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FROM THE DEAN'S DESK

It is with immense pleasure and a sense of scholarly accomplishment that I extend a warm welcome to the distinguished readership of the NMIMS Student Law Review. As we embark on the latest edition, it is gratifying to witness the culmination of dedicated efforts and intellectual rigor that have gone into crafting this legal compendium. The pages ahead unfold a tapestry of original research articles, meticulously curated through a rigorous peer-review process, embodying the essence of our commitment to fostering open, objective, and high-quality legal discourse.

This publication stands as a testament to the vibrant intellectual community at the Kirit P. Mehta School of Law and serves as a testament to our collective pursuit of advancing legal scholarship. Encompassing a broad spectrum of pertinent topics, our publication not only presents diverse perspectives on significant subjects but also acts as a catalyst for heightened awareness, offering intellectual enrichment to our readers.

On behalf of the institution, I extend sincere gratitude to our esteemed Board of Advisors and Peers, whose invaluable guidance has been instrumental in shaping this edition into a crucial platform that both generates and challenges prevailing paradigms of legal jurisprudence.

Heartfelt congratulations are extended to the Editorial Board for their steadfast dedication and significant contributions to the advancement of the NMIMS Student Law Review. I invite you to delve into the insightful analyses, diverse perspectives, and scholarly dialogues presented herein, anticipating that this edition will not only enrich your understanding of contemporary legal challenges but also inspire thoughtful reflections and discussions.

Dr. Durgambini Patel

MENTOR'S MESSAGE

It is with immense pleasure and a profound sense of accomplishment that I present to you this distinguished edition of the Student Law Review. The inception of this journal was fuelled by our institution's unwavering commitment to foster a platform for the exploration of legal discourse and the cultivation of academic excellence. With the guidance of our esteemed peers, we have embarked on a rigorous journey to curate a publication that would showcase the finest scholarly contributions from our student community.

Within these pages, you will find a rich tapestry of legal scholarship, meticulously crafted by our talented contributors. Each article represents countless hours of research, critical analysis, and meticulous attention to detail. These contributions have not only enriched the pages of this publication but have also elevated the discourse within our academic community. The tireless efforts of our reviewers and peers, who provided invaluable feedback and engaged in thoughtful deliberations, have contributed to the exceptional quality of the articles presented herein. I extend my deepest gratitude to them for their dedication to maintaining the highest standards of academic rigor.

To those who missed out, I want to emphasize upon the incredible value of your efforts and the enduring impact of your dedication to the pursuit of legal scholarship. Each submission showcased immense potential and demonstrated your unwavering commitment to the highest standards of academic excellence. I encourage you to persevere, for your contributions hold immense promise and will undoubtedly find their rightful place in future endeavours.

It is important to acknowledge the countless hours of meticulous review, rigorous editing, and collaborative teamwork that has shaped this edition. I extend my deepest appreciation to the dedicated members of the Editorial Board who have meticulously assessed each submission, ensuring that only the most exceptional works grace the pages of this publication. I hope each one of you found the experience enlightening and will go on to play a role in developing the research culture in the field of law.

Mr. Harshal Shah

ACKNOWLEDGMENT

This Sixth Issue of NMIMS Student Law Review has been a collective effort right from the moment we conceptualised its theme. We are filled with anticipation as we envision this issue to establish an unprecedented benchmark, surpassing all prior boundaries in terms of its comprehensive scope and profound depth. The variety of topics, explored with utmost precision and intellectual rigor, promises to deliver an unparalleled examination of contemporary issues. We extend our gratitude to our Hon'ble Vice Chancellor, NMIMS University for his constant support and unwavering encouragement throughout the process. Furthermore, we are immensely thankful to Dr. Durgambini Patel, the Dean of NMIMS Kirit P. Mehta School of Law, for entrusting us with this responsibility of overseeing the curation of this edition of the NMIMS Student Law Review. The unwavering support of everyone involved has helped nurtured this publication into something we had aspired when our work on this first began. We thank the Registrar of NMIMS University for her continued support. We would also thank the administrative department; our Board of peer reviewers for their time and close reading of the articles; our faculty colleagues who have always provided the intellectual space and friendship that help sustain projects like these and make them a happy affair. We must also thank our contributors who so encouragingly responded to our call for papers, were very cooperative with keeping deadlines, and thought of us as a worthy venue for publishing their scholarship. It is your work that makes this edition special. Our team also deserves a special mention: Our Student Head, Ms. Anushka Bhardwaj; Student Co-Head, Ms. Bhargavi Iyer; Student Editor-in-Chief, Ms. Shubhangi Mishra; Student Co Editor-in-Chief, Mr. Dhruvit Shah; Student Head and Editor-in-Chief – Blogs, Mr. Shashank Maheshwari; Co-Editor-in-Chief – Blogs, Ms. Rakshinda Raheman; along with the entire team of Content Editors. Lastly, we extend our sincere gratitude to our Mentor, Mr. Harshal Shah, whose intellectual engagement and thought-provoking guidance have played a vital role in upholding the theoretical rigor of our publication.

Prof. Richa Kashyap

Editor-in-Chief

FOREWORD

The Board of Editors is delighted to publish the sixth volume of the NMIMS Student Law Review. With this volume, we have carried forward our legacy of elevating pertinent legal discourse, as espoused by bright young legal minds. This volume serves to stimulate legal discussions and advance the development of cutting edge legal analysis. We thank the authors for sharing their exceptional insight and analysis into pressing contemporary debates.

Shruti Agarwal, in "*Critical analysis of effect of variance on discharge of surety's liability with respect to Anirudhan v. Thomco's Bank*" elucidates upon variance concerning a surety's liability in a contract of guarantee as given under the Indian Contract Act, 1872 *vis-à-vis* the landmark case of *MS Anirudhan v. Thomco's Bank*. Ms. Agarwal takes us on a global comparative study, noting the legal treatment of surety's liability in India and Canada. Crucial links between prevailing fundamental legal concepts and modern corporate governance are propounded.

Amisha Mittal and Shruti Jhanwar, in "*Equity and inclusivity in international tax governance: unveiling global south realities*" explores the intricate landscape of international tax governance, particularly focusing on the challenges faced by the global south, which has historically had unequal participation in shaping global tax policies.

Pritha Lahiri and Ria Agrawal, in "*Chilling effects: Section 235 and the minority shareholder dilemma*" critically examine freeze-out mergers in the context of Section 235 of the Companies Act, 2013. The authors note that the lack of clear valuation guidelines undermines the rights of dissenting and minority shareholders. To that effect, incorporating a comprehensive framework for fair valuation methodologies that ensure dissenting shareholders receive fair compensation is modelled and recommended.

We would like to congratulate the authors and thank our team of editors for their unwavering commitment, tireless perseverance, and unwavering dedication to fostering the dissemination of exemplary legal scholarship. Their ceaseless efforts have played an instrumental role in ensuring the publication of profound and exceptional legal literature of the highest calibre.

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SHORT ARTICLES

CRITICAL ANALYSIS OF EFFECT ON VARIANCE OF SURETY'S LIABILITY WITH RESPECT TO ANIRUDHAN V THOMCO'S BANK

- SHRUTI AGARWAL

ABSTRACT

The following research paper discusses variance concerning a surety's liability in a contract of guarantee as given under the Indian Contract Act of 1872. The author evaluates a landmark judgment – Anirudhan vs. Thomco's Bank to critically analyse the effect that the judgment has on the legal concept of surety's liability in a contract. Further, a critical angle of fraud or misrepresentation is analysed concerning variance in a bank guarantee. The distinction between a minor and a substantive variance has been explored in light of the law and the precedence. The research paper has attempted to evaluate the force of this particular judgment on contract law in recent times. The effectiveness of a surety's liability in reference to variance has been discussed. Lastly, a brief comparative analysis between India and Canada has been drawn to analyse whether there are any distinctions in minor or substantive variance and their determinations in their respective body of laws.

KEYWORDS – surety, liability, variance, fraud, misrepresentation, critical analysis, comparison.

I. INTRODUCTION

A contract of guarantee refers to a situation in which one party agrees to indemnify the other party against any losses or defaults that may occur. A contract of guarantee consists of three parties – making it a tripartite agreement. The parties involved include the surety (the party providing the guarantee), the principal debtor (the party guaranteed), and lastly, the creditor (the party to whom the guarantee is payable). The guarantee ensures that the surety will be held liable for any defaults made by the principal debtor.

In a contract of guarantee, the concept of variance holds extreme importance. Variance can determine whether surety will be liable or not. Variance refers to the material changes that the debtor makes with the creditor in the contract of guarantee without the knowledge of the surety. If the surety does not know of any material changes and then later is sued, then the surety cannot be held liable. However, if the material change is for the benefit of the surety, then the surety can be held liable for fulfilling the contract of guarantee. The above scenario is discussed in the case which will be the basis of this research paper, i.e. *Anirudhan vs Thomco's Bank*[1] in which material changes were held to be beneficial for the surety.

Surety's liability must be determined especially in cases of variance where there is a certain element of malafide intention or fraud or misrepresentation for that matter is concerned. In such cases, the surety can be saved from the liability of the debtor. The concern was that if the creditor makes contractual changes without consulting the surety, then it could lead to unfair treatment, especially when there is an element of misleading the surety. For example, if the creditor changes the terms of the contract to the effect that as a result of it the surety would have to pay extra money unfairly, then the contract of guarantee should stand nullified.

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[1]Anirudhan v Thomco's Bank Ltd., 1963 AIR 746

A. Facts of the Case

An appeal was raised in relation to the suit filed by Thomco's Bank (hereinafter referred to as the "Bank") against Sankaran, the principal debtor (hereinafter referred to as the "debtor") and Anirudhan, the surety and the appellant. The suit was based on a promissory note made by Sankaran on 24th February, 1947 in favour of the Bank and the contract of guarantee executed by the surety on 24th May, 1947.

A blank form was given to the debtor to fill up and was brought to the Bank. The debtor filled the maximum amount to be guaranteed as INR 25,000 (twenty-five thousand). However, the Bank refused to accept it and asked him to lower the amount. The debtor then lowered it to INR 20,000 (twenty thousand). The Bank duly accepted it. The alterations, however, were made without the consultation of the surety. When the appellant was sued to pay the amount, he argued that alterations in the contract of guarantee were made without his knowledge or consent. Thus, he cannot be held liable for the dues incurred by the debtor. Hence, he should be discharged from the liability.

B. Issues/Law Involved

The issue in this case per se was of variance. Whether the said alterations had discharged the surety from his liability or not was debated and discussed upon in this landmark judgement. Another issue considered in the case was whether along with discharging the liability, the alterations made the contract of guarantee void or null as per the Indian Contract Act, 1872. The law in question was Section 133 of the Indian Contract Act[2] **("ICA")** which provides for discharge of surety in cases of variance. The Ker HC relied on this particular section along with Section 87 of the Negotiable Instruments Act, 1881[3], to shed light on matters regarding material alterations with respect to negotiable instruments like a bank guarantee in this case,

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[2] Indian Contract Act, 1872, No. 09, Acts of Parliament, 1872 (India).
[3] Negotiable Instruments Act, 1881, No. 26, Acts of Parliament, 1881 (India).

which in turn implies that if an alteration is made without consent of a concerned party, it can lead to nullification of the said instrument.

