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Predictability in Corporate Insolvency Law: A Cornerstone Undermined in Bhushan Power Steel Limited Case

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ABSTRACT

Predictability is an important factor in ensuring legal clarity and investor confidence in corporation law. Corporate entities may clearly assess risks, allocate resources, and make strategic decisions under a stable and predictable legal framework. Recent developments in Indian corporate jurisprudence, however, have generated concerns about the growing ambiguity in how commercial principles are interpreted and implemented, particularly in connection to the Insolvency and Bankruptcy Code, 2016 (IBC). This concern has been heightened by the Supreme Court's recent decision in Bhushan Power and Steel Ltd. Case (BPSL), which appears to undermine the principle of legal certainty and predictability in corporate law that the corporate regime in general and under the IBC seeks to protect. This case, demonstrates the challenges in resolving insolvencies, as well as the judiciary's crucial role in maintaining corporate governance and predictability. This paper examines the Apex Court's verdict in BPSL case, prior decisions that have similarly threatened legal certainty and summarise the BPSL case in order to evaluate the judgment's deviation from recognized legal principles and international standards. It highlights the potential detrimental effects of India's judicial unpredictability on "investor confidence" and "ease of doing business". It emphasize on the importance of judicial reasoning being in line with legislative intent in preserving institutional trust in corporate laws.

Keywords: *Insolvency and Bankruptcy Code, 2016, Predictability, Legal Certainty, Rule of Law, Investors' confidence, Ease of Doing Business.*

I. INTRODUCTION

Corporate law has a significant impact on the economy of any country. One of its key ideas is predictability, which is critical for building investor trust, ensuring economic stability, and facilitating long-term corporate planning. Investors and business stakeholders rely on a clear, standard legal framework to assess risks, protect rights, and facilitate transactions. However, recent Indian court verdicts have brought this idea into question. The Supreme Court's

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decision in Bhushan Steel case, is an apparent departure from the Insolvency and Bankruptcy Code, 2016 (IBC) rule of finality and certainty in insolvency resolution, the decision has created concern in the legal and investor community. This decision has an adverse influence on the IBC's viability as a resolution mechanism, as well as the ease of doing business in India. This paper evaluates the judgment's relevance, situates it within a broader trend of judicial and legislative decisions that have generated legal uncertainty, and contrasts it with internationally acknowledged principles in corporate law. The analysis concludes that preserving the integrity of India's corporate law framework necessitates judicial restraint and doctrinal consistency.

II. PREDICTABILITY IN COMMERCIAL LAW

The default norms set forth by commercial law must yield results that commercial entities generally consider equitable. Hence, it is preferable that they generate outcomes that are relatively predictable, thus, the significance of certainty in corporate law is paramount.³ Predictability in law refers to the consistency with which legal norms are enforced, as well as the predictability of their outcomes. The greater concepts referred to as the “Rule of Law”, simply signifies that government actions are governed by pre-established and publicly declared rules, which enable individuals to anticipate with reasonable certainty how authority will exercise its coercive powers in specific situations, allowing for informed decision-making based on this knowledge.⁴ Any system of social governance that fails to ensure a consistent level of predictability cannot legitimately assert that it upholds the rule of law, regardless of its other qualities.⁵ Several concepts can be deduced from the foundational principle of the rule of law such as: the necessity for laws to be transparent, accessible, and progressive; the requirement for legal predictability; the establishment of laws adhering to general, transparent, and explicit regulations; the imperative of safeguarding judicial independence; the obligation to uphold natural justice; the authority of courts to review specific principles; the accessibility of courts; and the prohibition of judicial discretion that could distort legal interpretation etc.⁶

Predictability in the law must remain a priority for the legislators and the judiciary. In order to

³ Adrew Burrows, What Is the Point of Commercial Law?, <https://www.brickcourt.co.uk/images/uploads/misc/what-is-the-point-of-commercial-law.pdf>

⁴ F.A. Hayek, *The Road to Serfdom*, Chapter 6 (The Aspen Institute Edition, Aspen Institute, (2008), [https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/HAYEK_ROAD_TO_SERFDOM_CH_6_\(AS08\).PDF](https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/HAYEK_ROAD_TO_SERFDOM_CH_6_(AS08).PDF)

⁵ Christopher May, *The Centrality of predictability to the rule of Law*, EE Elgaronline, Edward Elgar Publishing, <https://www.elgaronline.com/edcollchap/edcoll/9781786432438/9781786432438.00012.xml>

