entities are entitled to the exemption after getting a certificate issued.[52] It is essential to note that *Associated Clothiers* was decided by the then High Court of Punjab. In 1966, this High Court was reinstituted as the High Court of Punjab and Haryana, having jurisdiction over both states.

In 2014, the P&H HC in *Minder and others v. the State of Haryana,*[53] struck down the 1937 Notification. In *Minder,* the Court ruled in the context of Haryana and held that the 1937 Notification issued in terms of the Companies Act, 1913, cannot be applied to sales between parent and subsidiaries. As the Notification "…*would not be valid as the basic substratum of the notification has undergone a sea change with the enactment of the 1956 Act.*"[54] The Court explained that parent companies heavily controlled subsidiaries under the Companies Act of 1913, allowing such exemptions. However, in contrast, the Companies Act of 1956 treats each company as an independent juristic legal entity, even if wholly owned by a parent company.

The Court gave its rationale by citing *Vodafone International Holdings B.V. v. Union of India,*[55] holding that each company is an independent juristic legal entity, even if wholly owned by a

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[49] *Associated Clothiers Ltd. v. Union of India,* AIR 1957 P&H 261 (India).

[50] *Id.* ¶ 9.

[51] *Id.* ¶ 3.

[52] *Id.* ¶ 6.

[53] *Minder v. State of Haryana,* 2014 SCC OnLine P&H 8263 (India).

[54] *Id.*

[55] *Vodafone International Holdings B.V. v. Union of India,* (2012) 6 SCC 613 (India).

parent company.[56] Thus, a question now emerges that does *Minder* automatically overrule *Associated Clothiers*, denying the validity of the Notification? Or can *Minder* be distinguished, allowing the Notification to remain operational in Punjab?

(ii) Why Associated Clothiers remains good law

The P&H HC, though a single court, applies territorially different laws in the context of both states. This bifurcation is recognised under Sections 88-90 of the Punjab Reorganisation Act, 1966, which preserve the pre-reorganisation legal framework unless expressly amended by the competent legislature.[57]

The binding authority of *Associated Clothiers* in Punjab remains and is reinforced by its hierarchical and doctrinal superiority over *Minder*, by virtue of the doctrine of *stare decisis*, judicial discipline and propriety. However, even though both were rendered by Division Benches comprising two judges each, *Associated Clothiers* was decided in a Letters Patent Appeal (LPA). *Associated Clothiers* has not been overruled and was in the form of intra-court appellate review. Whereas *Minder* was a mere civil writ petition under Article 226, with no mention or citation of *Associated Clothiers*.

The doctrine of *stare decisis* tilts in favour of *Associated Clothiers*, due to it having a higher rung in the judicial hierarchy than *Minder.* The Supreme Court, in *State of U.P. v. Ajay Kumar Sharma*, observed that a co-equal bench *"has no freedom other than to apply the law laid down by the earlier bench"* and if unconvinced must *"request the Hon'ble Chief Justice to constitute a larger bench."*[58] More recently, in 2024, the Supreme Court in *Mary Pushpam v. Telvi Curusumary* upheld the above principle, forming part of the doctrine of judicial discipline.[59] A five-judge constitution bench in *National Insurance Co. Ltd. v. Pranay Sethi*, upheld that the earlier coordinate bench would govern and the latter bench cannot refuse to follow a judgment or overturn it on the grounds that it has been doubted by a later coordinate bench.[60]

However, even assuming that *Minder* expressly tried to overrule *Associated Clothiers'* holding, it was impermissible for a coordinate bench of equal strength to ignore the binding nature of the ratio of *Associated Clothiers* without referring the dispute to a larger bench. In light of this, even if *Minder* raised novel concerns regarding the Notification's modern relevance, it could not displace the earlier coordinate judgment without formal reference. Therefore, by the combined force of judicial discipline and *stare decisis*, *Associated Clothiers* remains the

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[56] *Id.* ¶¶ 101, 103.

[57] Punjab Reorganisation Act, 1966, §§ 88–90 (India); *see also Amar Nath v. Estate Officer*, ILR (1971) 1 P&H 694 (India), ¶¶ 4–6.

[58] *State of U.P. v. Ajay Kumar Sharma*, (2016) 15 SCC 289 (India), ¶ 13.

[59] *Mary Pushpam v. Telvi Curusumary*, (2024) 3 SCC 224 (India), ¶¶ 1, 18-19.

[60] *National Insurance Co. Ltd. v. Pranay Sethi*, (2017) 16 SCC 680; *see Union Territory of Ladakh v. Jammu and Kashmir National Conference*, 2023 SCC OnLine SC 1140 (India), ¶ 35; *see also Geo Miller & Co. (P) Ltd. v. UP Jal Nigam*, 2024 SCC OnLine All 1676 (India), ¶ 10.

stronger precedent in Punjab, as *Minder* neither followed *Associated Clothiers* nor invoked the reference procedure.