The Apex court, on the other hand, also took into consideration Halsbury's Laws of England[4] concerning material alterations without consent of promisor that leads to avoidance of the contract. But, if the contract is made by a stranger when the promisee was not in custody, then the contract cannot be avoided. The promisor would not be discharged.

C. Conclusion of the Case

The trial court dismissed the appellant's plea by saying that the alteration was irrelevant even if it was made without his consent and that it had avoided the instrument. Later when the surety appealed to the Ker HC, the court agreed with the trial court's judgement. The majority conceded that the change was backed by the consideration which had already flowed from the bank and that the contract was an enforceable one. It was held that the change was not harmful to the surety. The variance was beneficial to the surety and he would have to pay INR 20,000 (twenty thousand) anyway to discharge the liability of INR 25,000 (twenty-five thousand). Thus, consent for such a harmless change can be assumed. The appeal was thus, dismissed.

The Supreme Court ("**Sup. Ct.**") held that the alterations or variance is in the interest of the surety or for his very own benefit and is minor or insignificant, therefore, the variance does not discharge the surety from any liability.

II. EFFECT OF VARIANCE ON SURETY'S LIABILITY

In variance, if alterations are made without the consent of the surety, then he would be liable for the transactions preceding the alterations and not any subsequent

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[4] Vol.8, HALSBURY'S LAWS OF ENGLAND (LexisNexis Butterworths 1964)

transactions.[5] This also maintains the sanctity of the contract of guarantee and ensures that no party gets an unfair enrichment due to the variance made in the contract. In *Bank of India v. Ali Mohammad*,[6] the surety was discharged from liability after a variance was made in the contract of guarantee. It was said that the sureties not being parties to subsequent transactions between the principal debtor and the appellant, the respondents/sureties were discharged from their liabilities. Unless the statute permits, parties are not allowed to alter the agreement and although it was not for the old sureties to prove that they were materially prejudiced, the fact remains that they were prejudiced and thus, the first sureties were discharged.

If variance is made without knowledge of the surety which ends up being in their favour, then the surety cannot demand discharge of liability. This is the exact principle which was followed in the case of *Anirudhan v Thomco Bank*[7]. Here, the amount was decreased by the principal debtor which ultimately ended up being in the surety's favour since his liability was also reduced by INR 5,000 (five thousand).

Again, in *Muthiah Mudaliar v. Somasundaram*,[8] it was established that any variance in a contract will discharge surety of his responsibility. Similarly, it was held in *State Bank of India v. Dharam Kumar*[9], that the provisions which the bank varied in the original agreement would not override the statutory provisions of contract law and the first respondent was not responsible for paying any sum which exceeded the limit of the suit.

Hence, when it comes to effect of variance on surety's liability, any sort of material changes without the consent of surety would result in discharge of liability.

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[5] Debangana Goswami, *The Judicial Debate on Discharge of Surety*, CBIL, NLIU BHOPAL (Nov 27, 2003, 7:00 PM), https://cbcl.nliu.ac.in/contemporary-issues/the-judicial-debate-on-discharge-of-surety/
[6] Bank of India v. Ali Mohammad AIR 2008 Bom 81.
[7] *Supra* note 1.
[8] Muthiah Mudaliar v. Somasundara (1974) 1 MLJ 129.
[9] State Bank of India v. Dharam Kumar and Anr 2000 102 CompCas 166 Mad, (1998) IIMLJ 774.

III. Effect Of Anirudhan v. Thomco's Bank on Surety's Liability

The ruling in this landmark case[10], is frequently cited in contemporary discussions of bank guarantees and variations in bank guarantees. It provides a component that may be used to determine the surety's culpability. A contract cannot be altered in any way without the prior knowledge and approval of the surety, as this is an established principle of contract law. This case thus validates the points made.

The decision in this case[11] established surety's liability with regard to variance by stating that when a variance in the guarantee contract amounts to benefit of a surety, their liability can be discharged. This decision is what established surety's liability with regard to variance. To provide credence to the assertion, an example can be provided. For instance, if the initial obligation of the surety amounts to INR 30,000 (thirty thousand), but the liability is later reduced to INR 10,000 (ten thousand) owing to a change in the terms of the agreement. It can conspicuously be determined that this is in the favour of the surety as it implies that the surety will be liable for a lesser amount than what was originally settled upon.

If the amount is increased or the terms are amended without the surety's knowledge and without it being to their profit, then the decision states that the surety can be freed from any liability. In the above case, the changes were made without the knowledge of the surety. However, the benefiting factor was given precedence over this and thus the liability was further determined.

It is also important to realise that the purpose of Section 133 of the Act[12] is to prevent either the creditor or the principal debtor from taking undue advantage of the available guarantee by escalating it on their own volition and thereby putting the surety in jeopardy. This can be seen as an objective of this section. [13]

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[10] *Supra* note 1.
[11] *Supra* note 1.
[12] *Supra* note 2.
[13] *Supra* note 5.

Thus, when we talk about the major effect this landmark case has on surety's liability, it is of great significance in contract law. This judgement established an Indian authority on the proposition that any changes in the conditions of the guarantee that are not material or that are advantageous for the surety are not to be considered a release of the guarantor from his responsibilities arising out of the contract.[14]

IV. FRAUD AND MISREPRESENTATION VIS-À-VIS BANK GUARANTEES AND SURETY'S LIABILITY

Even in guarantee contracts, misrepresentation or fraud is discouraged and the surety's liability can, thus, be discharged on account of such an element of malice. It is possible that the creditor's variation was motivated by ill will to gain an unfair advantage or harm the surety. For example, if the debt being incurred by the principal debtor is truly less but with certain alterations and variations, the creditor deems it to be more than the actual amount, due to having a feeling of animosity for the surety, and to defraud him. In the long run, this could hurt not only the principal debtor but also the surety.

In *UP Coop Federation Ltd v. Singh Consultants and Engineers Ltd,*[15] it was held by the Sup. Ct. that bank guarantees or guarantee contracts can be stayed only in cases which involve serious disputes, fraud or special equities. Consequently, while relating it to misrepresentation and fraud in the case of guarantees or bank guarantees specifically like *Anirudhan*[16], it can be observed that even the Sup. Ct. permits staying of such contracts when fraud is involved in order to prevent one or more parties from being unjustly enriched. This was done to prevent one or more parties from being enriched at the expense of another. This unfair enlargement of

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[14] Madhumitha Kesavan, *Anirudhan v. Thomco's Bank Ltd,* 4, JSLR (2018).

[15] UP Coop Federation Ltd v. Singh Consultants and Engineers Ltd, 1988 AIR 2239.

[16] *Supra* note 1.

one party's wealth has the potential to put the surety at a disadvantage and cause them to take on additional liability beyond that which was strictly required.

Hence, when there is an element of malice in a bank guarantee or a guarantee contract in general, it has to be egregious, enough to vitiate the very core on which a guarantee contract is based on. Only then, the courts can justify their interference in bank guarantees. Even in the case of special equities, the same principle is applied. However, the threshold for determining fraud is high. It should be cause an irretrievable injury and injustice for the liability to be discharged. However, a party's reckless disregard for the other party's rights under the underlying contract while cashing a guarantee is not enough to prove fraud[17].

Nevertheless, there needs to be a proper method of establishing fraud and misrepresentation in guarantee contracts which is accommodative and less rigid.

V. EFFECT OF LAW AND PRECEDENTS IN VARIANCE ON SURETY'S LIABILITY IN CURRENT SCENARIO

Banks enter into contracts of guarantee to pay off debts of the principal debtor. Businesses and individuals continue to take on bank guarantees for financing their trade activities.

However, bank guarantees or contracts of guarantee can still include variations on the part of the creditor or the principal debtor. This can affect surety's liability as a whole. The principles regarding variance as mentioned earlier remain the same presently. This means that in case of minor or insignificant variations, the surety is not discharged from his or her obligations. On the other hand, if the variations materially alter the initial objective of the guarantee contract or is not benefiting for the surety, then the surety can claim the discharge of all liabilities including any

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[17]Akshay Anurag, *Bank Guarantee and Judicial Intervention*, Manupatra (Nov 27, 2023, 7:00 PM), http://docs.manupatra.in/newsline/articles/Upload/1A60C2E6-874F-4655-8821-CA4915F9D4F6.-%20banking.pdf

subsequent transactions as well.[18] The effect variance has on surety's liability according to the statute has not been altered.

Anirudhan[19] still holds relevance in the current context. It is used to determine surety's liability in cases of variance. It is an unassailable ruling and sets a strong precedent and thus, does not lose its significance. It established the law for interpreting discharge of surety through variance of contract. It has been cited countless times to establish its authority several years after the judgment was pronounced. In *Shesh Narain Awasthi v. Chairperson Debt Recovery*,[20] it was held according to the law and precedent that the surety was not liable to pay more than the initial amount which was decided. The surety was discharged of the liability to pay the additional amount which was determined through variation of the contract. The petitioners as sureties were discharged from all liabilities pertaining to subsequent transactions from the date of variance. In *United Breweries Limited v. State of Karnataka*,[21] the same view was held wherein the surety was made liable for what he has already undertaken and nothing more than that. Thus, it is evident that even in recent cases, *Anirudhan*[22] still holds relevance while deciding surety's liability.

Recently, during the pandemic, cases relating to surety, again were decided according to precedents like *Anirudhan*[23]**.** For example, in *Haliburton Offshore Services v. Vedanta*,[24] the petitioner had completed his work on time but due to the nationwide lockdown, he defaulted on his contractual obligations. The respondent then terminated the contract and invoked encashment of eight bank guarantees.

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[18] Ragini Agarwal, *Performance Bank Guarantee: The Linchpin of Commercial Transactions*, Live Law (Nov 27, 2023, 7:10 PM), https://www.livelaw.in/know-the-law/performance-bank-guarantees-the-linchipin-of-commercial-transactions-part-1-162840

[19] *Supra* note 1.

[20] Shesh Narain Awasthi v. Chairperson Debt Recovery (*2011) 2 ADJ 102*.

[21] United Breweries Limited v. State of Karnataka and Anr (2007) 9 VST 594 Karn.

[22] *Supra* note 1.

[23] *Supra* note 1.

[24] Haliburton Offshore v. Vedanta 2020 SCC OnLine Del 542.

The Del HC issued an interim injunction in favour of the petitioner and ruled that this was a case of force majeure. The Del HC relied on *Standard Chartered Bank Heavy Limited v. Heavy Engineering Corporation Limited*[25] and reiterated that this can be an exceptional case of special equities. The Del HC also mentioned that not every case can be ruled along the same lines because of the nationwide lockdown. The conduct of the parties before the lockdown would be assessed as well.