⁶ **Joseph Raz**, *The Rule of Law and Its Virtue*, *Oxford Scholarship Online*, (DOI:10.1093/acprof:oso/9780198253457.003.0011), http://fs2.american.edu/dfagel/www/Philosophers/Raz/Rule%20of%20Law%20and%20its%20Virtue_%20%20Joseph%20Raz.pdf

do so, impulsive and ill-formulated legislation and “harsh judicial rulings”, should be avoided.⁷ Fuller asked in his work *The Morality of Law* “Is that law to be forever immune from change?”⁸ The answer is of course, a resounding “no” because doing so would ossify commercial law, but the bigger question is who should implement change and how, and that should be left to the legislature. Rex Ahdar pointed out that, despite the potential to be categorised as a “dinosaur” or an obstinate “new formalist,” it is essential to reaffirm and advocate for the importance of predictability as an established, unequivocal principles in contract law, at the same time, contract law must not disregard the courts' hortatory function, its signalling or channeling role, aimed to promote positive or affirmative action.⁹ According to Joseph Raz “The Law must be capable of guiding the behaviour of its subjects”. Hence, Certainty is not an ultimate objective. Instead, it serves as an instrumental objective. Humans, both individually and in collectives, consciously plan for the future and make an effort to see these plans through to execution.¹⁰ The ability to do business without having to worry about transactions being canceled is crucial since commercial transactions might need a great deal of planning. In order to ensure this, corporate law must ensure that the legislation are clear are the law should be enforced uniformly and exclusively only when essential. Businesses must operate under the principle that established legislation will not be modified without legitimate reasons, while also recognizing that legal changes are necessary to adapt to new conditions.¹¹

Predictability in law necessitates consistency in judicial interpretation and adherence to the statutory framework in order to enable stakeholders, both domestic and foreign, to anticipate the legal implications of their actions. This includes clarity in mergers and acquisitions, insolvency resolutions, taxation, and contract enforcement in the framework of corporate law. It can manifests itself in the legal scenario as the finality of contracts and transactions, the reliance on court rulings and precedent, the enforce-ability of resolution plans under the IBC without causing delays after approval, and the consistent treatment of stakeholders within a well-defined framework. This level of predictability is critical for improving the ease of doing business, attracting foreign direct investments, and fostering a positive business climate. The uncertainty or inconsistency in legal outcomes deters investment. For a long time, the World

⁷ George G. Bailey, Predictability of the law; its relation to respect for law, 66 West Virginia Law Review (1963), <https://researchrepository.wvu.edu/cgi/viewcontent.cgi?article=3628&context=wvlr>

⁸ **Lon L. Fuller**, *The Morality of Law* 61 (rev. ed. 1969).

⁹ Rex Ahdar, Contract Doctrine, Predictability and the Nebulous Exception, *The Cambridge Law Journal*, Vol. 73, No. 1 (2014), pp. 39-60, <https://www.jstor.org/stable/24693965>

¹⁰ Lowell J. Reed, Man as a Planning Animal, *Journal of the American Statistical Association*, Vol. 47, No. 257 (Mar., 1952), pp. 1-5 (5 pages), (<https://doi.org/10.2307/2279974>), <https://www.jstor.org/stable/2279974>

¹¹ Principles of Commercial Law: Predictability & Flexibility, Studocu, <https://www.studocu.com/en-gb/document/university-of-chester/commercial-law/principles-of-commercial-law-predictability-flexibility/16025461>

Bank's Doing corporate reports have emphasized the importance of efficient and predictable legal regimes. The “ease of doing business” score is the simple average of the scores for 10 subindices including: “ease of starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority investors, paying taxes, trading across borders, enforcing contracts, and resolving insolvency”.¹² Furthermore, predictability promotes cross-border trade and capital inflows by aligning India's regulatory framework with global best practices in an increasingly globalized economy.