Minder's rationale overlooks the very reasoning acknowledged by *Vodafone* itself. In the referenced paragraphs of *Vodafone*, as cited by *Minder,* the Court draws a line between two types of corporate relationships. The first type is ordinary parent-subsidiary relationships with independent decision-making, and the second is the rare case when the subsidiary acts only as an alter ego or façade of the parent company.[61]

While striking down the Notification, the *Minder* ruling implicitly also preserves a gateway for exemption. *Minder,* while holding that subsidiaries have a separate juristic identity, cited *Vodafone's* holding that whether a subsidiary acts as an independent entity or merely as a façade or agent of its parent, *'depends upon the facts of each case.'*[62] An inquiry to assess and analyse the facts of each case is crucial. As it would allow the courts and authorities to differentiate between *bona fide* intra-group restructuring and schemes only for tax evasion. The underlying principle is that form alone is insufficient, and substance and control matter.

III. Reinventing The Exemptions Under The 1937 Notification: Legal Tests for a Changing Corporate Reality

The risk of the *circulus in demonstrando* identified previously reveals that the question is not merely one of conflicting judicial outcomes, but also of structural incompleteness. So long as the Notification operates without articulated criteria for its application, administrative silence will create uncertainty, and uncertainty will increase disputes. The objections raised in the pending *Ambuja* appeal before the Delhi High Court's Division Bench show that the 1937 Notification, in its current form, is insufficient to regulate modern corporate restructurings. The four concerns raised in the appeal are: [63]

1. That the merger resulted in the transfer of assets and liabilities, constituting a conveyance subject to stamp duty, even though the merger was an internal restructuring.
2. That dematerialised shares and internal corporate instruments may be used to avoid stamp duty.
3. That it would result in long-term revenue losses if such exemptions are upheld without a safeguarding mechanism.
4. That blanket application of the 1937 Notification now runs contrary to the public interest, especially given India's evolving tax jurisprudence.

To break this *circulus,* the Notification must be supplemented by a structured framework of articulated criteria and protections. The need for such expansion should not be confined to

[61] Vodafone, *supra* note 55, ¶ 102.

[62] *Id.*

[63] Ambuja Cements Gets Delhi HC Notice, *supra* note 30.

Punjab, but should apply wherever its continued operation is questioned in the context of modern corporate restructuring.

A. Designing A Contemporary Legal Test For Exemptions

Comparative jurisprudence reflects a common principle that a purely internal restructuring