In *Standard Retail Pvt Ltd v. M/S G.S. Global Corp.*[26], because of lockdown and COVID-19, the petitioners claimed they were unable to fulfil their contractual responsibilities, whereas the other party, based in South Korea, had fulfilled theirs. The Bom HC rejected the argument and restrained the respondents from encashing the bank guarantee by saying that it could not be a reason for invoking force majeure since the contract was one-sided and only the seller could invoke the clause. Also, the exporter from South Korea had fulfilled their contractual obligations and therefore the contract was possible to be performed during the lockdown.

Hence, presently, the law and the precedents still hold quite a lot of significance when it comes to determining surety's liability and discharge with respect to variance as well.

VI. COMPARISON BETWEEN INDIA AND CANADA WITH RESPECT TO SURETY'S LIABILITY DUE TO VARIANCE AND DIFFERENCE BETWEEN MINOR AND SUBSTANTIVE VARIANCE

When it comes to guarantee contracts, India and Canada, both being common law countries, have rules that are *pari materia*. This is evident when comparing the laws of India and Canada. Because both systems are based on English common law, it is easy to spot the similarities between them. On the other hand, due to the fact that

[25] Standard Chartered Bank Heavy Limited v. Heavy Engineering Corporation Limited 2019 SCC OnLine SC 1638.

[26] Standard Retail Pvt Ltd v. M/S G.S. Global Corp. and Ors., (2020) Arb. L 404.

Canada has a mixed legal system, there may be minor variations in one or more of the provinces.

The concept of variance is governed by the same law in both countries, and their definitions of the term are identical. In India, a surety is released from their obligation to pay if the variation that was made was done so without their knowledge or approval, and it is also detrimental to the surety if it is invoked. Even if the changes were made without the surety's approval or knowledge, the surety cannot assert that they should be released from their obligation if the variation is insignificant and serves to the surety's advantage. The same regulations are in effect throughout Canada. If the modifications are significant to the terms of the contract and have the potential to cause the surety damage that cannot be repaired, then the surety may be released from all of its duties.

Contract law in India, on the other hand, contains phrases such as "*irretrievable injustice*" and "*damage*,"[27] whereas contract law in Canada does not contain such legal principles. In India, a guarantor can be released from their obligation to pay if one of three conditions is met: the guarantee has been subjected to major changes, the surety has suffered irreparable harm or disadvantage, or the surety has been treated unfairly. It is made abundantly clear that a guarantor cannot be released from their obligations under circumstances in which the change in circumstances is insubstantial, in which the surety has given their agreement, and in which the surety will benefit from the change. Whereas on the other hand, the law of guarantees in Canada mentions four criteria in precise language on which a surety cannot be discharged. These criteria are as follows: if the alteration is plainly unsubstantial; if it necessarily benefits for the surety; if the surety has consented to the alteration; and if the surety has contracted out of protection of the rule or of the

[27] *Supra* note 2.

law. The last criteria is different than what is mentioned in Indian law of guarantees.[28]

In Canadian law, although there is a theoretically limitless number of alterations that could be deemed material, there are a number of changes that have been established as material deviations in contracts. Loan extensions, interest rate hikes, loan conversions to revolving credit facilities, credit limit increases, and lease term changes that prevent the principal from conducting the type of business originally contemplated by the parties are all examples of events that could constitute a material breach of an agreement.[29]

There have been instances where Canadian courts have relied on the same judgments as the Indian courts. In *Manulife Bank of Canada v. Conlin*[30], there was a material alteration regarding a loan and a mortgage agreement where the Sup. Ct. found that the sureties were released from their obligations because of renewal of the mortgage loan, which was done without the knowledge of the surety. It affirmed the principle that any material alterations that risks the surety, will extinguish liability in cases where consent is also absent as well. Canadian courts have also referred to *Holmes v. Brunskill*[31] as well. In *Rose v. Afterberger*,[32] it was reaffirmed that if a proposed variation has the capacity to prejudice the surety's position, then the creditor has to seek the surety's consent before such variations or alterations are made. If variations are not beneficial to the surety, then he can claim discharge of responsibilities. Thus, courts relying on these principles, have passed several judgments releasing sureties from their liabilities.

In case of minor and substantive variance as well, laws of both the countries are quite similar. Minor variations are those which do not materially alter the principal

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[28] Samuel M. Robinson, *Recent Developments in the Law of Guarantees,* CI (2016).

[29] Daniel P. Cipollone, *The Liabilities of Sureties,* OHLS-LSPRS (2015).

[30] Manulife Bank of Canada v. Conlin (1996) 3 SCR 415.

[31] Holme v. Brunskill [1878] QB 495 at 505 (Eng.).

[32] Rose v. Aftenberger [1969] OJ No 1496, [1970] 1 OR 547, 9 DLR (3d) 42 (Ont CA).

contract whereas substantive ones are those which have the potential of affecting the principal contract and prejudicing the surety. Thus, in case of insignificant changes the surety is held to be liable and not discharged from any responsibilities or obligations whereas in case of material alterations, surety is discharged.

Thus, on comparing Indian and Canadian law, similarity on a large scale is evident, however, with minor differences, where both countries rely on the same judgments to a certain extent. Hence, laws of both the countries are quite significant when it comes to laws relating to guarantee contracts.

VII. Critical Analysis

Given the proliferation of bank guarantees and guarantees in general as a result of an increase in the number of contracts being signed, the idea of variation in guarantees is novel. When carefully analysed, variance might be regarded as a significant basis for discharging the surety when it becomes unfavourable or prejudiced the surety. Therefore, the conditions when surety shall be discharged in cases of such variance have been relatively clear in Indian contract law and judicial precedent interpretation of the law. However, courts may face ambiguity in determining the surety's liability considering that the severity of the irreparable harm that can occur to a surety in determining his liability has not been codified in the black letter of the law.

The language of the provision also suggests that the surety may provide his approval for changes or variations. It cannot be considered valid if it is supplied in advance, however, due to the law's rigid interpretation. This can create a conflict of interest since, even after granting his consent, he is released from any responsibility, which could hurt both the principal debtor and the creditor in some sense.

Thus, when it comes to variance and discharge of surety's liability, the law is precise and clear on what will constitute its discharge, that is, the concept of substantial and material alterations. However, there might still be loopholes which could make the law more balanced and keep in mind the interests of all three parties in all sorts of situations. Except in cases of misrepresentation and fraud, even the interests of principal debtor and creditor have to be kept in mind along with those of the surety. The law regarding fraud in variance of bank guarantees needs to be clearer and precise, ensuring that irretrievable harm and injury is reversed for the injured party, that is, the surety.

Talking about bank guarantees as well, it is critical that cognisance of risk is undertaken, especially in the current scenario where bank guarantees are on a rise, considering the increase in business contracts and personal contracts as well. The security of the contingent or implied credit facility must be prioritised alongside the mitigation of the risks that have been identified. Thus, bank guarantees require special attention when it comes to the current scenario and on a broad aspect too.

A. *Critical Analysis of Anirudhan v. Thomco's Bank*[33]

This landmark case has been one of the most significant judicial precedents on the contract of guarantee in India. It has been instrumental in setting the stage for the subsequent cases and has established some well-constructed and precise principles which are still followed today. Thus, it becomes extremely imperative to analyse the effects that this precedent has left behind.

In this case, the claim against the appellant was dismissed by the trial court saying that the alteration was not important. The Ker HC conceded with the trial court and the change in an amount from INR 25,000 (twenty-five thousand) to INR 20,000 (twenty thousand) was considered to have been insignificant and beneficial to the surety. Such a change was not considered harmful to the surety since it meant that his liability had decreased. It was said that the initial contract of guarantee and its

[33] *Supra* note 1.

objective remained the same. Thus, his obligations and responsibilities were not discharged.

When one considers the significance of this landmark case, it becomes clear that it established a powerful and stringent precedent on the release of a surety's liability. It establishes explicit guidelines for determining the amount to which a surety's duty is incurred if a guarantee contract, in this instance a bank guarantee, contains a variance in its terms. It lays forth specific guidelines and mentions that any insubstantial change that is not material to the contract, in addition to being favourable to the surety and not putting him in a prejudiced position, cannot relieve the surety of his or her responsibilities and liabilities. This decision has been cited in a large number of subsequent cases where the surety's duty concerning variance has been the central point of debate.

In this particular instance, it was unmistakable that the appellant, Anirudhan, had provided the principal debtor with the letter of guarantee to be placed in the financial institution. Because of this, it is possible to infer that the principal debtor did have the consent of the surety, given that the appellant might have deposited the surety himself with the creditor based on the debtor's obligation. This may or may not have played a role in the decision that the court made.

In a minority opinion of J.L. Kapur[34], he opined that no matter how innocent the alteration was, the appellant cannot be held liable since he did not give his consent. However, the decision was based on the majority opinion which said that the surety should be held liable since the alteration was beneficial for him. The document was handed to the principal debtor who had made the changes. The surety entrusted the document with him and the debtor was acting on behalf of the appellant which should have made the appellant liable. Because the document was not altered while in the possession of the promisee or its agent, the avoidance of contract by material

[34] *Supra* note 1.

alteration does not apply in this scenario. Rather, the document was altered by the principal debtor, who at the time was acting as the agent of the guarantor, the appellant.[35] However, like any other judicial precedent, this case has been subject to criticism too. The court did not refer to the required sections of contract law but majorly decided on principles of common law. In the face of the existing law, the case was majorly decided on the grounds of common law.

Looking at the judgment in an overview, the case was instrumental in laying down a stringent law in terms of guarantee and is still considered as significant even after passage of several years. It is vital to highlight, as a last point, that this decision established the law for the interpretation of the principle of release of surety by variance in the provisions of the contract of guarantee. This is an important issue to keep in mind. The interpretation of the rule of discharge of surety is still considered a good law against the criticism that has been levelled against it. Therefore, in its entirety, the judgement is considered cogent, comprehensive and a strong judicial precedent that is considered to be unimpeachable.

VIII. SUGGESTIONS

The law must evolve according to the changing times, and thus, suggestions to improve the law are the need of the hour. Bank guarantees, for example, can be issued by banks by being more observant of the financial status of the customer, and by banks being more cognizant of risks involved in the transactions. Banks are required to be more cautious of what various transactions entail and thus, to avoid further complications should dutifully adhere to guidelines issued by the Reserve Bank of India to ensure smooth and efficient functioning. Banks should ensure that the debtors pay off their dues if they are capable of paying them and penalize such wilful defaulters appropriately.

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[35] *Supra* note 1.