III. OVERVIEW OF THE BHUSHAN POWER AND STEEL LTD. (BPSL) CASE

In 2020, the CoC and NCLT approved JSW Steel's resolution plan for Bhushan Power and Steel Ltd., valued at around ₹19,700 crore. The resolution plan's purpose was to dissolve BPSL's previous liabilities, particularly those relating to the former promoters' violations under investigation by the Enforcement Directorate (ED). Surprisingly, even after the proposal was accepted, the ED retained BPSL's assets, which is clearly against Section 32A of the IBC. The two-judge panel consisting of Justices Bela M. Trivedi and Satish Chandra Sharma, annulled JSW Steel's acquisition of BPSL four years post transaction, citing that the Rs 19,700 crore resolution plan was “illegal” and constituted a “gross violation” of the Insolvency and Bankruptcy Code (IBC). The court's ruling was issued by.¹³

With an outstanding obligation of INR 47,825.90 crore, the Reserve Bank of India designated BPSL as one of the "dirty dozen" list. It was a unique case because the Enforcement Directorate took BPSL's assets after the NCLT approved the Resolution Plan in 2019, with a total estimated value of INR 20,000 crore (ED Attachment). JSW gained temporary relief from the attachment in 2019 after appealing it in front of the Supreme Court and the NCLAT. The government also adopted Section 32A of the IBC in December 2019, which grants resolution applicants and bidders immunity from corporate debtor violations committed prior to the CIRP's inception. Section 32A did not, however, apply retroactively. Despite the uncertainty surrounding the ED attachment, JSW successfully implemented its Resolution Plan in three stages: “(a) an equity infusion of INR 100 crore in BPSL in 2021; (b) payment of approximately INR 19,350 crore to BPSL's financial creditors in 2021; and (c) payment of approximately INR 350 crore to BPSL's operational creditors in 2022”. It is important to note that the Committee of Creditors (CoC) initially backed JSW's decision to deal uncertainty by

¹² **World Bank**, *Ease of Doing Business Index (Distance to Frontier) – DB2016*, <https://databank.worldbank.org/metadataglossary/doing-business/series/IC.BUS.EASE.DFRN.DB16>

¹³ SC Rejects JSW Steel Bhushan Power Resolution Plan, Orders Liquidation, Bus. Standard, https://www.business-standard.com/companies/news/sc-rejects-jsw-steel-bhushan-power-resolution-plan-liquidation-125050201442_1.html

opposing the ED Attachment in appeals to the NCLAT and the Supreme Court. However, the CoC later appealed the delay in the Resolution Plan's implementation before the Supreme Court, stating that the operational creditors' and BPSL promoters' outstanding appeals do not constitute a stay on the Resolution Plan's execution. Post this, the CoC accepted the late payment of sums under the Resolution Plan. In its March 6, 2020 decision, the Supreme Court noted the counsel for the CoC's statements that, if the appeals by BPSL's promoters and operational creditors are successful, the "CoC" will reimburse all funds within two months.¹⁴

At the end, the Supreme Court finally invalidated JSW Steel's resolution plan for Bhushan Power & Steel on May 2 saying it did not strictly follow the IBC's requirements and directed the NCLT to commence liquidation proceedings, remanding the matter to the tribunal despite the fact that the original resolution was accepted by both the NCLT and the Committee of Creditors in 2019.¹⁵ The Supreme Court also held that the CoC lacked commercial wisdom in accepting the Resolution Plan that violated the IBC, and that BPSL's Resolution Professional failed to carry out his responsibilities under the IBC. The Supreme Court also directed BPSL's creditors to repay the money and equity contributions made in the debt-laden the company, which was consistent with a Supreme Court order dated March 6, 2020.¹⁶ Following the Supreme Court's decision to invalidate its 2019 acquisition of Bhushan Power and Steel (BPSL), JSW Steel has sent notice to banks for a reimbursement of the money it paid towards the resolution plan for BPSL.¹⁷

JSW Steel, the resolution applicant, successfully submitted the resolution plan, which was approved by both the Committee of Creditors and the National Company Law Tribunal (NCLT). However, after the resolution applicant took over the business, the ED proceeded to seize the corporate debtor's assets on suspicion of money laundering, despite the fact that the resolution plan was finalized under Section 31. The Supreme Court finally held "Approval of a resolution plan does not bar investigation agencies from proceeding against the corporate debtor's assets, even if those assets were part of the resolution plan".

