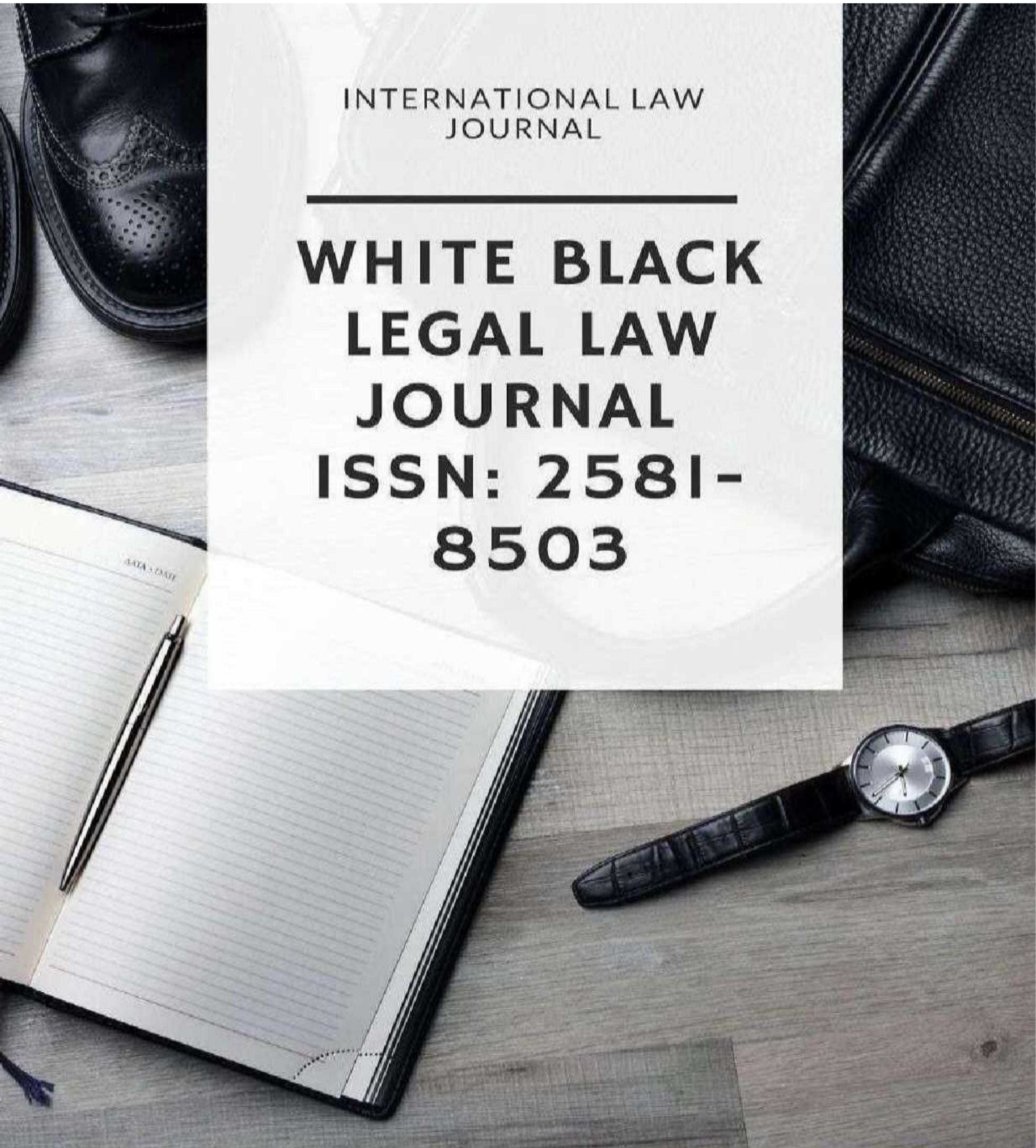

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With this thought, we hereby present to you

EQUITY IN MOTION: ANALYZING FREEZEOUT MERGERS AND THE BURDEN OF PROOF IN INDIAN CORPORATE LAW

AUTHORED BY - ADARSH KHUNTIA & VASUNDHARA DHAR

Abstract

The dynamic landscape of corporate transactions in India has witnessed the proliferation of freeze-out mergers, a mechanism that allows majority shareholders to consolidate control by acquiring the shares of minority shareholders. Freeze-out mergers have the potential to cornerstone the rights of minority shareholders by posing a threat to corporate governance implications. This paper addresses the multifaceted challenges faced by minority shareholders that include coercion, information asymmetry and unequal bargaining power. The article draws comparative analysis from the treatment of issues ranging out of freeze-out mergers in other jurisdictions. This research highlights suggestive recommendations for necessary reforms to corporate law to enhance the burden of proof to address the interests of minority shareholders during the process of freeze-out mergers. It scrutinises existing regulations, pinpointing their limitations in effectively protecting minority shareholder interests during freeze-out mergers. Recommendations for enhancing minority shareholder protection, strengthening corporate governance practices, and rebalancing the burden of proof are outlined as potential remedies. Moreover, the research underscores the significance of case studies to underscore the practical implications of freeze-out mergers on minority shareholders, presenting a comprehensive view of their experiences within the Indian legal framework. The article also explores the economic nuances of the freeze-out merger procedure and the possibilities of outcome that it has already and is expected from it shortly. This paper ultimately aims to state forward the suggestive recommendations for legislative policy framework to further on in the course of leading up to considering freeze-out or squeeze-out mergers in their consideration as a preferable and go-to procedural option for complex transactions that are vital for economic growth of countries like mergers and acquisitions.