When it comes to variance, the liability of the surety must be correctly determined. It is important that a surety is discharged of obligations if he is irretrievably harmed because of the variance. For example, efforts can be made to make the rights of discharge available to the guarantor or surety in a much more comprehensive manner and the limited rights are either made more precise or the rights are increased, for instance, in the case of variance achieved with an intent of malice. The law regarding such malafide intentions relating to bank guarantees or variance specifically is missing, the implementation of which could be the next step in making the law around guarantees stronger. Law can be catered to serve the current scenario and various other instances could be referred to facilitate the determination of surety's liability, for instance, finding the severity of variance or severity of substantiality and materiality. Making clearer distinctions on what could constitute minor and substantive variance and including provisions for the same instead of just relying on judicial precedents could be another step further in improving to contracts of guarantee.

Despite its significance, the judicial precedent surrounding the *Anirudhan* case needs to be examined in light of the current situation to assess its applicability. Thus, efforts can be made to work on the significance of such a landmark judgment and its rules too can be analysed and modified to accommodate any changes in the current context and the law modified accordingly. The rules and principles that it establishes should be reviewed once to ensure that it maintains its efficiency in determining the liability of the surety. Variance related to bank guarantees should be modified to include the principles of the aforementioned case as well.

IX. CONCLUSION

Contracts are one of the most essential components of corporate governance. They are also one of the most essential elements for all businessmen and other professionals, as they are formed specifically according to the interests of the parties, and they also seal off liabilities at the time that contracts are formed. A contract of guarantee is formed when there is a particular reassurance that the debt is due to the creditor will be paid either by the principal debtor if he is financially capable or in the traditional sense by a guarantor or a surety. Thus, contracts of guarantee have been of utmost importance ever since contract law evolved and even in the current context.

Bank guarantees as aforementioned are of cardinal value to today's century, considering how much business and trade contracts are growing and how individuals approach the banks for issuing guarantees. Hence, it is crucial, to see how much these bank guarantees are evolving to relevance today. Bank guarantees have gained a significant impact on contract law and will continue to have unprecedented growth in the future.

It is of utmost importance that the surety should not bear the brunt of such variations when significant alterations are carried out that have the potential to cause the surety an unacceptable amount of harm. There may be situations in which variance will be advantageous for the surety as well. As a result, the idea of variance is both fundamental and significant, and it takes up a significant place in the legal system governing the discharge of surety obligations. However, the law as it stands now provides a further benefit to the creditor, who may be the person who initiates the variance and may also have ill intentions. The surety must be offered some rewards as well if there is a variance. As a consequence of this, the law needs to be more detailed about the conditions that must be met before the surety can be released from their obligation. However, variation continues to be one of the most common methods in which a surety is discharged, and as a result, it still carries a large amount of weight.

Anirudhan vs Thomco's Bank[36], one of the milestone precedents of contract law and guarantees specifically, has been a cogent and stringent precedent in terms of the

[36] *Supra* note 1.

cases it has been referred in or the law that it establishes in terms of discharge of surety. In retrospect, the case was crucial in establishing a strict legislation regarding guarantee, and its impact has endured after the passage of several years. Last but not least, it's important to stress that this ruling set the precedent for how courts should apply the principle of release of surety by variance in the requirements of the contract of guarantee. Hence, even after being subjected to criticisms, it has never lost its relevance and continues to being a sound and unimpeachable precedent.

EQUITY AND INCLUSIVITY IN INTERNATIONAL TAX GOVERNANCE: UNVEILING GLOBAL SOUTH REALITIES

- AMISHA MITTAL & SHRUTI JHANWAR

ABSTRACT

The paper delves into the intricate landscape of international tax governance, particularly focusing on the challenges faced by the Global South. The global south, composed of lower-ranked Human Development Index ("HDI") countries, grapples with historical power imbalances and unequal participation in shaping global tax policies. The paper critically evaluates the impact of tax treaties, examining their historical context and how they perpetuate inequalities. The emergence of the Global South as a key player in shaping international tax governance is highlighted, especially through the Inclusive Framework on Base Erosion and Profit Shifting ("BEPS"). However, the paper emphasizes that existing structures fall short of addressing the diverse needs of developing nations. A pivotal focal point is the Global Minimum Corporate Tax Rate set forth by the Organisation for Economic Co-operation and Development ("OECD"), set at 15%, as a potential remedy to income loss and tax evasion in low- and middle-income countries (hereinafter referred to as "LMICs"). The paper scrutinizes its effectiveness and examines the critiques of its magnitude, especially by Group of Seventy-Seven ("G77") nations and African countries, advocating for higher rates. Comparing the OECD Inclusive Framework and a potential United Nations Tax Convention ("UN Tax Convention"), the paper emphasizes the need for a more open, inclusive, and participatory process. It underscores that the existing framework fails to provide a level playing field and considers the United Nations ("UN") as a potential avenue for more equitable negotiations. The UN source-based model for equitable international taxation is presented as a compelling solution to address historical imbalances, advocating for source-based taxation and fair revenue distribution. India's active engagement in the global tax discourse and its role in the Group of Twenty ("G20") *presidency are explored, suggesting its potential to drive change and foster a more inclusive approach to digital taxation along with a thorough impact of the G20 Summit and Delhi Declaration on the Global Taxation regime. The paper concludes by urging a departure from conventional narratives that perpetuate inequality. It emphasizes the importance of embracing equity, inclusivity, and cooperation to reshape international tax governance and create a more just and prosperous global economic order that benefits all nations, particularly those in the Global South.*

Key Words – Global South, Global Tax Governance, Source-based taxation, OECD, US Model Tax Convention.

I. INTRODUCTION

The evolving global tax governance discourse scrutinizes the OECD's Inclusive Framework and explores the potential of a UN Tax Convention. Challenges within this framework have spurred a demand for inclusivity, particularly from LMICs and civil society in the Global South[1], underlining the importance of comprehending these perspectives for shaping future reforms. A crucial concern is the influence of global tax treaties on the development of the Global South, including India's role, as the world becomes more interconnected.[2] These developing countries face challenges related to potential revenue losses caused by tax treaties with richer countries, particularly due to reduced withholding taxes on outgoing dividends and interest payments, with Japan, the Netherlands, Switzerland, and Singapore being major contributors to these losses.[3] This paper delves into the impact of these treaties on Global South economies, with a specific focus on India's involvement.

The term "Global South" encompasses countries which stand lower on the HDI and share common development challenges.[4] The swift expansion of Global South economies in recent years has subjected their tax policies and treaties to increased scrutiny due to their integration into the global economy. Tax revenue plays a vital

[1] For understanding of technical abbreviations throughout the paper read –
G77: A coalition of developing countries that aims to promote their collective economic interests and enhance their negotiating capacity on all major international economic issues.
G20: A group of 19 countries and the European Union, representing the world's largest economies, that aims to promote international financial stability and sustainable economic growth.
OECD: An intergovernmental organization that promotes policies to improve the economic and social well-being of people around the world.
Inclusive Framework BEPS: A group of over 135 countries and jurisdictions that collaborate on the implementation of 15 measures to tackle tax avoidance, improve the coherence of international tax rules, and ensure a more transparent tax environment.

[2] *The Impact of Tax Treaties on Revenue Collection: A case study of developing and least developed countries*, Actionaid (July, 2018), https://actionaid.nl/wp-content/uploads/2018/11/The-Impact-of-Tax-Treaties.pdf.

[3] *Ibid.*

[4] *The Global South*, Sage Journals (2012), https://doi.org/10.1177/1536504212436479.

role in public investment, social programs, and overall economic growth in many Global South nations. However, challenges in tax administration, such as limited capacity, weak enforcement, and widespread tax evasion, hinder the overall welfare efforts. Consequently, multinational corporations and foreign investors heavily depend on tax revenues from the aforementioned nations. The current global tax treaty network is heavily influenced by the OECD Model Tax Convention[5], primarily designed to serve the economic and political interests of OECD countries. Consequently, developing nations in the Global South experience significant tax income loss under this system, which favours higher-income nations and enables multinational firms to exploit loopholes.[6]

Nevertheless, recent developments have highlighted the Global South's growing influence in shaping global tax governance.[7] In a recent working paper by the International Centre for Tax and Development, researchers investigated how the United Nations could create a more inclusive and effective space for international cooperation.[8] The paper defines the current governance architecture as an 'international regime complex', emphasising the fact that several institutions govern international tax cooperation, without there being a hierarchy between them. Based on evidence drawn from interviews with 33 government officials (mainly from lower- income countries) conducted from May to July 2023, and from literature reviews on global governance arrangements in other policy areas, the paper discusses what role the UN could take in this international regime complex.[9] The adverse effects of international tax treaties on developing nations stem from

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[5] OECD, *Model Tax Convention on Income and on Capital: Condensed Version*, OECD Publishing (2017).

[6] *Supra* note 1.

[7] Martin Hearson, Rasmus Corlin Christensen & Tovony Randriamanalina, *Developing influence: the power of 'the rest' in global tax governance*, 30(3) 841-864 REVIEW OF INTERNATIONAL POLITICAL ECONOMY, (2023).

[8] Lucinda Cadzow, Martin Hearson, Frederik Heitmüller, Katharina Kuhn, Okanga Okanga and Tovony Randriamanalina, *Inclusive and Effective International Tax Cooperation: Views From the Global South*, INSTITUTUE OF DEVELOPMENT STUDIES (2023), https://ideas.repec.org/p/idq/ictduk/18097.html.

[9] *Ibid.*

multiple sources. Many developing nations lacked negotiation strength and technical expertise during the establishment of these agreements decades ago. Consequently, they often agreed to unfavourable terms to attract foreign investment[10]. Moreover, these treaties can favour residence-based taxation over source-based taxes, creating bias in favour of developed nations. This mismatch exacerbates income loss for developing countries, as they are frequently the source of cross-border transactions. This piece explores the significant repercussions of lower tax revenues on Global South growth, including reduced investment in crucial infrastructure, healthcare, and education. It also addresses the perpetuation of non-compliance culture due to tax avoidance and evasion by multinational corporations. The growing recognition of the need to reform international tax treaties is evident. The OECD and G20 are taking steps toward balanced, gap-closing, and anti-evasion international tax policies, including the Model Double Taxation Convention. The paper argues that the Global South must proactively engage in international tax negotiations to safeguard their interests and protect their tax bases effectively.

II. HISTORICAL CONTEXT

The historical context surrounding the international tax landscape reveals a pervasive legacy of power imbalances and disparities, particularly evident in the Global South's historical engagement with global tax governance.[11] From the era of colonialism to the present day, the interests of the Global South have often been sidelined in discussions concerning tax treaties and international tax strategies. During the colonial era, many countries in the Global South established taxation

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[10] Martin Hearson, *Developing Countries' Role in International Tax Cooperation*, INTERGOVERNMENTAL GROUP OF 24 (25 May 2017), https://www.g24.org/wp-content/uploads/2017/07/Developing-Countries-Role-in-International-Tax-Cooperation.pdf.x`

[11] Allison Christians, *Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20*, 5(1) NW. J. L. & SOC. POL'Y., (2010).

systems primarily geared towards meeting the financial needs of colonial powers, often prioritizing resource exploitation and income generation for the colonial authorities over domestic development. Consequently, after gaining independence, these nations found themselves equipped with inadequate tax structures to address the needs of their populations and foster sustainable economic growth.[12]

Following decolonization, several Global South nations entered into tax agreements with former colonial powers and other affluent countries.[13] These early tax treaties perpetuated inequalities and power imbalances reminiscent of colonial-era tax policies, resulting in terms that did not adequately represent the interests of the Global South. The League of Nations and later the OECD played central roles in shaping international tax cooperation, with the OECD's Model Tax Convention influencing the majority of bilateral tax treaties. However, the Global South's perspectives were largely absent from these discussions, further marginalizing their concerns within the evolving international tax framework.