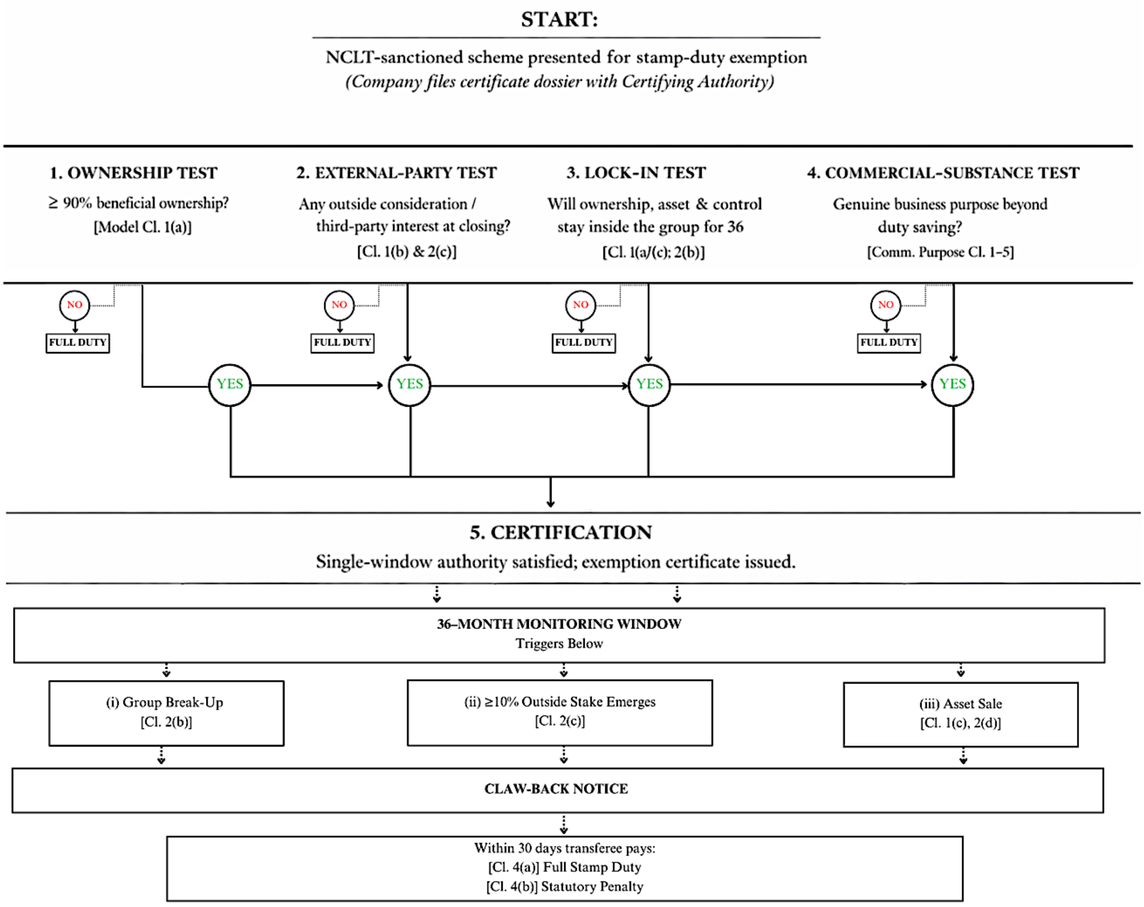

Figure SEQ Figure * ARABIC 1. The Five-Part Test

should not attract fiscal burdens where beneficial ownership remains materially unchanged. This principle supports the proposed test and the model clauses in Appendices A and B. The illustration given in Figure 1 shows its operation.

Illustration: ABC Infra Pvt. Ltd., a wholly-owned subsidiary of XYZ Holdings Ltd., demerges as per the directions of the NCLT. Immovable property in Punjab is transferred to another group entity, PQR Developers Ltd. At the time of the transfer, XYZ Holdings owns 98.4% of both companies' issued share capital. There are no consideration flows to other parties. The group files for a certificate before the designated certifying authority and provides the required documentation and undertakings.

(iii) Beneficial Ownership Criteria of the 1937 Notification

The first limb of the test requires that the transferee must be beneficially owned either equal to 90% or more than 90% by the transferor or the parent company. In the illustration, XYZ

Holdings' 98.4% ownership of ABC Infra satisfies this requirement, which is operationalised in Appendix A. If beneficial ownership is not more than or equal to 90%, the exemption is immediately denied.

(iv) No External Consideration or Third-Party Interests

The second limb ensures that the restructuring is limited to within the corporate group and free from external and third parties receiving shares, consideration or indirect control. In the illustration, there are no external benefits to third parties. This exclusion is reflected in Clause 1(b) of Appendix A, which prohibits external consideration. Clause 2(c), which prohibits contingent rights exceeding ten per cent and Clause 3, which bars restructurings involving third parties except for regulated public floats. Thus, the certification application must also declare no third-party interests, clarifying that no securities are issued to outsiders. If a public float is issued, statutory compliance as per SEBI must be followed. If the second limb is not satisfied, the exemption is denied.

(v) Lock-In Period To Prevent Immediate Disposal

The third limb recognises that a restructuring may be internal during the time of transfer but loses that character soon after. To protect against such immediate disposal or dilution, the test requires a lock-in period to prevent indirect asset stakes or dilution. Clause 1(c) of Appendix A establishes such a requirement, while Clause 2(a)–(d) and Clause 4 specify the clawback consequences. For example, should PQR Developers sell the property to a private equity purchaser within thirteen months, the exemption would be *void ab initio* and full duty would become payable.

(vi) Commercial Substance and Purpose

The fourth limb of the test requires that the restructuring possess real economic substance beyond the mere attainment of an exemption benefit. In the illustration, PQR Developers supports its application with board resolutions, reports and other evidence of business rationale. This limb is developed in the Commercial Purpose Clause in Appendix B. Clause 1 demands a bona fide commercial purpose and substantive economic effect. Clause 2 excludes circular flows of consideration, while Clause 3 disqualifies colourable devices. Clause 4 allows the authority to examine the transaction as a composite whole rather than in isolated steps, and Clause 5(a)–(d) enumerates concrete indicators of commercial substance, such as operational integration, asset retention and post-transaction continuity. These provisions ensure that only genuine restructurings qualify for relief. The certifying authority must review these submissions as per the Clauses given in Appendix B before granting certification.

(vii) Certification and Administrative Approval

The final limb places the exemption within a formal administrative framework. When all the aforementioned limbs are satisfied, the certifying authority issues a conditional Exemption

Certificate. Thus, as per the illustration, the authority would grant the certificate. During the 36-month monitoring window clawback. During this timeline, if PQR sells the property to a private equity firm after thirteen months, it would violate Clause 1(c) and Clause 2(b), triggering the Notice under Clause 4(a)-(b) of Appendix A.