Introduction

Freezeout mergers represent a mechanism that could significantly impact the structure and dynamics of a corporation, reshaping its ownership landscape. At the core of this transformation lies the intricate interplay between majority shareholders, who wield the power of control, and minority shareholders, who hold stakes that may be vulnerable to erosion in such transactions. Amidst this dynamic, the question of the burden of proof emerges as a pivotal juncture, influencing the trajectory of corporate legal battles. The realm of corporate law continually navigates a complex interplay between the interests of majority shareholders and the protection of minority rights. One of the most intriguing facets of this intricate legal landscape is the domain of freezeout mergers, where controlling shareholders seek to acquire the remaining shares of a corporation and effectively eliminate minority shareholders. The process, while often driven by the pursuit of corporate efficiency and consolidation, raises profound questions about the balance of power, fairness, and the safeguarding of minority rights within the corporate realm. Freezeout mergers embody this challenge, juxtaposing the legitimate pursuit of efficiency, competitiveness, and growth with the imperative to uphold minority rights and ensure equitable treatment. The focus on the burden of proof takes centre stage in this discourse, as it determines the threshold that must be met to substantiate claims of wrongdoing or oppression in freezeout mergers.

Freeze-out mechanisms, while capable of enhancing corporate dynamics and competitiveness when aligned with legitimate business goals, often straddle a fine line between their advantageous use and the potential for majority shareholder abuse.[1] The distinction between a constructive freeze-out and the exploitation of majority rights can be ambiguous. We contend that instead of outright prohibition, a prudent regulatory framework holds the potential to effectively address freeze-out issues, curbing instances of undue aggressiveness or abuse by dominant shareholders striving for complete control of a company. Freeze-outs typically respond to sound business imperatives that hold intrinsic value.[2] However, how they are executed must be subject to regulation that prevents the infringement of minority rights and maintains the requisite stability for minority investments. In the context of India, the regulatory landscape surrounding freeze-outs is relatively nascent but has garnered significant attention and scrutiny. The prevalence of freeze-out incidents has surged in India over the past decade, leading to heightened media coverage and

[1] John C. Coates IV, "Fair Value" as an Avoidable Rule of Corporate Law: Minority Discounts in Conflict Transactions, 147 U. Pa. L. Rev 1251, 1274 (1999)
[2] Lucian Arye Bebchuk & Marcel Kahan, The "Lemons Effect" in Corporate Freeze-outs, NBER Working Paper 6938 (1999) 2, <http://ssrn.com/abstract=226397> accessed on 15th July 2023.

discourse.

Given the predominance of controlled firms in India, the prospect of increased freeze-outs remains robust. Despite this, and the mounting array of reform proposals, a comprehensive and exhaustive examination of the existing legal framework and potential reform avenues within India's unique institutional and business environment is yet to be undertaken. Likewise, in the Indian context, the concept of freeze-outs is novel but carries profound significance, thus drawing substantial interest. Given the substantial presence of managed businesses in India, the propensity for more freeze-outs is substantial. Nevertheless, despite the proliferation of reform propositions, a comprehensive and systematic assessment of the current legal landscape and plausible reform strategies remains lacking, particularly considering India's distinctive institutional and corporate milieu.

History of Freezeout Mechanism

The term 'freezeout' frequently refers to the compelled acquisition of the minority's equity shares at a 'fair' price determined by the provisions of the Companies Act 2013 and the Companies (Compromises, Arrangements, and Amalgamations) Rules 2016. Regardless of their form, freeze-outs raise concerns for corporate law because the controller can determine the timing and price of the freeze-out, even against the wishes of minorities, because in most jurisdictions, approving a freeze-out only requires a majority vote in its favour, which a controller can typically obtain. This raises the possibility that the controller will engage in exploitative behaviour towards minority groups.

When the majority shareholder participates in a deal to forcefully acquire the remaining shares of the firm held by the minority owners, a freeze-out occurs. Business arrangements such as' majority-owned and controlled companies' have arisen as a workaround in cases when broad agreement among stakeholders is not attainable. This concept, which derives from the precedent-setting case of Foss v. Harbottle, is based on the core assumption of corporate democracy, which asserts that it is up to the majority's will to decide what is best for the firm. In India, freeze-out regulation is a recent idea, but it is gaining popularity owing to its relevance. Given that the vast majority of firms in India are managed, the possibility of further lockouts is highly likely. Despite this, and the increasing number of reform suggestions, there is yet to be a complete and systematic review of present law and prospective reform measures in India's unique institutional and corporate framework.

Freeze out the template in a legal and economic framework

There has been much discussion about freeze-out transactions. Several critics saw these transactions as damaging to minority investors due to the controlling stockholder's largely unrestricted capacity to displace the minority's stake[3]. Unsurprisingly, they advocated for outright bans or legal restrictions on freeze-outs. Other observers, on the other hand, contended that freeze-outs benefit investors because they encourage the effective deployment of social resources. These analysts concluded that freeze-outs should be authorised if disclosure and fairness standards were followed. Initially, the complete fairness model was used, and judges changed the threshold based on the many factual circumstances they encountered. The courts concluded that additional examination was required because of the potential for misuse and conflicts in freeze-out transactions. Recent Delaware case law has questioned and undercut this traditional concern for minority interests in the setting of a freeze-out. These recent rulings have combined to diminish minority shareholder rights by allowing corporate planners to deftly avoid the whole fairness criterion. Freeze-outs can improve the efficiency of the corporate control market by facilitating takeovers. The market for corporate control can play a role in monitoring management and ensuring that assets are allocated where they are most productive. However, various collective action issues, such as the free rider and holdout difficulties, preclude the market for corporate control from working according to the single-owner criterion. The objective of the freeze-out law is then to eliminate these collective action difficulties and duplicate the outcome offered by the lone owner norm. The free rider problem is the first collective action problem that prohibits the market for corporate governance from working effectively. The free rider problem is the first collective action problem that prohibits the market for corporate governance from working effectively. Grossman and Hart[4] discovered it initially, and their model has since been improved and enhanced by numerous writers. The free rider problem arises from the fact that the shareholders of a firm that is the subject of a takeover offer expect that the bidder would increase the company's profitability since he would not have made the bid otherwise.[5] Instead of accepting the bid, the shareholders keep their shares to profit from the bidder's earnings. To address the issue of free riders, Amihud, Kahan, and Sundaram presented a freeze-out mechanism in which the freeze-out price is set at the maximum of two variables: the pre-bid market price and the bid price.