The United Nations attempted to address this imbalance by developing its own Model Tax Convention in 1980, aiming to balance the interests of source and residence countries and safeguard the tax bases of developing nations.[14] Despite these efforts, the UN's approach did not gain as much traction as the OECD's widely recognized model. The emergence of multinational corporations **("MNCs")** and their exploitation of tax regulations led to the phenomenon of BEPS, wherein profits were shifted from high-tax to low-tax jurisdictions, depriving high-tax countries of revenue. The subsequent BEPS Project, initiated by OECD countries, aimed to rectify these issues by recommending changes to tax laws and enhancing

[12] Ibid

[13] *Empire And Decolonisation, Tax Justice And Networks*, (November 2020), https://taxjustice.net/topics/empire-and-decolonisation/.

[14] *UN Model Convention*, Department of Economic and Social Affairs Financing, (1980), https://financing.desa.un.org/what-we-do/ECOSOC/tax-committee/thematic-areas/UN-model-convention.

transparency. Initially excluded from the BEPS Project, the Global South's involvement grew over time, culminating in the creation of the Inclusive Framework on BEPS[15], a coalition of over 140 nations, many of which hail from the Global South.

In contemporary global tax governance, the Group of 77 **("G77")**, representing developing nations, has long advocated for a UN Tax Commission to better represent the interests of the Global South in international tax policy discussions.[16] Despite these calls, the OECD maintains its dominance over these conversations, limiting meaningful participation from non-OECD nations due to financial constraints, capacity limitations, and persistent power differentials.[17]

To promote sustainable development and rectify historical injustices, it is imperative to address the deeply entrenched power dynamics that have shaped global tax policies. The influence of OECD countries, rooted in economic and political power, has historically steered tax policies to favour their own economies, underscoring the necessity for a more equitable and inclusive approach to shaping the global tax governance landscape.

III. THE GLOBAL MINIMUM CORPORATE TAX DEAL

As part of the OECD/G20 inclusive framework, 136 of the 140 nations reached an agreement in October 2021 on a two-pillar tax reform proposal to address ongoing international tax issues.[18] The first pillar addresses tax issues brought on by the digitalization of the economy by extending taxing authority to "market jurisdictions," or nations where major multinational firms have clients but no

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[15] *What is BEPS?*, OECD, https://www.oecd.org/tax/beps/about/.

[16] Donald. R. Whittaker, *An Examination of the O.E.C.D. and U.N. Model Tax Treaties: History, Provisions and Application to U.S. Foreign Policy*, 8(1) N.C. J. INT'L L. & COM., (2016).

[17] Ibid

[18] *Supra* note 6.

physical presence. In order to stop a global corporate taxation race to the bottom and to counteract

multinational corporations'[19] base erosion and profit shifting, the second pillar establishes a global minimum effective corporate tax rate of 15%.[20]

The agreed-upon rate of 15% has drawn criticism from some G7 nations, inclusive of global south countries (majorly African nations), who claim that it is too low to effectively combat tax evasion through base erosion and profit shifting.[21] The African Tax Administration Forum **("ATAF")** recommended a 20% minimum rate as the worldwide minimum corporation tax rate, although the United States had advocated a 21% minimum rate. While the worldwide minimum corporate tax rate has been set at 15% in the current plan, there are still ongoing discussions about the ideal threshold, therefore modifications are still a possibility. Countries may review tax incentives in domestic law and investment contracts to bring the effective tax rate into line with the global tax rate as a result of the establishment of a global minimum corporation tax rate. It might be difficult to change tax incentives that are subject to fiscal stabilisation provisions in contracts or laws, which could obstruct the full application of the global minimum tax rate regulation. In addition, the implementation of a minimal global effective corporation tax rate may result in a fall in foreign direct investment **("FDI")** inflows to formerly attractive low-income nations due to their favourable tax laws, thereby lowering their corporate tax bases.[22]

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[19] Kaylin Dawe, Jae Yoon Mary Noh, Alexander Ignatov, *2020 G20 Riyadh Summit Final Compliance Report,* G20 Research Group (2021), http://www.g20.utoronto.ca/compliance/2020riyadh-final/06-2020-g20-compliance-final-tax-systems-211110.pdf

[20] Seydou Coulibaly, *Revenue Effects of the Global Minimum Corporate Tax Rate for African Economies,* SOUTH CENTRE TAX CORPORATION POLICY BRIEF (2022), https://www.southcentre.int/wp-content/uploads/2022/11/TCPB26_Revenue-Effects-of-the-Global-Minimum-Corporate-Tax-Rate-for-African-Economies_EN.pdf

[21] *Ibid.*

[22] *Ibid.*

Some nations might adhere to the global minimum tax rate while continuing to provide tax subsidies to multinational corporations in order to entice investment, possibly undermining the revenue advantages from enacting the global minimum tax rate. Theoretically speaking, the minimum effective corporate tax rate's influence on tax collections in Global South economies is still debatable.

IV. OECD INCLUSIVE FRAMEWORK

The governance of international tax issues has long been a sensitive topic, with LMICs and civil society voicing aggravation at the OECD's persistent dominance in establishing global tax laws. As part of a larger mission of expansion and outreach, the OECD has gradually pushed to incorporate non-member nations in its policymaking activity.[23] In the domain of taxes, this started to take shape in 2010 with the involvement of developing nations in OECD discussions via an unofficial Task Force on Tax and Development. A number of developing nations were invited to watch standard-setting sessions beginning in January, 2015. The OECD expressed confidence that this would give developing countries the opportunity to directly participate in and better understand the BEPS process while also providing OECD members and BEPS Associates with an understanding of the particular perspectives and difficulties that face developing countries.[24] Nearly twice as many nations as there were full OECD members were directly involved in the creation of BEPS measures by May, 2015. The G20 agreed with the OECD's proposal to create an "inclusive framework" that puts developing nations on an "equal footing" in the same year.[25] The framework has slowly grown and was present in 141 jurisdictions.

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[23] Morten Ougaard, Chapter 2 – The OECD's Global Role: Agenda-Setting and Policy Diffusion in Kerstin Martens, and Anja P. Jakobi (eds*), Mechanisms of OECD Governance: International Incentives For National Policy - Making? 26- 50,* (Oxford 2010).

[24] OECD, *The BEPS Project and Developing Countries: from Consultation to Participation,* THE BEPS PROJECT (2014), https://www.oecd.org/ctp/strategy-deepening-developing-country-engagement.pdf.

[25] G20 Research Group, *G20 Leaders' Communiqué,* UNIVERSITY OF TORONTO (2015), http://www.g20.utoronto.ca/2015/151116-communique.html.

Particularly when compared to trade governance, where developing countries had to join up to the General Agreement on Trade and Tariffs **("GATT")** decades before they had reached[26] an equilibrium that might threaten the historical core, this rapid and diversified expansion is noteworthy.[27] As an almost overnight experiment in the widespread inclusion of developing nations in previously Northern-led global governance, tax multilateralism presents a noteworthy setting. Although the OECD has declared the Inclusive Framework a resounding success, it is still very difficult for nations to participate effectively and formally in its standard-setting organisations. All respondents agreed that many developing nations' low levels of traditional regulatory capabilities were the cause of their lack of involvement. This argument demonstrates that just including developing nations in the process might not be sufficient to guarantee their equitable participation or to address their distinctive requirements and apprehensions within the framework of global tax policy.[28]

Despite the establishment of the OECD Inclusive Framework, which in theory permits all interested nations and jurisdictions to join, many Least Developed Countries **("LDCs")** and LMICs are still excluded from or unable to effectively participate in these negotiations.[29] It is important to delve into the criticisms raised by LMICs and civil society regarding the current global tax governance structure and to explore the potential benefits of establishing a more inclusive, universal forum for international tax policy negotiations. In this context, there are a number of approaches that could be taken. Primarily a pivotal aspect is the facilitation of capacity building, wherein the OECD should extend technical assistance and provide comprehensive capacity-building support to LMICs to empower them for

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[26] Martin Hearson, Rasmus Corlin Christensen & Tovony Randriamanalina, *Developing influence: the power of 'the rest' in global tax governance,* 30 (3) Review of International Political Economy 841 (2023).

[27] MICHALOPOULOS, C., *The Developing Countries in the WTO*, 22 World Economy 117-143 (1999).

[28] *Supra* note 12.

[29] *Supra* note 8.

more effective and meaningful engagement within the Inclusive Framework negotiations. Furthermore, there is a growing impetus for the establishment of a universally representative forum for international tax policy negotiations, aiming to address the legitimate concerns voiced by LMICs and civil society concerning the current configuration of global tax governance. Lastly, the question of equity in the allocation of taxing rights remains fundamental. The OECD is incumbent upon ensuring a scrupulously equitable allocation process that duly takes into account the multifaceted interests of all nations, LMICs included. These salient considerations underscore the evolving landscape of global tax governance and the pressing exigency for the development of mechanisms characterized by inclusivity, equitability, and genuine participation in the configuration of international tax policies. The UN taxation model seems to answer much of these requirements.[30]

V. OECD VS. THE UN MODEL - THE NEED FOR A MORE OPEN AND PARTICIPATORY PROCESS

The OECD Inclusive Framework faces criticism for limited African and LDC participation due to high costs and stringent requirements, leading to reduced representation and concerns about LMIC engagement.[31] Additionally, the G7[32]/G20 advantage has been criticized for favouring high-income nations. This essentially means that the framework favours the big national part of the G7 and G20 because it reduces the tax burden on them through its taxation structure. LMICs often contend with rushed deadlines and insufficient document analysis time, risking

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[30] *Supra* note 6.

[31] Julie McCarthy, *A Bad Deal for Development Assessing the Impacts of the New Inclusive Framework Tax Deal on Low- and Middle-Income Countries*, Center for Sustainable Development, https://www.brookings.edu/wp-content/uploads/2022/05/Tax-and-Bad-Deal-for-Development_Final.pdf.