A. The Best Transnational Practices

Comparative practice confirms that duty exemption for internal M&A hinges on two safeguards. First, continuity of beneficial ownership and second, the presence of a genuine commercial purpose. The model clauses proposed in this article are informed by these principles, drawn from common-law jurisdictions.

(i) Ownership Continuity and Lock-In

English case law showcases how beneficial ownership continuity functions as a precondition for relief. In *Escoigne Properties Ltd. v. IRC* and *Swithland Investments v. Commissioners of Inland Revenue,* the courts examined whether substantive ownership remained unchanged and whether the restructuring was internal or had external influence.[64] These decisions, along with the Canadian authority *Upper Valley Dodge Chrysler Ltd. v. Minister of Finance,*[65] demonstrate that intra-group eligibility is to be based on actual economic continuity, and not just technical structures. Therefore, the jurisprudence supports the first two limbs of the Five-Part Test and underpins Clause 1(a)–(c) of Appendix A, which requires a minimum 90% beneficial ownership threshold and imposes a 36-month lock-in to preserve that continuity. Moreover, they also justify Clause 3, which bars third-party participation except for a regulated public float, thereby keeping the exemption restricted internally.

Australian and Canadian practice further emphasises the importance of lock-in and clawback mechanisms. In *Asciano Properties Operations Pty. Ltd. v. Commissioner of State Revenue*[66] it was reinforced that: (a) the Commissioner could revoke the exemption if the integrity of the group collapses within 3 years of the transaction, (b) disguised private transfers are discarded, and a genuine public float exemption was defined. The Ontario stamp-duty regime adopts a similar approach, and conditions affiliate exemptions on a 36-month holding requirement.[67] These models informed the clawback provisions in Clause 2 of Appendix A, which render the exemption *void ab initio* if beneficial ownership or group integrity is compromised within 36 months, and Clause 4, which sets out the retrospective duty and penalty liabilities.

[64] *Escoigne Properties Ltd. v. Comm'rs of Inland Revenue*, [1958] A.C. 549, 564 (HL) (UK); *Swithland Investments Ltd. v. Comm'rs of Inland Revenue*, [1990] S.T.C. 448 (Ch) (UK).

[65] *Upper Valley Dodge Chrysler Ltd. v. Ontario (Minister of Finance),* 2004 CanLII 73249 (ON SCDC) (Can.).

[66] *Asciano Properties Operations Pty. Ltd. v. Commissioner of State Revenue*, [2009] VSC 329 (Austl.).

[67] Ministry of Fin. (Ont.), *Land Transfer Tax and the Treatment of Unregistered Dispositions of a Beneficial Interest in Land* (Apr. 6, 2022), https://www.ontario.ca/document/land-transfer-tax/land-transfer-tax-and-treatment-unregistered-dispositions-beneficial#section-6 (last visited Mar. 9, 2025); Ministry of Fin. (Ont.), *Transfers Involving Corporations* (Apr. 6, 2022), https://www.ontario.ca/document/land-transfer-tax/transfers-involving-corporations (last visited Apr. 23, 2025).

(i) Ownership Continuity and Lock-In

The United States framework differs fundamentally from India's stamp duty system in scope.[68] However, the precedent of *Gregory v. Helvering*[69] stands as one of the most influential tax cases,[70] as it has influenced Indian frameworks as well. *Gregory* has been cited in 2,960 cases and 738 law review articles.[71] It held that a transaction must have substance beyond tax avoidance to qualify for tax exemption. The U.S. Supreme Court famously explained that the nature of a scheme is by what happened and not by the applied labels. The *Gregory* test filtered out *bona fide* transactions from shams by checking: (a) whether the transaction had an independent commercial purpose beyond tax evasion and (b) if the new legal personality effectively shows the economic reality. *Gregory* authoritatively rejects '*colourable'* compliance with statutory requirements.

Subsequent decisions, such as *Knetsch v. United States*,[72] reinforce that formal compliance is insufficient when the economic realities belie the corporate restructuring.[73] These cases have inspired the fourth limb of the Five-Part Test, and Appendix B. Clause 1 requires parties to show a *bona fide* commercial purpose. Clause 2 prohibits circular flows of consideration. Clause 3 denies relief to colourable arrangements, while Clause 4 allows the authority to assess the transaction as a composite whole rather than in isolated steps. Clause 5(a)–(d), identifies indicators of commercial substance, such as operational change and continuity.

The anti-avoidance reasoning in *W.T. Ramsay Ltd. v. IRC*[74] complements this line of analysis as well. *Ramsay* instructs courts not to consider the individual steps in a transaction (even if all are lawful) and evaluate the entire transaction as one singular whole. Thereby, supporting Clauses 3 and 4 of Appendix B, allowing authorities to treat the transaction holistically.