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[3] Richard A. Booth, Management Buyouts, Shareholder Welfare, and the Limits of Fiduciary Duty, 60 N.Y.U. L. REV. 630 (1985);

[4] SJ Grossman and OD Hart, ‘Takeover bids, the free-rider problem and the theory of the corporation’ [1980] The Bell Journal of Economics 42.

[5] LA Bebchuk and OD Hart, ‘Takeover bids vs. proxy fights in contests for corporate control’ (2001).

Minority shareholders can no longer free-ride on the bidder's value growth with this option, as they can be expelled after the acquisition at the bid price.[6] Indeed, by the lone owner criterion, shareholders will only evaluate the offer price to their valuation of the shares, disregarding the post-bid value of the shares.

Legal framework under Indian Corporate Law

The Companies Act of 2013 included a system in which minority stakeholders are driven out of the business or corporate mechanism to decrease company litigation against minority stakeholders. This legislation includes provisions that allow an acquirer or anyone acting with the approval of the majority or controlling stakeholders to become a registered shareholder of 90% or more of the issued shares of the targeted firm or their own company, whether listed or not. The acquirer or the majority stakeholder's representative must notify the minority stakeholders of their desire to purchase the remaining share. In some cases, a minority shareholder may make a Suo-Motto offer to the majority or controlling shareholder.

The Companies Act, 2013, further stipulates that when a listed company goes through a freeze-out or minority buyback, the values of the minority owners' shares are decided by SEBI standards and carried out by a registered valuer. According to the Companies Act of 2013, the methods of 'freezing out' can be classified into four categories:

1. Compulsory acquisition or acquisition of shares of dissenting shareholders,
2. Purchase of minority shareholding,
3. Scheme of arrangement4 (section 230 to 234), and
4. Capital reduction.

These measures also safeguard minority stockholders. This clause was added following several company restructurings. This clause now makes freeze out a lawful option. The notion of freeze-out is relatively recent, having emerged in the last decade. However, the freeze-out in India has grown significantly. This field has been tough and constantly scrutinised. This incident has received extensive press coverage and media coverage. If we go ahead, we will see an increase in these freeze-outs because it has been legalised and the majority of companies in India are registered. Several modifications to these laws have been proposed, but no legislation has been

[6] Y Amihud, M Kahan and RK Sundaram, 'The foundation of freeze-out laws in takeovers' [2004] The Journal of Finance 1325.

passed. It contains untapped potential that might have a positive or negative impact. Sections 235 and 236 of the Companies Act 2013 include the most detailed provisions addressing freezeout mergers. Though they do not expressly address mergers or other schemes of organisation, they do outline the method for buyouts. They are especially significant in forced share purchases, in which an offeror business squeezes out the minority in the second company by an acquisition offer. They might be regarded as the statutory provision on the issue of freezeout mergers because they are the key phase of a freezeout merger. Section 235 states unequivocally that if minority shareholders do not accept or provide their agreement to the transfer or sale of shares within a certain time frame, their shares are presumed to be cancelled and they are promptly paid out. Given the scarcity of freezeout merger instances in India, we must look for similarities in other similar deals. For example, in the case of Sandvik Asia[7], the court recognised that schemes of arrangement in which the minority shareholder was inequitably squeezed out of the company's shareholding might be held accountable even though they were not, ostensibly, in breach of the legal restrictions. This is because the plan of selective share reduction was legally permissible and could be readily passed with the backing of a shareholder majority, particularly in concentrated corporate structures such as those seen in India. This is a rich basis for lawsuits alleging minority oppression[8].

Furthermore, in AIG (Mauritius) LLC v. Tata Televentures (Holdings) Limited[9], the court acknowledged the potential of a dominant majority removing a minority holding by using the established voting method (under Section 395 of the Companies Act 1956). The approach did not account for the possibility that the offeror of a form of arrangement, such as a merger or a takeover, might have a majority interest in the target firm, rendering the entire transaction manifestly unjust. It is plausible to think that the controlling majority may execute a merger and minority expulsion without inviting these constraints by hiding behind the legal guise of an independent firm.

Minority Shareholder's welfare determination

When determining whether a freeze-out swap is appropriate for minorities, the cost at which they are being frozen out is extremely important. The technique followed determines the method of

[7] Sandvik Asia Limited vs. Bharat Kumar Padamsi and Ors, Appeal No. 308 of 2004 in Company Petition No. 478 of 2003 in Company Application No. 290 of 2003, as decided on April 4, 2009 <https://www.nishithdesai.com/corporate-update/2009/Minority%20Shareholder%20judgments.pdf> accessed on 11th August 2023.

[8] Utkarsh Mani Tripathi, 'Evaluating Freezeout Mergers and Burden of Proof in Indian Corporate Law', <*https://www.irccl.in/post/winning-entry-evaluating-freezeout-mergers-and-burden-of-proof-in-indian-corporate-law*> accessed on 11th August 2023.