[32] The Group of Seven (G7) is an intergovernmental organization consisting of the world's seven largest advanced economies, which dominate global trade and the international financial system. Its members include Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States.

unintended loss of taxing rights and exclusion from negotiations. In order to solve these concerns, a more extensive international framework, such as a UN tax commission or a formal UN Tax Convention, may be required but at this juncture, it also becomes important to address the inherent need for a UN-based model which would reap more benefits. In the rapidly evolving landscape of the digital economy, where data has become the cornerstone of production and commerce, a UN-based model for addressing taxation issues within the realm of global tech corporations offers a compelling solution. The transformation of business dynamics from physical factories to data-driven cloud platforms necessitates a corresponding evolution in the international tax system. Notably, a substantial portion of the world's big tech companies, predominantly headquartered in the United States, have exploited outdated tax structures, enabling them to avoid their fair share of taxes through practices like BEPS.

As highlighted by the Fair Tax Mark report[33], major multinational digital companies, largely US-based, evaded an estimated US$155 billion in taxes between 2010 and 2019 across offshore setups. Moreover, these US digital services firms often pay significantly more taxes to their home country than to other nations, even though a substantial portion of their revenue is generated internationally. The emergence of Digital Services Taxes **("DST")** by various countries was an initial response to this challenge.[34] However, the lack of a global consensus led to arbitrary tax rates and retaliatory measures, as witnessed in the case of the US imposing tariffs against countries implementing DST. While the US argued against these taxes on the grounds of discrimination and contravention of international conventions, it is essential to consider the rationale behind DST implementation. These levies are designed to ensure that non-resident digital service providers

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[33] Fair Tax Mark, *The Silicon Six and their $100 billion global tax gap*, Fair Tax (2019), fairtaxmark.net/wp-content/uploads/2019/12/Silicon-Six-Report-5-12-19.pdf.

[34] Understanding Digital Services Taxes & the OECD, BLOOMBERG TAX (January 4, 2023), https://pro.bloombergtax.com/brief/understanding-digital-services-taxes-the-oecd/.

contribute their rightful share of taxes based on revenue generated in the respective markets, a principle that becomes even more crucial during times of economic crisis, such as the COVID-19 pandemic.

To address this global debate, the OECD proposed a model[35] that promotes uniform taxation for digital service companies worldwide. This model consists of two pillars, the first of which mandates companies with significant global sales and profitability to pay taxes based on their business operations, regardless of their home market. The second pillar suggests a global minimum tax rate of 15 percent, providing a standardized benchmark for taxation. However, the UN Model offers several advantages over the OECD proposal. Firstly, it addresses the concerns of developing countries more effectively. Unlike the OECD model, which focuses on minimum thresholds for global sales, the UN model emphasizes the equitable distribution of taxation rights to the source country, ensuring that these nations can benefit from the economic gains facilitated by digital giants[36]. Furthermore, the UN model's flexibility allows source countries to negotiate tax rates with their partners, leading to a more balanced and tailored approach to taxation. Additionally, the UN model's inclusion of medium-sized tech companies ensures a more comprehensive tax base, capturing a wider range of businesses operating in the digital realm. Thus, a UN-based model for digital taxation offers a comprehensive solution to the challenges posed by the evolving digital economy. and ensures that developing economies can reap the benefits of their contributions to the success of major tech corporations. As the digital landscape continues to evolve, an UN-based approach

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[35] *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (October 8, 2021), https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm

[36] United Nations, *United Nations Model Double Taxation Convention between Developed and Developing Countries*, (2021), https://financing.desa.un.org/sites/default/files/2023-05/UN%20Model_2021.pdf.

to global taxation can pave the way for a fairer and more balanced economic ecosystem.

A more open and inclusive procedure that allows for independent analysis and input from a wider variety of stakeholders might address concerns that have been voiced about the lack of engagement from individuals and civil society in the negotiating process. The OECD's tax recommendations for LMICs also include an impact assessment of the equitable implications and economic risks, which would help ensure that international tax accords serve the interests of all participating countries.[37] Henceforth, the OECD Inclusive Framework, which represents the existing global tax governance framework, falls short of offering an inclusive and fair setting for discussions of international tax policy. The creation of a UN tax commission and/or a formal UN Tax Convention may provide a more open, inclusive, and transparent negotiating process while providing an intergovernmental platform that better addresses the worries and requirements of LMICs.

VI. INDIA'S STAND AND THE G20 PRESIDENCY

India has urged the UN to provide a transparent forum where all members may voice their opinions equally on international taxes, which is seen as being "skewed" in favour of those who set the laws.[38] The methods available for developing nations to voice their concerns about international tax issues are limited. The "Inclusive Framework" for BEPS enforces OECD-made regulations, leaving numerous problems unresolved. As a result, developing nations may only voice their complaints in the UN tax committee. Any amount of India's involvement in this

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[37] Ibid.

[38] PTI, *India Calls on UN to Provide Transparent Platform to Raise International Taxation Issues*, THE ECONOMIC TIMES (2018), https://economictimes.indiatimes.com/news/economy/policy/india-calls-on-un-to-provide-transparent-platform-to-raise-international-taxation-issues/articleshow/64272112.cms.

committee would help advance multilateralism and economic fairness. India's engagement is even more critical now that globalization is under criticism for not helping the masses.[39]

India has taken a strong stance in addressing the challenges posed by the evolving digital economy and the outdated international tax system. By implementing a 2-percent levy on non-resident digital service providers' revenues exceeding INR 2 crore[40], India has shown its commitment to ensuring fair taxation and revenue generation within its digital market. This step aligns with India's economic interests and reflects its determination to cope with the changing business landscape. Looking ahead, India should continue to advocate for its position on digital taxation, particularly by supporting the UN Model Tax Convention. This model offers the flexibility needed for source countries like India to negotiate tax rates and comprehensively tax all relevant entities, including medium-sized firms. By championing the UN model, India can establish a more inclusive and equitable framework for digital taxation that better serves the interests of developing countries, enables a fair distribution of gains, and ensures that tech giants contribute their rightful share to the economies where they operate.

India's assumption of the G20 presidency carried profound implications for its position and influence within the global arena, particularly concerning multifaceted issues like digital taxation.[41] As the current G20 presidency holder, India's role is elevated to that of a leading influencer, allowing it to wield

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[39] Abdul Muheet Chowdhary, *Why Is India the Only Country Funding the United Nations Tax Committee?*, THE WIRE (2018), https://thewire.in/economy/india-united-nations-tax-committee.

[40] Shadab Rabbani, *Digital service tax explained: India backs out of equalisation levy after global tax agreement kicks in*, BUSINESS INSIDER INDIA (November, 2021), https://www.businessinsider.in/policy/news/digital-service-tax-explained-india-backs-out-of-equalisation-levy-after-global-tax-agreement-kicks-in/articleshow/87928006.cms.

[41] *G20 New Delhi Leaders' Declaration*, (2023), https://www.mea.gov.in/Images/CPV/G20-New-Delhi-Leaders-Declaration.pdf.

considerable power in shaping international discourse, setting agendas, and driving policy decisions across a range of critical global matters, including those pertaining to economic governance and taxation. Within the context of digital taxation, India's G20 presidency confers upon it an elevated platform and heightened responsibility to champion its stance and strategic priorities. By leveraging its presidency, India can rally support and forge consensus among fellow G20 member nations, nurturing a shared commitment to establish an equitable and efficient global framework for taxing digital transactions and activities.

Furthermore, India's leadership role within the G20 empowers it to actively engage in intricate diplomatic manoeuvres, fostering dialogue and understanding between countries with disparate viewpoints on the complexities of digital taxation. This includes bridging gaps and encouraging constructive deliberations to find common ground between nations with varying economic circumstances and perspectives. Through these efforts, India can facilitate the formulation of a holistic and balanced approach to digital taxation that takes into account the interests of both advanced economies and developing nations. India's G20 presidency represents an opportune juncture to assert its vision for fair and effective digital taxation on a global scale. By adeptly utilizing this platform, India can advocate for the widespread adoption of principles that mirror its national interests and aspirations.

With the G20 Summit coming to an end, the New Delhi G20 declaration provides valuable insights into the influence of Global South in addressing the issues within the International Taxation Regime. The G20 New Delhi Declaration on international taxation holds significant implications when viewed through the lens of historical power imbalances and the unique challenges faced by lower-ranked HDI countries, collectively known as the Global South. The reaffirmation of commitment to a globally fair and modern international tax system underscores a global recognition of the need to address these imbalances and inequalities in shaping global tax policies. The declaration references the two-pillar international tax package and the Inclusive Framework on BEPS, showcasing the increased involvement of the Global South in international tax governance. However, it is crucial to critically evaluate whether these structures truly address the diverse and pressing needs of developing nations. The mention of the Global Minimum Corporate Tax Rate, set at 15% by the OECD, is a notable development, particularly in the context of income loss and tax evasion in LMICs. Still, this figure's magnitude remains a contentious issue, underscoring the necessity of inclusive discussions to ensure its effectiveness in addressing the concerns of the Global South. The paper's emphasis on inclusivity and the potential role of the United Nations in facilitating equitable negotiations aligns with the declaration's call for capacity building and support for developing countries, a key component in fostering a more balanced international tax landscape. This paper's advocacy for a UN source-based model for international taxation, promoting source-based taxation and fair revenue distribution, echoes the desire to address historical imbalances and inequalities, ensuring that countries with substantial economic activities receive their fair share of tax revenues. The reference to India's active participation in the global tax discourse and its role in the G20 presidency highlights the potential for countries in the Global South to influence international tax policies, particularly in the realm of digital taxation. The declaration ultimately concurs with the paper's overarching theme of departing from conventional narratives that perpetuate inequality. It embraces the principles of equity, inclusivity, and cooperation, all with the aim of reshaping international tax governance to create a more just and prosperous global economic order that benefits all nations, particularly those in the Global South.

VII. CONCLUSION

In summary, the discourse on international tax governance has evolved beyond the OECD framework, calling for inclusivity and equity in shaping global tax policies.

LMICs and civil society entities, particularly from the Global South, demand a comprehensive reassessment of existing paradigms due to historical power imbalances that have marginalized them in tax treaties and strategies. While the Inclusive Framework on BEPS represents a limited shift towards greater Global South participation, inequalities persist. LMICs have historically faced exploitative tax arrangements that hinder development. The Global Minimum Corporate Tax Rate, though a step toward equity, faces scepticism about its effectiveness. The Global South's call for justice and economic self-sufficiency resonates with a UN-based model for digital taxation, which rectifies historical injustices through source-based taxation and equitable distribution. India's assertive stance, especially in advocating for the UN Model Tax Convention as the G20 presidency holder, has provides to be an opportunity to amplify the Global South's voice, foster dialogue, and promote equitable reforms that address historical imbalances.

To reform international tax governance for LMICs, transcending historical power dynamics and embracing a paradigm of equity and inclusivity is imperative. This approach ensures meaningful involvement of LMICs in shaping global tax policies and upholds the principles of fairness within economic globalization. Departing from traditional narratives that sustain disparities is pivotal. A concerted effort is warranted to rectify past injustices and pave the way for a more inclusive and sustainable future, thereby realizing the development aspirations of the Global South.