(ii) The Clawback Mechanism: Pre-Empting Misuse of Gregory

According to Stephen B. Cohen, the ruling in *Gregory* left future courts with unclear boundaries, as it didn't clearly explain why having a genuine commercial purpose was necessary. As a result, future cases had to struggle with setting out clear rules for when a

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[68] *See* Simon T. Phillipson & Robert L. Caldwell, *Mergers, Liquidations and Reconstructions of Foreign Corporations and Australian Stamp Duty Consequences*, 19 INT'L BUS. LAW. 404 (1991).

[69] *Gregory v. Helvering*, 293 U.S. 465 (1935).

[70] Leandra Lederman, *W(h)ither Economic Substance?*, 95 IOWA L. REV. 389, 402 (2010).

[71] David Elkins, *Gregory v. Helvering: A Red Herring that Shaped Tax Jurisprudence,* 21 BERKELEY BUS. L.J. 171, 172 n.2 (2024).

[72] *Knetsch v. United States*, 364 U.S. 361, 363, 368-68 (1960).

[73] *See, e.g., Commissioner v. Court Holding Co.*, 324 U.S. 331, 334 (1945).

[74] *W.T. Ramsay Ltd. v. Inland Revenue Comm'rs*, [1982] A.C. 300 (H.L) 323-324, 325-326.

transaction was real or a sham.[75] According to Leandra Lederman, in the years after *Gregory,* the courts expanded the substance-over-form and commercial substance doctrines without any codified law, thus leading to a rise in litigation.[76] David Elkins reconciles the above scholars' views by highlighting that if the U.S. Supreme Court had decided *Gregory* differently, by not applying general anti-avoidance doctrines (GAARs), then the burden to fill out all loopholes would fall on the legislatures to clarify and amend the tax code.[77] Thereby, the Congress became less proactive and more reactive by allowing flexible doctrines.

The Clawback model clauses in Appendix A aim to prevent the erosion of fiscal integrity and the unpredictability that the *Gregory*-inspired doctrines introduce. Instead of relying on *ex-post* judicial invalidation after a scheme is completed or when authorities retrospectively cancel a mutation (as happened in the Emaar demerger). These clauses are designed to set out a clear checklist beforehand to prevent any abuse of power from the beginning.

Punjab can end the cycle of administrative and judicial ambiguity by not relying solely on judicial *ex-post* review, but relying on an *ex-ante* certification process as well. Thus, this new approach would also protect fiscal integrity.[78] It furthermore also avoids the problems that post-*Gregory* tax systems faced. Then Punjab wouldn't need to rely only on judicial rulings and can make monitoring more effective by initiating the retrospective clawback triggers.

Assaf Likhovski[79] pointed out Kaplov's assertion that anti-avoidance doctrines and rules work better when they are flexible and not highly rigid. This approach helps in maintaining a balance between modern corporate realities and also respecting the original law. Kaplov notes that because tax avoidance doctrines change constantly, using a broad interpretation is more efficient in enforcing the law.[80] This assertion directly supports how Clauses 2 and 4 in Appendix A are read. By not relying on a one-time rule-based exemption, as seen in a bare reading of the 1937 Notification, the clause requires continuous, real-time monitoring for 36 months. If the ownership continuity or commercial purpose changes, it makes the exemption *void ab initio,* and the entire duty becomes payable with fines. This is inspired by *Asciano,* wherein a partial exemption of 90% was granted, but it also included a provision to take back the exemption if the assets were later sold to third parties.[81] Assaf Likhovski[82] pointed out

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[75] *See* Stephen B. Cohen, *Honoring Justice Thurgood Marshall: Thurgood Marshall: Tax Lawyer*, 80 GEO. L.J. 2011, 2013–14 (1992); *see also* Linda D. Jellum, *Codifying and "Miscodifying" Judicial Anti-Abuse Tax Doctrines*, 33 VA. TAX REV. 579, 592–94 (2014).

[76] *See* Leandra Lederman, *supra* note 70, at 402–06; *see also* Cody A. Wilson, *"Form" Determines "Substance": A Call to Reign in Tax Law's Substance-Over-Form Principle*, 3 CREIGHTON L. REV. 533, 558–61 (2020).

[77] David Elkins, *supra* note 71, at 199.

[78] *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 592–93 (1992); David Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 871–73 (1999).

[79] Assaf Likhovski, *The Duke and the Lady: Helvering v. Gregory and the History of Tax Avoidance Adjudication*, 25 CARDOZO L. REV. 953, 967 (2004).

[80] Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L. J. 557, 563-64, 573, 577, 621 (1992).

[81] Asciano, *supra* note 66, ¶¶ 7-9, 31, 35-36.

[82] Assaf Likhovski, *supra* note 79, at 968.