[9] AIG (Mauritius) LLC v. Tata Televentures (Holdings) Limited, 2003 IIAD Delhi 672, 103 (2003) DLT 250.

value assurance. In such a scheme, there is little risk that minority shareholders who disagree with the underlying offer would be penalised. They cannot be coerced into accepting the controller's offer in this way. On the other hand, special factors operate when a freeze-out is initiated by a plan of action or a capital drop. In both of these cases, the courts were given fully equivalent requirements. Even though the evaluation of freeze-outs is constantly questioned, courts have a propensity to accept the master value evaluations of accounting firms or venture capitalists. The Supreme Court's decision in Hindustan Lever Employees' Union v. Hindustan Lever Ltd[10]. emphasised that "an organisation court does not practise a re-appraising ward." This criterion has been extensively followed by courts in India when sustaining freeze-outs through either a plan of action or capital reduction. Minorities are unlikely to be useful in testing the expense at which the freeze-out is being implemented in the absence of a patent error or illegality in the valuation workout. Given the subjectivity of the valuation system, which is dependent on the data provided by the organisation (i.e., the controller), minorities can find little comfort in the fact that they are receiving a fair price and that their rights have been protected. Another miracle is the court's limited examination. For example, a delisting followed by a freeze-out will almost always result in a significant disparity between the cost at which a controller initially delists the organisation and the cost of the freeze-out. Minorities have a say in determining the cost of delisting, but it is severely limited due to a freeze-out.

Under the Delisting Regulations, the controller is responsible for determining the cost of a delisting offer using the 'turn around book building' handle. Because the system is simple, minorities may evaluate the prices at which different shareholders are making their proposals before deciding on the price at which they would make their offer. As it is, they cannot just make an educated judgement; they must also determine the cost of delisting. Distinguish the inversion book-building process in a delisting from the valuation-based procedure acquired in a freeze-out via a plan of action or capital reduction. Shareholders have not chosen as of yet. The controllers make the estimate decisions, although they are assisted by master valuation reports. Minorities have only responsive forces to contest the value, with the onus on them to demonstrate errors in the valuation system used if they believe it is unjustified to their interests. The lack of opportunity for the minority to participate in the value disclosure component enhances the possibility that such shareholders may be obliged to sell their shares in a delisting offer rather than clutching them following the delisting. Overall, there is no goal mechanism for reaching out at a fair cost in a

[10] Hindustan Lever Employees' Union v. Hindustan Lever Ltd, (1999) IILLJ 804 Bom.

freeze-out that safeguards minorities' interests[11].

International Freeze out transaction treatment

While there are a few methods in India for freezing out minority shareholders, the guarantee provided is insufficient. Given this limited exposure of jurisprudence in India there needs to be a comparative analysis of the treatment of minority shareholder rights in freeze-out mergers in other developed and developing economies around the world.

South Korea

In recent years, minority shareholders in South Korea have demonstrated heightened engagement, facilitated by regulatory advancements such as the Securities Class Action Act of 2005. These developments provide minority shareholders with enhanced tools to actively influence corporate decisions. However, the increased involvement of proactive minority shareholders may entail escalated administrative costs. Professor Hyeok-Joon Rho[12] has correlated this surge in shareholder activism with a rise in delisting requests, frequently preceding tender offers orchestrated by controlling shareholders to extend an exit avenue to minority stakeholders.

Within the framework of the South Korean Commercial Code (KCC), majority shareholders can employ coercive tactics such as curbing dividends, restructuring the corporate framework, or diverting earnings to marginalize minority shareholders. South Korean law circumscribes the contexts within which such oppressive actions can be executed. Sections 368, 538, and 464 of the KCC extend safeguards to minority shareholders about dividends and voting rights. While the KCC does not explicitly address cash-out mergers, customary practice assumes that shareholders of the absorbed entity would receive shares in the resultant or acquiring company. Nevertheless, Section 523.4 of the KCC offers room for the acquirer to opt for cash payments to shareholders of the acquired entity, with terms stipulated in the merger agreement.

It is noteworthy that this approach is inapplicable in abbreviated mergers involving a company's subsidiary that is 90% owned. Article 360.2 of the KCC governs the "Share Exchange," facilitating

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[11] Ninad Shah, '"FREEZE OUT": TAKEOVER AND ACQUISITION OF MINORITY INTEREST',< https://www.linkedin.com/pulse/freeze-out-takeover-acquisition-minority-interest-ninad-shah> accessed on 11th July 2023.

[12] Rho, Hyeok-Joon, New Squeeze out Devices as a Part of Corporate Law Reform in Korea: What Type of Device is Required for a Developing Economy?. Boston University International Law Journal, Vol. 29, p. 41, 2011. http://ssrn.com/abstract=2217488. Page 44.

a transfer of all target company shares to the acquiring entity, thus conferring full ownership to the buyer. Nonetheless, shareholders from the target firm are anticipated to receive shares in the acquiring enterprise. Alternatively, under Article 360.15 of the KCC, the "Comprehensive Share Transfer" mandates the creation of a new entity, whereby shareholders of the target company receive shares in this new entity, subsequently assuming the role of a holding company for the target. These mechanisms impose mandatory compliance, even for dissenting shareholders, contingent upon approval from both the target and the acquiring company's shareholder meetings. While not a strict squeeze-out technique, it is perceived as a stride towards such regulations due to its assertive nature. The stringent regulatory hurdles imposed by South Korea render the direct squeezing out of minority shareholders by majority stakeholders an arduous task. Consequently, alternative forceful measures, often demotivating minority investors, are resorted to. Thus, this rigorous regulatory landscape inadvertently fails to adequately safeguard minority rights while fostering efficiency-driven majority interests.