CHILLING EFFECTS: SECTION 235 AND THE MINORITY SHAREHOLDER DILEMMA

- PRITHA LAHIRI & RIA AGRAWAL

ABSTRACT

This article critically examines freeze-out mergers (majority shareholders acquiring the shares of minority shareholders) in India, in light of Section 235 of the Companies Act, 2013. It proposes amendments to protect the rights of dissenting shareholders affected by these mergers. Freeze-out mergers involve the forced acquisition of shares from dissenting shareholders, raising concerns and vulnerabilities.

The analysis highlights the existing grey area of Section 235 in offering sufficient protection to dissenting shareholders during freeze-out mergers. The lack of clear valuation guidelines leads to undervaluation and oppression of dissenting shareholders. Additionally, the absence of a mandatory independent valuation expert further undermines dissenting shareholders' rights. Moreover, the provision grants dissenting shareholders the right to object without specifying grounds for objection, and even the courts do not quickly intervene in these matters.

To address these issues, the article suggests specific amendments to Section 235. It recommends incorporating a comprehensive framework for fair valuation methodologies that ensure dissenting shareholders receive fair compensation. Market-based approaches like market price or comparable company analysis should be utilized to determine the shares' actual value. Furthermore, the article proposes a mandatory requirement for an independent valuation expert who can unbiasedly assess the shares' fair value. Drawing inspiration from international practices, the article aims to strike a balance between the interests of majority and minority shareholders in freeze-out mergers.

Implementing these amendments would establish a more equitable and transparent framework for freeze-out mergers in India. It would guarantee fair treatment and adequate *compensation for minority shareholders while balancing the interests of the majority and minority shareholders.*

Keywords: Compulsory acquisition, Freeze-out mergers, Minority shareholders, Regulatory safeguards, Section 235 of Companies Act, 2013

I. INTRODUCTION

Freeze-out mergers, also known as squeeze-out mergers or minority buyouts, are transactions in which the majority shareholders of a company, typically holding more than ninety percent of the company's shares, acquire the shares of minority shareholders. According to the Black's Law Dictionary[1], 'Freeze Out' is 'an action taken to eliminate or reduce minority interest in a corporation'. A freeze-out merger aims to consolidate ownership and control of the company, enabling majority shareholders to streamline decision-making processes and achieve greater operational efficiency. According to the Companies Act of 2013 **("The Act")**, there are four ways to 'freeze out':

First. Compulsory acquisition or acquisition of shares of dissenting shareholders (Sectio 235[2]);

Second. Purchase of minority shareholding, (Section 236[3]);

Third. Scheme of arrangement (Section 230[4] to 234[5]);

Fourth. Reduction of capital (Section 66[6]).

Section 235[7] provides for freeze-out mergers through compulsory acquisition in India. In cases of compulsory acquisition, the absence of court approval does not impede the execution of the transaction. Nonetheless, dissenting minority shareholders retain the right to approach the court after the transaction has occurred, seeking to prevent their forced exclusion. The court's jurisdiction in such matters is restricted, and it can either dismiss the application or grant it to prevent the forced squeeze-out of the minority shareholders. It is one such provision that

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[1] BRIAN A. GARNER, BLACK'S LAW DICTIONARY (6th ed. 1990).
[2] The Companies Act, 2013, § 235, No. 18, Acts of Parliament, 2013 (India).
[3] The Companies Act, 2013, § 236, No. 18, Acts of Parliament, 2013 (India).
[4] The Companies Act, 2013, § 230, No. 18, Acts of Parliament, 2013 (India).
[5] The Companies Act, 2013, § 234, No. 18, Acts of Parliament, 2013 (India).
[6] The Companies Act, 2013, § 66, No. 18, Acts of Parliament, 2013 (India).
[7] *Supra* note 2.

renders the minority shareholders powerless and thus deserves more regulatory interference. While it allows the acquiring company to simplify its corporate structure by eliminating minority shareholders, it can be weighed against the concerns related to minority shareholder rights.

Majority shareholders have always been afforded a more significant say in a company's decision-making process. In the case of *MacDougall v. Gardiner*[8], the courts have emphasized this idea by asserting that they would refrain from interfering with a company's decisions if a majority made them, save in certain circumstances, such as fraud or oppression, this principle found firm footing in company law early on.

However, a balance must be struck between the interests of the majority shareholders and the minority shareholders, especially when their ownership rights are in question.

In light of these developments, the article seeks to analyze Section 235[9] of the Act and propose a practical way ahead for the existing ambiguities by involving the comprehensive analysis of regulatory frameworks across various jurisdictions and carving out favorable solutions suited to the Indian landscape in order to improve the existing regulatory grey area.

II. EXISTING REGULATIONS

In India, the freeze-out process is regulated by the delisting regulations set by the Securities and Exchange Board of India **("SEBI")** and the statutory provisions outlined in the Companies Act, 2013. Under the previous Act of 1956, Section 395[10] dealt with freeze-out mergers, which has now been replaced by Section 235 of the

[8] Macdougall v Gardiner, [1875] 1 Ch D 13.
[9] *Supra* note 2.
[10] The Companies Act, 1956, § 395, No. 1, Acts of Parliament, 1956 (India).

Act. Section 235 explicitly addresses the authority to acquire shares from shareholders who dissent from a scheme or contract approved by the majority.[11]

This provision enables a corporation to buy shares from dissenting shareholders through a scheme or agreement that has received majority shareholder approval.[12]

The Section[13] provides that:

> *"Where a scheme or contract involving the transfer of shares or any class of shares in a company (the transferor company) to another company (the transferee company) has, within four months after making of an offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved, other than shares already held at the date of the offer by, or by a nominee of the transferee company or its subsidiary companies, the transferee company may, at any time within two months after the expiry of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares"*

In addition, where a notice has been given, the transferee company shall be entitled to and bound to acquire such shares within one month following the date of such notice.[14] The provision imposes restrictions by allowing shareholders to utilize it only in specific cases. *In Re: Pattrakola Tea Company Ltd*[15], it was stated as follows- *"The reason is that the Act itself in Section 394(4)(b) makes a distinction between a 'transferee company' and a 'transferor company' In the case of a 'transferor company', a body corporate is specifically included but that provision has not been purposely made in the case of a 'transferee company'."* These provisions indicate that the Companies Act,

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[11] The Companies Act, 2013, § 235(1), No. 18, Acts of Parliament, 2013 (India).
[12] The Companies Act, 2013, § 235(3), No. 18, Acts of Parliament, 2013 (India).
[13] The Companies Act, 2013, § 235(1), No. 18, Acts of Parliament, 2013 (India).
[14] The Companies Act, 2013, § 235(2), No. 18, Acts of Parliament, 2013 (India).
[15] In Re: Pattrakola Tea Company Ltd, AIR 1967 Cal 406.

concerning Section 395[16] and the present Section 235[17] grants indulgence solely to companies falling within the Act's definition.

Section 235[18] as it stands now has various adverse consequences like share valuation and consideration determination among other things. This imbalance could result in potential disputes and reduced investor confidence in freeze-out mergers.

III. OVERLOOKED ESSENTIAL FACTORS: A TALE OF LEGISLATIVE FALLACY

A. The ambiguity surrounding the determination of the price of the proposed shares being acquired

The process of acquiring shares in a transferee company is a crucial aspect of corporate transactions.

Section 235[19] establishes that the transferee company may acquire shares by either making a payment or transferring an amount or consideration equivalent to the share price. While this provision allows for flexibility in the transaction, it fails to outline any criteria for determining the share price. Additionally, it does not identify any specific authority responsible for deciding the price. The absence of such guidelines has created ambiguity, leaving room for differing interpretations among stakeholders involved in share acquisitions. As a result, courts and regulators have been grappling with the challenge of establishing a consistent approach to determine share prices.

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[16] The Companies Act, 1956, § 395, No. 1, Acts of Parliament, 1956 (India).
[17] The Companies Act, 2013, § 235, No. 18, Acts of Parliament, 2013 (India).
[18] The Companies Act, 2013, § 235, No. 18, Acts of Parliament, 2013 (India).
[19] *Supra* note 2.

In the case of *AIG (Mauritius Case v. Tata Tele Ventures)*[20], the courts have interpreted Section 235 of the Act[21] to require that the acquiring company and the target company be separate entities.

Concerning valuation, the Supreme Court, in the *Cadbury case*[22], approved a squeeze-out merger and reduced capital at a price determined by a High Court-appointed independent valuer.

Additionally, in the case of *The Government Telephones Board v. Hormusji Manekji Seerval*[23], the Government of India appointed the valuer, and the court held that the purchasing company should not have the freedom to acquire the shares of minority shareholders in the transferring company.

Alternatively, SEBI's discussion paper[24] suggested that the listed company's exit offer to dissenting shareholders should be based on the stock's current market value. The exit price could be determined based on the price set in the exit offer given to existing shareholders, as per the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011[25]. For frequently traded shares, the exit price is calculated as the highest of the following options[26]:

First. The volume-weighted average price was paid during the fifty-two weeks immediately before the announcement date.

Second. The highest price paid for any acquisition during the twenty-six weeks immediately before the announcement date.

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[20] AIG (Mauritius Case v. Tata Tele Ventures), 2003 IIAD Delhi 672.

[21] The Companies Act, 2013, § 235, No. 18, Acts of Parliament, 2013 (India).

[22] In re: Cadbury India Ltd., (2015) 125 CLA 77 Bom.

[23] The Government Telephones Board v. Hormusji Manekji Seerval, (1943) 45 BOMLR 633.

[24] Securities and Exchange Board of India, Discussion Paper on Exit Offer to Dissenting Shareholders (2016), https://www.sebi.gov.in/sebi_data/attachdocs/1448966221407.pdf.

[25] SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

[26] SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Regulation 8, https://www.sebi.gov.in/legal/regulations/apr-2017/sebi-substantial-acquisition-of-shares-and-takeovers-regulations-2011-last-amended-on-march-6-2017-_34693.html.

Third. The volume-weighted average market price for a period of sixty trading days immediately before the announcement date.

Thus, the prevailing inconsistency can be observed in the varying interpretations of acquisition requirements, the appointment of valuers, and methodologies for determining exit prices.

B. Objection by Minority Shareholders

According to the Act, dissenting shareholders have the right to raise objections before the National Company Law Tribunal **("NCLT")** within one month of receiving a notice regarding the compulsory acquisition.[27] However, the tribunal holds the discretion to determine whether to rule in favour of the dissenting shareholders. If the court rules against the dissenting shareholders, they are obligated to abide by the contract or scheme approved by the majority shareholders of the transferor company.