Weisbach's assertion that tax law works best when there is a hybrid system.[83] This hybrid system should include two approaches, wherein typical restructuring can follow clear rules and complex restructuring can be adjudicated by flexible standards. Thus, in the same spirit, the model clauses combine the Five-Part Test with flexible checks, such as the model clauses in Appendices A and B.

A. Doctrinal Foundations in Indian Law

The proposed framework ultimately must be justified by Indian law. Read alongside *Associated Clothiers* and the anti-avoidance reasoning affirmed in *McDowell & Co. Ltd. v. Commercial Tax Officer,*[84] the proposed test gives doctrinal and procedural form to principles already latent in Indian law. The economic rationale for incorporating the framework relies on closing existing efficiency gaps, so that an even higher stamp duty amount can be recovered without imposing or introducing new duties under the Stamp Act.[85]

(i) Linking the test with Associated Clothiers

The proposed framework ultimately draws its doctrinal legitimacy from *Associated Clothiers,* which remains the most important judicial exposition of the Notification in Punjab. The Court held:

> "…[T]he notification of 1937 is designed to facilitate reconstruction of a company or amalgamation of two companies which *are more or less under the same ownership* so that they should be able to *rearrange their affairs without being saddled* with liability for payment of stamp duties. A company wishing to claim relief from stamp duty under the provisions of this notification must satisfy the officers concerned (1) that the document evidences the transfer of properties between companies limited by shares, and (2) that shares of the transferee company are in the *beneficial ownership of the transferor company to the extent of 90 per cent*. Shares must be in the beneficial ownership of the transferor company, but *legal ownership is not necessary*."[86] [emphasis added]

Three principles can be drawn from the passage. *First,* the Court treats beneficial ownership, rather than formal legal title, as the controlling criterion for exemption. That reasoning supports the framework's emphasis on continuity of beneficial ownership and is reflected most directly in Clauses 1(a) and (b) of the Model Clawback Clause, which require continuing affiliation and

[83] *See* David A. Weisbach, *Formalism in the Tax Law,* 66 U. CHI. L. REV. 860 (1990); *see also* David A. Weisbach, *Ten Truths about Tax Shelters,* 55 TAX L. REV. 215, 248 (2002).

[84] *McDowell & Co. Ltd. v. Commercial Tax Officer*, (1985) 3 SCC 230 (India).

[85] Alm, Annez & Modi, *supra* note 43, at 32.

[86] Associated Clothiers, *supra* note 49, ¶ 3.

prevent dilution of ownership beyond the allowed threshold. Read with Clause 2, these provisions give operational form to the Court's insistence that exemption depends on the preservation of genuine economic control rather than formal shareholding structure alone. *Second*, the Court's description of the Notification as facilitating reconstruction between companies "more or less under the same ownership" and enabling them to "rearrange their affairs" confirms that the exemption is confined to genuine internal reorganisations. This internal-only rationale is what underlies the exclusion of external consideration, third-party interests, and contingent outside participation in the model clauses. Particularly, Clause 3 of Appendix A, read with the anti-dilution and clawback provisions, is designed to ensure that the exemption cannot be invoked for internal transactions in form but externally oriented in substance.

Third, the passage is purposive. It treats the Notification not as a blanket fiscal privilege, but to facilitate *bona fide* corporate restructuring. This supports the incorporation of a commercial-purpose inquiry in Appendix B. Clause 1, which requires the transaction to possess commercial purpose and economic substance beyond the mere attainment of a duty benefit, and Clauses 3–5, which allow the identification of colourable devices and composite arrangements, do not depart from *Associated Clothiers*. Rather, they elaborate the judgment's facilitative logic under modern conditions in which layered ownership, circular structuring, and artificial compliance are real possibilities.

The Court's direction that the claimant must "*satisfy the officers concerned"* indicates that exemption under the 1937 Notification was never intended to be self-executing, but to depend upon an official determination that the prescribed conditions have in fact been met. The certification mechanism proposed in this article, and the allocation of the burden of proof in Clause 6 of Appendix B, builds directly on that remedial logic. In that sense, the model clauses do not superimpose an external framework upon the Notification. The administrative significance is illustrated by the Emaar demerger. There, the NCLT-sanctioned scheme was not treated as self-executing for stamp-duty purposes, yet the State had no clear process for determining whether any exemption was nevertheless available.

A certification-based model addresses that difficulty. Properly structured, it would require the applicant to place before the designated authority[87] the NCLT order, shareholding material, board resolutions, etc. The authority would then assess the claim against the criteria embodied in the model clauses and issue a conditional exemption certificate if satisfied. Such a process will align Punjab's practice with *Associated Clothiers,* reduce the uncertainties and doubts seen in Emaar, and ensure a fact-based determination.