Europe

In Europe, the practice of conducting cash-out mergers is largely absent due to regulatory limitations and the overarching principle that a shareholder's participation right cannot be nullified without their consent. The Third Council Directive Concerning Mergers of Public Limited Liability Companies (Third Directive) underscores this by mandating that shareholders involved in a merger receive shares of the surviving entity, ensuring minority shareholders maintain ownership rather than being cashed out.[13] Under the European regulatory framework, conducting a merger with a purely cash consideration for select shareholders is impermissible. This rule stems from the fundamental principle that minority shareholders' rights should be preserved. Even within the context of public-to-private transactions where a listed corporation merges into an unlisted entity, minority shareholders retain participation in the resulting corporation due to the mechanism of mandatory bids introduced by the Takeover Directive. This mechanism, inspired by UK practices, stipulates that any acquisition of control over a listed corporation necessitates a tender offer for all outstanding voting shares, minimizing the scope for cash-out mergers.

The Takeover Directive further establishes conditions under which a squeeze-out of minority shareholders can occur following a mandatory or voluntary tender offer. The threshold for such

[13] Croci, Ettore and Ehrhardt, Olaf and Nowak, Eric, 'The Corporate Governance Endgame – An Economic Analysis of Minority Squeeze-Out Regulation in Germany' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2080745, 2013> accessed on 14th July 2023.

squeeze-outs varies among Member States, with the requirement generally ranging from 90% to 95% of shares included in the offer. This regulatory landscape ensures that cash-out mergers remain atypical, and while variations exist across European jurisdictions, the prevailing approach is to prioritize minority shareholder rights and equitable treatment. Thus, the predominant mode for privatization within Europe adheres to the framework of statutory freeze-out rights triggered by comprehensive tender offers on outstanding shares.

United Kingdom

Under English law, under the Companies Act, 2006, the acquirer may Freeze out the minority owners utilising the identical techniques as those used in India, i.e. requisite procurement, game plan, and capital decrease. While the restrictions and tactics are comparable in both Indian and English law, the legal concepts and rights of minority shareholders are varied. For example, in Hellenic and General Trust Ltd., the Court decided that a backup of the acquirer had unmistakable excitement from the minorities and that each must now represent a separate class, even though "most of the minority" lead in a plan of course of action. Such a stance has not yet been adopted in India. Freeze-outs have been invalidated by English courts when they have been carried out in a way that harms the interests of minorities. Furthermore, the notice that will be provided to the minority shareholders defines the consequences and impact of the plan of course of action on the minority shareholders under English law.

USA

The legal landscape surrounding freeze-out transactions in the United States, particularly in Delaware, has evolved to ensure protection against potential self-dealing. Delaware courts have traditionally subjected freeze-out transactions to judicial scrutiny. This legal framework distinguishes the obligations of majority shareholders in freeze-out merger bids from tender offers. In the context of freeze-out mergers, Delaware law mandates judicial review under the entire fairness standard for controlling shareholders holding less than 89.5% of a target corporation.[14] This standard encompasses two facets: fair dealing and fair price. Fair dealing emphasizes the transparency and arm's length nature of the transaction, while fair price entails granting appraisal rights to dissenting shareholders. Tender offer freeze-outs offer an alternative route, often involving a two-stage process with a controlling shareholder's tender offer followed by a short-

[14] Subramanian, Guhan . «Post-Siliconix Freeze-Outs: Theory & Evidence.» The Harvard John M. Olin Discussion Paper Series. Discussion Paper No. 472 (2004) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=530284> accessed on 14th July 2023.

form merger. Delaware courts apply a less rigorous standard to these tender offer bids, provided the offer is not coercive in structure, full disclosure is maintained, and a non-waivable majority of the minority tender condition is included. The trajectory of cash-out mergers in the United States traces back to the 1920s when Florida became the first state to allow them. Delaware subsequently authorized cash consideration in both short-form and long-form mergers. While the Model Business Corporation Act incorporated cash-out provisions for mergers, regulations aimed at protecting minority shareholders emerged, emphasizing fairness in both dealing and price.

Section 251 of the Delaware General Corporation Law (DGCL) facilitates mergers, requiring board approval and shareholder consent. Squeeze-outs can occur through tender offers or two-step mergers. If a controlling shareholder can't acquire all minority shares through a tender offer, a two-step merger may ensue. Section 253 of the DGCL governs short-form mergers where one corporation owns 90% of another's outstanding shares. Delaware's flexible regulations promote controlled squeeze-out transactions while safeguarding minority shareholder interests. Courts incentivize negotiated transactions by distinguishing between arm's length and non-arm's length dealings, enhancing fairness scrutiny. This balanced approach strives to protect minority shareholders without negating the advantages of squeeze-out transactions.