In *Government Telephones Board Ltd. v. Hormusji Maneckji Seervai*[28] it was held that "where a scheme or contract is approved by ninety percent of the shareholders, the offer would be treated prima facie as a fair one, and the onus to prove to the contrary lies upon the dissenting shareholders".[29]

Also, in the case of *M/S Astrix Laboratories Limited v. M/S Mylan Laboratories Limited*[30], the minority shareholders objected that the independent valuer had not taken into consideration the net asset value approach while valuing the shares. The court accepted the argument that the appellant, who represented just five percent of the shareholders who disagreed with the majority, was essentially a lone voice in the crowd and did not resonate with the majority of the other shareholders. Even after

[27] The Companies Act, 2013, § 235(2), No. 18, Acts of Parliament, 2013 (India).
[28] Government Telephones Board Ltd. v. Hormusji Maneckji Seervai, (1943) 13 Com Cases 249.
[29] Government Telephones Board Ltd. v. Hormusji Maneckji Seervai, (1943) 13 Com Cases 249, Para 2.
[30] M/S Astrix Laboratories Limited v. M/S Mylan Laboratories Limited, (2015) 191 CompCas 376 (AP).

agreeing with the contention, the court was of the opinion that no interference with the valuation report is warranted and there is no need for appointing an independent valuer, as requested by the objectors.

These case laws indicate that the court tends to avoid intervening in matters concerning compulsory acquisition.

C. Uncertain nature of consideration

Section 235[31] states that the transferor company has the authority to acquire shares from dissenting shareholders. This acquisition can be made by paying the specified amount or providing alternative considerations representing the price for acquiring the shares. However, the Section does not provide any clear guidelines or specifics regarding the nature of such considerations representing the price payable. On the other hand, Section 236[32] of the act restricts the purchase of minority shares to cash transactions only, but this matter is not addressed in Section 235[33]. Due to the absence of definition of the term ***"consideration"*** in the 2013 Act[34], there is an uncertainty in determination of consideration.

IV. ROAD AHEAD: RECOMMENDED MODIFICATIONS

A. Criteria to Determine the Share Price

The provision i.e., Section 235 of the Act in its present form lacks specific guidelines for determining the acquisition price of shares, which could lead to counterproductive outcomes.

To avoid such undesirable consequences, a harmonious reading of Sections 236 and 235 is suggested wherein the Registered Valuer should determine the share price.

[31] *Supra* note 1.
[32] *Supra* note 4.
[33] *Supra* note 2.
[34] The Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).

Another approach is establishing an independent valuation mechanism to assess the value of the company's shares. Drawing from practices in the United Kingdom[35], this would involve independent valuation and fair payment for minority shares while also providing additional guidance on conducting freeze-out mergers. Additionally, guidance from Section 327b[36] of the Germany Stock Corporation Act can be considered, which mandates a written report from the controller and an independent auditor's report to determine the adequacy of the squeeze-out price.

Introducing the above-suggested amendments and implementing these requirements would protect minority interests in such transactions.

B. Determination of Consideration

As mentioned earlier, the ambiguity surrounding Section 235[37] pertains to the nature of consideration to be made when acquiring shares from dissenting shareholders. To avoid conflicting interpretations and consideration being undervalued and in prejudice of the minority shareholders, it is necessary to introduce a clear definition of "*consideration*" in the Act. One possible reference for guidance is Section 3486 of the Maine Insurance Code of 1925[38], which allows consideration for share acquisition to include the stock exchange, other securities, cash, alternative forms of payment, or a combination thereof.

C. Majority of Minority

To prevent an excessive number of objections before the NCLT, SEBI has proposed guidelines regarding the majority of minority approval for certain transactions, as

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[35] The Companies Act 2006, c. 46 (UK).

[36] Aktiengesetz [Germany Stock Corporation Act], § 327b. https://www.gesetze-im-internet.de/englisch_aktg/englisch_aktg.html.

[37] *Supra* note 2.

[38] Maine Insurance Code, 1925, § 3486, https://legislature.maine.gov/statutes/24-A/title24-Ach0sec0.html.

stated in its consultation paper Strengthening Corporate Governance at Listed Entities by Empowering Shareholders[39]. SEBI now intends to mandate that all guarantee transactions, regardless of their materiality, must be approved by the majority of minority shareholders. Furthermore, the directors of the lending company must establish and document their "economic interest" in granting such guarantees.

In the case of a company seeking to sell, dispose of, or lease its entire or substantial undertaking, SEBI has proposed two measures.

First. The objectives and commercial rationale for the transaction should be adequately disclosed to the shareholders;

Second. In addition to the special resolution required under Section 180(1)[40] of the Act, SEBI aims to include a requirement for the resolution to be passed by a "majority of the minority" shareholders. This means that the public shareholders' votes in favor of the proposal should outweigh the votes against it. Once again, empowering minority shareholders appears to be the central theme of this proposal.

This dual approval process should also be extended to Section 235[41]. Currently, Regulation 23 of LODR (Listing Obligations and Disclosure Requirements)[42] and Section 188[43] of the Act, already recognize the concept of majority of minority approval, where all related parties of the company abstain from voting.

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[39] SEBI Consultation Paper on Strengthening Corporate Governance at Listed Entities by Empowering Shareholders, (2023), https://www.sebi.gov.in/reports-and-statistics/reports/feb-2023/consultation-paper-on-strengthening-corporate-governance-at-listed-entities-by-empowering-shareholders-amendments-to-the-sebi-lodr-regulations-2015_68261.html.

[40] The Companies Act, 2013, § 180, No. 18, Acts of Parliament, 2013 (India).

[41] The Companies Act, 2013, § 235, No. 18, Acts of Parliament, 2013 (India).

[42] SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Reg. 23.

[43] The Companies Act, 2013, § 66, No. 188, Acts of Parliament, 2013 (India).

D. Empowering Minority Shareholders

The decisions made by the majority typically carry legal weight for all shareholders and, as a result, for the company as a whole. However, this approach can potentially lead to situations where the majority members abuse their strength to oppress the minority shareholders, resulting in the marginalization of the minority.

Section 235[44] is one such provision that results in the marginalization of minority shareholders, as it ultimately favors the majority's desires, as exemplified above. This notion of Majority Rule has been glorified in the well-known cases of Harbottle[45] and Astrix[46]. However, the *ICICI v. Parasrampuria Synthetic Ltd.*[47] case challenged this notion by highlighting the unique circumstances in India compared to other countries. In India, corporate enterprises are predominantly supported by state-sponsored funding structures that acquire funds from financial institutions, rather than relying on investments from individual small and medium-sized investors[48]. Suppose the strict application of the rule established in the Foss case is adopted in India, then it may prioritize the majority shareholders who possess a more significant percentage of shares, even if financial institutions (the minority shareholders), despite holding a smaller percentage of shares, contribute the majority of the finances. Consequently, depriving institutional investors of a voice-based solely on the mechanical application of the Foss rule would be considered unfair and unjust in the Indian context.

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[44] The Companies Act, 2013, § 235, No. 18, Acts of Parliament, 2013 (India).

[45] Foss v Harbottle (1843) 2 Hare 461, 67 ER 189.

[46] M/S Astrix Laboratories Limited v. M/S Mylan Laboratories Limited, (2015) 191 CompCas 376 (AP).

[47] ICICI v. Parasrampuria Synthetic Ltd, (2002) 9 SCC 428.

[48]Abe, Masato, Michael Troilo, and Orgil Batsaikhan. *Financing small and medium enterprises in Asia and the Pacific*" JOURNAL OF ENTREPRENEURSHIP AND PUBLIC POLICY 4.1 (2015): 2-32.

Essentially, Section 235[49] should be amended to include the voice of the minority shareholders in letters and spirits, as has been highlighted in the Parasrampuria[50] Ccase.

E. Principle of Fair Price

In the US, freeze-out mergers are subject to strict judicial scrutiny, and courts apply the "entire fairness" standard to ensure that minority shareholders receive fair treatment in terms of process and price.[51] Typically, a prospective buyer is not required to offer a minimum price when attempting to purchase shares of a target company, regardless of whether they have previously obtained shares through open-market transactions.

However, in specific jurisdictions, if a buyer acquires a certain percentage of the target company's shares, they may face limitations on merging with the company unless they adhere to minimum or fair price conditions or secure approval from the target's board of directors and/or a designated percentage of dissenting shareholders. The same has been held in *In re MultiPlan Corp. Stockholders Litigation*[52], wherein the Chancery Court observed that "the entire fairness standard is Delaware's "most onerous standard of review" and shifts the burden of proof to the defendant "to demonstrate that the challenged act or transaction was entirely fair to the corporation and its stockholders."

India has the opportunity to embrace the fair value principle, a practice currently utilized in the USA, in order to safeguard dissenting shareholders who are vulnerable to exploitation and oppression.

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[49] *Supra* note 2.
[50] ICICI v. Parasrampuria Synthetic Ltd, (2002) 9 SCC 428.
[51] Kahn v. Lynch Communication Systems, Inc., 638 A.2d 1110 (Del. 1994).
[52] In re MultiPlan Corp. Stockholders Litigation, C.A. No. 2021-0300-LWW, Court of Chancery of the State of Delaware.

F. The strict threshold for the 90% value

The ability to easily surpass the ninety percent threshold undermines a crucial safeguard for minority shareholders and creates an inconsistency in the rules governing offers made *by individuals and body corporates. In order to make the system favourable to the* minority, India should draw inspiration from Singapore, which recently amended its Companies Act, 1967[53], to broaden the scope of excluded shareholders in the calculation. The expanded criteria include the following:

First. A person who is accustomed or obligated, formally or informally, to act according to the acquirer's directions, instructions, or wishes concerning the target company.

Second. The acquirer's close relatives, such as a spouse, parents, siblings, and children (including adopted and step-children).

Third. A person whose directions, instructions, or wishes the acquirer is accustomed or obligated, formally or informally, to follow concerning the target company.

Fourth. A body corporate controlled by the acquirer or any individual mentioned in points (a), (b), or (c) above. Additionally, shares in the target company held by special purpose vehicles controlled by such individuals will also be excluded from calculating the ninety percent threshold.

By implementing stringent criteria for meeting the 90% holding requirement, the interests of minority shareholders will be safeguarded, irrespective of the size of their holdings.

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[53] The Companies (Amendment) Act, 1967 (Singapore).

V. FINAL THOUGHTS

In freeze-out mergers, the ownership and control of a firm are consolidated by the majority shareholders purchasing the shares of the minority shareholders. Dissenting shareholders lack legal protection under Section 235 of the Act, which deals with the compulsory acquisition of minority shares. The provision does not provide clarification on critical issues such as share price determination, consideration ambiguity, and restricted judicial involvement, among others.

Additionally, the costs of bringing legal action makes it difficult for dissenting minority shareholders to protest unfair practices, which has an especially negative effect on retail investors with modest holdings. As a result, the minority lacks the ability or resources to challenge unfavourable circumstances.

It is essential to overcome the current ambiguity - to determine the share price, precise criteria and rules should be developed, possibly by incorporating registered valuers or independent valuation methods. In order to minimize inconsistent interpretations, "consideration" should also be defined clearly.

The adoption of these improvements would promote a fairer environment by providing minorities an equal voice in the acquisition of their shares.

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