(ii) Linking The Test With McDowell

[87] *The Vth NLSIR Symposium on Corporate Mergers and Acquisitions in India–A Transcription,* 24 NAT'L L. SCH. INDIA REV. 89, 107 (2013).

In *McDowell*, the Supreme Court cited and referred to the English ruling of *Ramsay*. In *Ramsay*, the U.K. courts developed an anti-avoidance doctrine that focused on economic reality over form, thus strengthening the assertion that the test should operationalise the Model Clause in Appendix B as well.[88] In *McDowell*, the Supreme Court of India rejected the older principle laid down in *IRC v. Duke of Westminster*, which allowed tax avoidance if there was strict compliance with the legal form. Instead, the Court used a substance-over-form approach by referring to the U.K. House of Lords ruling in *W.T. Ramsay*.[89] In *Ramsay*, the House of Lords enumerated that when each step in a scheme is lawful, the entire scheme must be seen together as a composite whole to see if there is any genuine commercial purpose or if it is a pretext to avoid tax. Thus, this approach of the Supreme Court to look beyond formal compliance and evaluate the real economic substance and purpose supports the inclusion of the Commercial Purpose and Substantive Economic Effect Clause in Appendix B.
Furthermore, the Court observed that judicial approval must be denied to colourable devices,[90] thus justifying the incorporation of Clause 2 (which prohibits circular asset transfers) and Clause 5 (which requires commercial purposes). The Ontarian 36 lock-in period and the Clawback in Appendix A, are not oppressive, as it ensures that these colourable devices do not engage in duty avoidance.[91] Thus, analysing the doctrinal evolution from *Westminster* to *Ramsay* to *McDowell*, the framework embodies the true spirit of the 1937 Notification.

IV. Conclusion

"…[A]rticle 395 repudiates the chain of colonial continuity and symbolises constitutional autochthony by repealing the Indian Independence Act 1947. At the same time, Article 372 represents the thread of continuity even when a new system of governance is put in place…"[92]

– Dr Dhananjaya Y Chandrachud, CJI

The 1937 Notification is best understood against this constitutional interplay between repudiation and continuity. The central difficulty with *Minder* is not that it recognised the transformation brought by the Companies Act, 1956, but that it treated that very transformation as sufficient to displace the Notification altogether. The real question is whether such a change necessarily extinguished the Notification, or instead required a more disciplined framework for its contemporary application. Against that backdrop, the article answers the following question: Does the 1937 Notification exempt intra-group mergers in Punjab from stamp duty? The answer is not a resounding yes or no. It is a qualified yes. The Notification survives under Article 372, but cannot operate as a blanket exemption in the context of modern corporate restructuring.

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[88] W.T. Ramsay, *supra* note 74.

[89] McDowell, *supra* note 84, ¶¶ 9-10.

[90] *Id.* ¶ 17.

[91] *Id.* ¶ 45.

[92] *Aligarh Muslim University v. Naresh Agarwal & Ors.*, 2024 INSC 856, ¶ 84 (India).

The objections raised in the pending *Ambuja* appeal confirm that the present difficulty lies not in the mere existence of the Notification, but in the absence of a principled framework governing its *bona fide* application. Left in its historic form, the Notification risks perpetuating the same *circulus in demonstrando* identified earlier. The broader response, not limited to Punjab, is to retain the Notification, but subject it to a structured 'Five-Part Test' that preserves relief for *bona fide* intra-group reorganisations. The task is not to preserve the Notification as a mere chain of colonial continuity, but to repudiate that continuity in its uncritical form and revive it within a constitutionally autochthonous post-Constitution legal order. In this way, the proposed framework revives the 1937 Notification by reinventing it as a living fiscal instrument for M&A.

APPENDIX – A: Model Clauses on Clawback of Exemption for Intra-Group Transfers

This Appendix sets out the model clawback clauses that operationalise the first three limbs of the Five-Part Test. The accompanying footnotes identify the comparative authorities and statutory models on which each sub-clause is based.

1. Clawback of Exemption on Intragroup Transfers—(1) Any exemption from stamp duty under the 1937 Notification in respect of a transfer of property between two or more companies claiming to be part of the same corporate group shall be subject to the following–

(*a*) The transferee company remains an affiliate of the transferor company (or of the common parent company, as the case may be for a minimum period of thirty-six (36) consecutive calendar months from the effective date of the transfer.[93]

(*b*) There is no direct or indirect change in beneficial ownership affecting more than 10% of the transferee company's paid-up and issued share capital, and[94]

(*c*) The property so transferred is not alienated, conveyed, transferred or otherwise disposed of to any third party, in whole or in part, during the lock-in period of 36 months.[95]

(2) The exemption will be deemed void *ab initio,* and the transferee company will become liable for the payment of full stamp duty at any point within 36 months from the date of registration or mutation if:[96]