Canada

Under the framework of general Canadian corporate law, the execution of squeeze-out transactions necessitates the endorsement of a regular shareholders' meeting for each class of shares individually. A distinctive feature of Canadian law lies in its differentiation among holders of the same class, stipulating that shareholders entitled to a superior consideration after the squeeze-out than their counterparts are precluded from participating in the resolution's voting process. Furthermore, squeeze-out endeavours within Canada are subject to an oppression remedy, which assesses the transaction's equity and fairness, focusing on potential harm to the legal and equitable interests of diverse stakeholders affected by the corporation's or directors' oppressive actions. This remedy empowers courts to enforce not solely legality, but also fairness, with judgments resting upon the reasonable expectations of stakeholders in the pertinent context and relationships at stake. The predominant mode of acquisition in Canada occurs through a statutory plan of arrangement. This entails obtaining approval not only from shareholders, as per section 193 of the Canada Business Corporations Act (CBCA), but also from the court, per article 192(3) of the same act. Court approval is granted when a valid business rationale exists, coupled with the resolution of opposing shareholders' concerns fairly and equitably. Under such a plan, the purchaser secures all the outstanding shares of the target company in one transaction, obviating the need for subsequent squeeze-out transactions. Amalgamations, subject to a 2/3 majority approval by the amalgamated corporations' shareholders' meeting, offer a potentially streamlined approach if the controlling shareholder owns at least 67% of the company's shares. Nonetheless, a two-step transaction mandates approval not only by a 2/3 majority of shareholders but also by a majority of minority shareholders.[15]

For effectuating a squeeze-out via share consolidation or reverse stock split, the modification of bylaws is required. The Canada Business Corporations Act stipulates that such an alteration necessitates endorsement through a special resolution passed in a shareholders' meeting, requiring a 2/3 majority. To efficiently effect a squeeze-out through share consolidation, the amendment must encompass provisions for cashing out fractional shares, while the exchange ratio must render minority shareholders with fractional shares that, collectively, do not comprise a full share. Canadian law furnishes mechanisms for squeeze-outs necessitating shareholder authorization with a special majority or subject to prior court sanction. In cases other than those aligned with a plan of arrangement, aggrieved shareholders post-squeeze-out possess the recourse of legal action to seek compensation or equitable value for their shares. The option of a plan of arrangement, albeit involving substantial transactional expenses, strengthens the transaction's foundation by securing court approval that safeguards both controllers' and minority shareholders' interests and offers versatile transactional structures. Notably, the efficacy of this regulatory approach hinges upon the availability of specialized judges adept at addressing intricate transactional nuances.

Australia

Under the Corporations Act, of 2001, there are two procedures for freeze-out in Australia:

(1) required procurement following a takeover bid or

(2) necessary obtaining in distinct situations. In all of these tactics, minority shareholders have the right to object to the acquisition of their securities by filling out a complaint form (which comes with the notification) and returning it to the shareholders (90%) who supported the acquisition. The objection with the Australian Securities and Investments Commission ("ASIC") is halted, along with a list of shareholders who complained. Once the minority complaint is resolved, the mandatory procurement continues provided that the shareholders in each class who have objected

[15] Cumming, Matthew ‘Take-over Bid vs Plan of Arrangement: Top 10 Considerations’, Canadian M&A Perspectives. McCarthy Tetrault. (2011) <http://www.canadianmergersacquisitions.com/2011/12/14/take-over-bid-vs-plan-of-arrangementtop-10-considerations/> accessed on 14th July 2023.

to the acquisition together control less than 10% of the shares or the Court has confirmed the securing based on appropriate inducement for the securities advertised.

Burden of Proof under Indian Corporate Law

In corporate law, the requirement of burden of proof serves as a fundamental principle that helps maintain fairness and accountability within the corporate legal system. This requirement necessitates that the party making a claim or raising an issue bears the responsibility of providing credible and sufficient evidence to support their contentions. In other words, the party asserting a particular fact or alleging wrongdoing must present convincing proof that the fact is true or the alleged misconduct occurred.[16] This requirement ensures that legal proceedings are conducted on a solid evidentiary basis, preventing baseless claims from causing unwarranted harm or disruption to corporate entities. By placing the burden of proof on the party making the assertion, corporate law promotes transparency, discourages frivolous litigation, and encourages parties to engage in responsible and justifiable legal actions. In the context of Indian Corporate Law, the burden of proof refers to the responsibility placed on parties to provide evidence and substantiate their claims or defences in legal proceedings related to corporate matters. This legal principle plays a pivotal role in determining the outcome of disputes, regulatory actions, and litigation involving corporations and their stakeholders. In India, the burden of proof is intricately linked to the principles of natural justice and fairness, ensuring that parties have a just opportunity to present their case and establish the veracity of their contentions.

In matters concerning Indian Corporate Law, the allocation of the burden of proof can vary based on the nature of the case and the issues at hand. For instance, in cases of alleged corporate misconduct, such as fraud or mismanagement, regulatory authorities or plaintiffs often bear the burden of proving the wrongdoing. In contrast, when shareholders or investors seek remedies for breach of corporate duties or derivative actions, they may carry the burden of demonstrating the harm suffered and the causal link to the alleged corporate actions. The burden of proof in Indian Corporate Law is vital for maintaining accountability and upholding the integrity of corporate practices. It ensures that parties are held responsible for their claims and defences, fostering a transparent and just corporate environment. The Indian legal system aims to strike a balance

[16] Coates, IV, John C, 'Mergers, Acquisitions and Restructuring: Types, Regulation, and Patterns of Practice', Forthcoming in Oxford Handbook on Corporate Law and Governance.» The Harvard John M. Olin Discussion Paper Series. Discussion Paper No. 781. (2014) <http://www.law.harvard.edu/programs/olin_center/papers/pdf/Coates_781.pdf> accessed on 14th July 2023.

between the interests of stakeholders, such as shareholders, creditors, and employees while safeguarding the rights of corporations. As corporate law evolves, the allocation of the burden of proof continues to play a central role in shaping legal precedents and determining the outcomes of complex corporate disputes.

The burden of proof is to be ascertained by Indian regulating and adjudicating authorities to safeguard the rights and interests of every type of shareholder. The word from the judiciary is that there is faith in a system of tests which is subjected to cases having elements of minority shareholder's rights violations to be determined effectively. There have been reported instances of voluntary delisting whereby a controlling shareholder gets to purchase shares of remaining shareholders, which results in unequal treatment for them.[17] There are two tests entire fairness test, but due to its dependency on majority shareholders resulting in accounting of the final determination of fair and ethical freeze-out merger procedure, it negates its substantial standard requirements.[18] On the other hand, the business judgment rule is being relied upon in most of the cases as although no clear fairness of procedural nuances in freeze-out mergers by deferring to the decision and action taken by the majority shareholders as per their interests.

In freezeout mergers, the majority shareholders or controlling parties typically initiate the transaction. Here, the BJR can potentially act as a form of the burden of proof, albeit indirectly. The rule presupposes that directors act on an informed basis, without conflicts of interest, and with the honest belief that their decisions are in the corporation's best interest. If minority shareholders challenge a freezeout merger, the BJR can serve as a protective armour for directors by placing the burden of proof on the challenging minority shareholders to prove that the directors did not act in good faith, were grossly negligent, or that their decision lacked rational basis. This alignment of the BJR with the burden of proof hinges on the assumption that directors' actions, including freeze-out mergers, are entitled to a presumption of validity. Minority shareholders, seeking to challenge the merger, would need to substantiate their claims with convincing evidence that the directors either breached their fiduciary duties or did not exercise reasonable business judgment. In essence, the BJR can require minority shareholders to bear the onus of proof when asserting that the directors' decision-making process was flawed, that conflicts of interest were

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[17] Khanna, Vikramaditya S Varottil, Umakanth, 'Regulating Squeeze Outs in India: A Comparative Perspective', American Journal of Comparative Law, Forthcoming; NUS Law Working Paper No. 2014/009 (2014) <http://law.nus.edu.sg/wps/pdfs/009_2014_Umakanth%20Varottil.pdf> accessed on 16th July 2023.

[18] ALLEN, KRAAKMAN & SUBRAMANIAN, supra note 11, at 497 – 98; Subramanian, supra note 16, at 8 – 11.

present, or that the transaction lacked a reasonable business purpose. This framework, while preserving directors' decision-making autonomy, also ensures that they are held accountable when their actions deviate from the standard of care expected of them.

The Business Judgment Rule also plays a role in safeguarding minority shareholder rights. Minority shareholders often lack the control and influence over corporate decisions that majority shareholders possess. The BJR ensures that directors' decisions are subject to scrutiny only if there is evidence of bad faith, negligence, or self-dealing. This safeguard is crucial for protecting minority shareholders from arbitrary or self-serving decisions by the majority or controlling shareholders. It ensures that directors prioritize the best interests of the company and its shareholders as a whole, mitigating the risk of opportunistic actions that could disadvantage minority shareholders. Ultimately, the Business Judgment Rule contributes to maintaining a fair and transparent corporate environment in India, where all shareholders' interests are taken into account.

Legislative Scope of Freeze-out Mergers

The legislative scope for freeze-out mergers in Indian corporate law ensures that minority shareholders are adequately protected against unfair practices and that the process remains transparent and equitable. The Companies Act, of 2013, empowers the NCLT to closely scrutinize the merger scheme and assess its impact on minority shareholders. This oversight is critical to prevent potential abuses by majority shareholders, who may otherwise exploit their position to push through mergers at the expense of minority shareholders. The NCLT's role is to ensure that the terms of the merger scheme are reasonable, that adequate information has been provided to shareholders and creditors, and that their interests are not compromised. Section 230-232 of the Companies Act, 2013, lays down the provisions governing the merger and amalgamation of companies in India, including freeze-out mergers. These sections establish the framework for seeking approval from the National Company Law Tribunal (NCLT) for merger schemes. Freeze-out mergers typically involve a dominant shareholder acquiring the remaining shares of minority shareholders, often leading to concerns of exploitation and disregard for the interests of minority stakeholders. To address these concerns, the legislative framework mandates a rigorous process, including convening meetings of shareholders and creditors, obtaining their approvals, and obtaining the NCLT's sanction, all of which must demonstrate that the merger is just and fair and is not prejudicial to the interests of any class of shareholders or creditors. The legislative framework for freeze-out mergers is not merely procedural; it embodies a philosophy that recognizes the need to strike a balance between the autonomy of majority shareholders and the rights of minority shareholders. By mandating transparency, information dissemination, and judicial review, the law reinforces the principles of corporate governance and shareholder protection. This approach acknowledges the delicate power dynamics at play and underscores the importance of minority shareholders' role in ensuring checks on corporate decision-making.

Regulation 37 and its subsequent addition, Regulation 37A, within the framework of the Listing Obligations and Disclosure Requirements (LODR) in India, delineate the procedural intricacies and safeguards concerning draft schemes of arrangement and private transactions involving undertakings by listed companies. Regulation 37 sets forth the prerequisites for draft schemes of arrangement, stipulating that listed companies must secure a no-objection letter from the stock exchange and obtain approval from the National Company Law Tribunal (NCLT) to proceed with the arrangement under the Companies Act 2013. The regulation implicitly acknowledges the tribunal's role in scrutinizing shareholder rights during the scheme's approval process, obviating the need for explicit provisions addressing shareholder rights.