(*a*) There is a breach of any of the conditions in [CLAUSE 1],

(*b*) The transferee ceases to be part of the same group as defined,

(*c*) The transfer results in any third party acquiring, or having an enforceable option or contingent right to acquire, a beneficial interest exceeding 10% in the transferee, transferor, or the subject property, or[97]

(*d*) If there is, at the time of the transfer, any arrangement for the subsequent sale, transfer, or other disposition of the transferred assets to anyone who is not a part of the corporate group;[98]

(3) Transfer of assets between members of a corporate group shall not be eligible for exemption where the property is transferred as part of, or in connection with, a broader transaction involving the corporate group's restructuring,[99] demerger,[100] or capital

[93] *See* Asciano, *supra* note 66, ¶ 7; *see* McDowell, *supra* note 84, ¶ 9.

[94] *See* Asciano, *supra* note 66, ¶¶ 2-3, 20-21.

[95] *See* Asciano, *supra* note 66, ¶¶ 7, 14; *see also* McDowell, *supra* note 84, ¶ 17.

[96] *See* McDowell, *supra* note 84, ¶ 9.

[97] *Id.* ¶ 6.

[98] *See* McDowell, *supra* note 84, ¶ 14; Gregory, *supra* note 69, at 469–70.

[99] Gregory, *supra* note 69, at 470.

[100] *See also* Asciano, *supra* note 66, ¶ 12.

realignment,[101] in which securities or units are issued or transferred to persons outside the corporate group,[102] unless such issuance qualifies as a public float.[103]

(4) Upon the occurrence of any triggering event, the transferee shall, within 30 days, intimate the designated certifying authority and pay:

(*a*) The full stamp duty is originally exempt from the transaction,[104]

(*b*) penalty, if any, as determined under the provisions of the Indian Stamp Act, 1899.

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[101] *See* W.T. Ramsay, *supra* note 74, at 324-25.

[102] *See* Asciano, *supra* note 66, ¶¶ 14, 39.

[103] *Id*. ¶ 39.

[104] *See* McDowell, *supra* note 84, ¶ 48.

APPENDIX – B: Model Clauses on Commercial Purpose and Substantive Economic Effect

This Appendix sets out the model commercial-purpose clauses that operationalise the fourth limb of the Five-Part Test. The accompanying footnotes identify the comparative jurisprudence on substance over form from which each sub-clause is drawn.

2. Commercial Purpose and Substantive Economic Effect—(1) As sanctioned by the NCLT, an amalgamation, demerger, or arrangement cannot be granted stamp duty exemption unless it can be shown, to the satisfaction of the requisite authority, that the transaction is real and possesses considerable commercial purpose and economic substance beyond the mere attainment of a duty benefit.[105]

(2) The transaction must not involve circular flows of consideration or arrangements[106] that offset each other without changing the economic position of the parties.[107] The activities must lead to a material alteration of commercial risk, legal rights, or the asset base of the transferee or transferor companies, sustained for an applicable period as per the provisions of [MODEL CLAUSE 1].

(3) The transaction shall be ineligible for exemption if it constitutes a colourable device, stratagem, or arrangement designed to give the appearance of a legitimate corporate reorganisation while lacking actual substance, purpose, or continuity of business,[108] irrespective of whether each step appears legally valid when viewed in isolation.

(4) Where the transaction involves many entities, the authorities are not required to evaluate each step individually. Instead, by examining the overall effect, they can look at the entire transaction as a composite whole and see if the transaction lacks commercial substance.[109]

(5) In determining the presence or absence of commercial substance, regard shall be had to, inter alia:

(*a*) Whether the transaction involved any genuine business activity or change in the functional profile of the companies involved;[110]

(*b*) Whether the assets transferred were integrated into the transferee's business operations or immediately disposed of;[111]

(*c*) Whether the transferee company existed before the scheme with a functional business or was newly created solely for effecting the arrangement;[112]

(*d*) The duration of the company, its existence and operation after the transaction.[113]

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[105] *See* Gregory, *supra* note 69, at 469-70; *see* W.T. Ramsay, *supra* note 74, at 326; *see also* McDowell, *supra* note 84, ¶ 45.

[106] *See* W.T. Ramsay, *supra* note 74, at 320.

[107] *See* Gregory, *supra* note 69, at 470.

[108] *Id*.

[109] McDowell, *supra* note 84, ¶¶ 11-12.

[110] *See* Gregory, *supra* note 69, at 468-69.

[111] *Id*. at 468.

[112] *See* Gregory, *supra* note 69, at 468-69.

[113] *See* Asciano, *supra* note 66, ¶¶ 7-9.

(6) The burden shall lie on the parties claiming exemption to prove the existence of bona fide commercial objectives.[114]

[114] *See* Asciano, *supra* note 66, ¶¶ 5-8.