In contrast, the newly introduced Regulation 37A carves a distinctive path from Regulation 37. It is tailored for private transactions outside the purview of court-driven processes, particularly focusing on undertakings, with the archetypal example being a 'slump sale' – a unique Indian concept involving the transfer of an undertaking through business transfer agreements (BTAs). Under this regulation, listed companies engaging in private transactions must attain approval from shareholders via special resolutions and divulge the commercial rationale behind the transaction. However, Regulation 37A includes two provisos, asserting that the special resolution necessitates endorsement by a majority of the minority shareholders, effectively empowering public shareholders with significant voting rights on issues substantially affecting the value of their shares. The amendment reflects an endeavour to strike a balance between minority shareholders' protection and operational efficiency. The section resonates with Section 180 of the Companies Act 2013, which restricts the Board of Directors' authority when dealing with undertakings. Notably, the concept of undertakings encompasses investments constituting at least 20% of the company's net worth or generating 20% of its total income. While the amendment fortifies minority shareholder influence by mandating the majority of the minority approval, concerns arise about potential impediments in everyday business operations due to rigorous regulatory demands. The author posits that the investment thresholds mentioned in Section 180 might warrant reevaluation to prevent an undue escalation of transaction costs arising from universal compliance requirements.

In essence, the recent amendment introduced through Regulation 37A introduces a nuanced dimension to the Indian corporate regulatory landscape. It addresses the imperative of ensuring minority shareholder participation and safeguarding their interests in private transactions. By requiring the majority of the minority approval for special resolutions, the amendment seeks to balance the scales of power, embedding an essential democratic principle within corporate decision-making. As India's corporate environment evolves, this legal framework strives to promote transparency, equity, and efficient governance, while concurrently fostering an environment conducive to business growth. This just clearly defines the intent of the Indian corporate law regime for serious persuasion in setting defined boundaries for ensuring protection to minority shareholders in freeze-out mergers. The further consideration that will help stimuli in this case can be defined by considering other factors. Introducing a clear and comprehensive definition of freezeout mergers within the regulatory framework can help provide clarity and specificity.[19] This would help differentiate freezeout mergers from other types of corporate transactions, enabling better understanding and application of the regulations. Strengthening disclosure requirements can ensure that minority shareholders are provided with detailed information about the freezeout merger, including the rationale behind the transaction, valuation methods used, and any potential conflicts of interest. This will empower minority shareholders to make informed decisions. Requiring an independent valuation of the company's assets and shares during a freezeout merger can prevent potential undervaluation of minority shareholders' interests. Independent valuation can ensure fairness and accuracy in determining the offer price.

Implementing a mandatory requirement for freezeout mergers to receive approval from a specified percentage of minority shareholders, beyond just a simple majority, can ensure that the transaction truly reflects the interests of a broader range of shareholders. Granting appraisal rights to dissenting minority shareholders can provide an additional safeguard. This would enable minority shareholders who disagree with the freezeout offer price to have their shares independently appraised, potentially leading to a fairer valuation. Including provisions that explicitly prohibit any form of coercion, manipulation, or undue influence on minority shareholders during the freezeout merger process can prevent unfair practices and ensure that their rights are respected.

[19] Guhan Subramanian, ‘Fixing Freezeouts’, 115 YALE L.J. 2, 30 – 48 (2005).

Establishing a specialized tribunal or dispute resolution mechanism to handle freezeout merger disputes can expedite resolution and provide expertise in complex corporate matters. Requiring companies to establish easily accessible communication channels for minority shareholders to voice concerns, ask questions, and obtain clarifications regarding freezeout mergers can promote transparency and inclusivity. Strengthening penalties for non-compliance with regulations related to freezeout mergers can act as a deterrent against any attempts to disregard minority shareholders' rights.

Conclusion

In conclusion, the intricate interplay between freezeout mergers and the burden of proof in Indian corporate law presents a complex yet crucial dimension of corporate governance. As explored in this research paper, freezeout mergers have emerged as significant mechanisms for consolidating control, streamlining operations, and enhancing competitiveness. However, their potential misuse to exploit minority shareholders and bypass their rights necessitates a careful legal framework. The burden of proof acts as a critical safeguard in this context, shifting the onus onto the controlling majority to demonstrate the fairness and propriety of such mergers. The legal landscape in India demonstrates an evolving response to the challenges posed by freezeout mergers. The importance of minority shareholder rights is increasingly recognized, fostering a more balanced approach to corporate governance. The Indian judiciary's adherence to equitable principles, as underscored by landmark judgments, underscores the commitment to ensuring the protection of minority shareholders. The principle of fairness enshrined in Indian corporate law provides a foundation for assessing freezeout mergers, ensuring that their execution respects not only majority interests but also minority rights.

While the existing legal framework provides a foundation, this research reveals areas for potential enhancement. Striking the right balance between allowing freezeout mergers to foster business efficiency and preventing their misuse requires ongoing refinement. Leveraging the burden of proof as a mechanism to scrutinize the fairness and necessity of freezeout mergers can be a cornerstone of this regulatory evolution. The burden of proof acts as a deterrent against unjust enrichment and places the controlling shareholders under the obligation to justify their actions, effectively serving as a check against potential abuses. As the Indian corporate landscape continues to evolve and adapt, lawmakers, regulators, and legal practitioners must remain vigilant in addressing the nuances of freezeout mergers. A holistic approach to legislative reform, coupled with continued judicial scrutiny, can foster a corporate environment where the rights of all stakeholders are harmonized. While freezeout mergers offer a means to unlock business potential, the burden of proof ensures that such potential is realized through equitable practices.

In essence, the convergence of freezeout mergers and the burden of proof represents a pivotal juncture in Indian corporate law. This research underscores the need for a balanced, robust, and dynamic legal framework that acknowledges both the imperatives of business growth and the imperatives of minority shareholder protection. As India's corporate sphere evolves, the equilibrium achieved between these forces will significantly impact corporate governance and the broader economic landscape. By ensuring that freezeout mergers are executed within the bounds of fairness and equity, Indian corporate law can truly achieve the delicate balance envisioned in this study – one that upholds both the interests of the majority and the protection of minority rights.