¹⁴ Trilegal, Supreme Court: Liquidation of Bhushan Power and Steel Limited – A Cautionary Tale, Trilegal, https://trilegal.com/knowledge_repository/trilegal-update-supreme-court-liquidation-of-bhushan-power-and-steel-limited-a-cautionary-tale/

¹⁵ Supreme Court to Review NCLT's Resolution Approval in Bhushan Steel Case, Mint, <https://www.livemint.com/companies/news/supreme-court-nclt-bhushan-steel-resolution-review-bpsl-justice-ramalingam-sudhakar-jsw-steel-11747214562566.html>

¹⁶ JSW Steel Says BPSL Resolution Plan in Compliance with Law, Bus. Standard, https://www.business-standard.com/companies/news/jsw-steel-says-bpsl-resolution-plan-in-compliance-with-law-125052301606_1.html

¹⁷ **JSW Steel Demands ₹19,300 Cr Refund from BPSL Creditors After SC Ruling**, *Outlook Bus.*, <https://www.outlookbusiness.com/corporate/jsw-steel-demands-rs-19300-cr-refund-from-bpsl-creditors-after-sc-ruling>

Section 32A of IBC was specifically enacted to provide the corporate debtor and its assets with post-resolution immunity. In *Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta*¹⁸, the Supreme Court emphasized that the successful resolution applicant must be granted a clean slate, free of prior liabilities. Bhushan steel judgement stands in stark contrast to the principles stated in this case. Furthermore, the ruling also diverges from the Court's established precedent that affirmed Section 32A of the IBC in *Manish Kumar v. Union of India*¹⁹, safeguarding resolution applicants from legal action for prior management misconduct.

IV. SUPREME COURT'S RATIONALE FOR REJECTION OF THE RESOLUTION PLAN

The Supreme Court identified multiple legal and procedural mistakes when it dismissed the Resolution Plan in the Bhushan Power case. Initially, it was established that JSW breached Section 61 of the IBC by challenging an order that sanctioned its own resolution plan, which is expressly forbidden by the provision. The Court concluded that, since a related appeal was ongoing before the Supreme Court, the NCLAT did not possess the competence to confer immunity from ED attachment under Section 32A. Secondly, notwithstanding JSW's previous joint venture with BPSL, JSW failed to provide the necessary affidavit under Section 29A affirming its eligibility, and the Resolution Professional did not verify this. The Resolution Plan contravened Section 12 by being filed beyond the statutory 270 days without a request for an extension. The strategy contravened Regulation 38 of the CIRP Regulations by prioritising financial creditors over operational debtors. The Court determined that the CoC, having fulfilled its duties post-approval, lacked the jurisdiction to extend implementation deadlines and condemned the substantial delay, exceeding 540 days in executing the plan, attributing it to JSW's opportunism related to variations in steel prices. Finally, the Court highlighted inconsistencies in the CoC's conduct, from initial protests to the eventual endorsement of deferred payments, suggesting potential collusion among the CoC, JSW, and the Resolution Professional.

The Supreme Court's decision, overall underscores the critical necessity of compliance with the Insolvency and Bankruptcy Code, 2016 (IBC) and the perils associated with opportunistic tactics and procedural negligence. The protracted and tumultuous process, spanning nearly seven and a half years, underscores the need of adhering to deadlines, ensuring resolution professional execute their duties diligently, and exercising sound business judgement by the Committee of Creditors (CoC). It underscore that the IBC is a framework necessitating

¹⁸ Comm. of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta, 2019 SC 1494

¹⁹ Manish Kumar v. Union of India (2021), WRIT PETITION(C) NO.26 OF 2020.

vigilance, transparency, and good faith from all stakeholders, rather than a panacea for all financial obstacles. The integrity and swift execution of the IBC framework are essential, and this case should remind all stakeholders in the bankruptcy resolution process that the Apex Court would not condone self-interested tactics or procedural expedencies.²⁰ The prolonged and arduous process of BPSL's insolvency ultimately yielded a severe and costly lesson in compliance and intent, undermining investor confidence and triggering legal and economic repercussions. The Court's conclusions starkly reflect the systemic deficiencies in the Corporate Insolvency Resolution Process (CIRP).²¹ This ruling, while legally grounded, undermines the integrity of India's insolvency framework and goes against the norms established under the commercial laws.

V. IMPACT OF SUPREME-COURT'S DECISION IN THE BHUSHAN POWER STEEL LTD. CASE

The Supreme Court allowed the Enforcement Directorate (ED) to confiscate the corporate debtor's assets after it approved a resolution plan under Section 31 of the IBC. The corporate community is concerned about this ruling because it departs from previously established precedents and existing provisions under IBC. The Supreme Court not only dismissed the National Company Law Appellate Tribunal's (NCLAT) judicial review of cases related to the Prevention of Money Laundering Act (PMLA) but also issued a scathing critique of the entire Corporate Insolvency Resolution Process (CIRP) concerning Bhushan Power and Steel Ltd. (BPSL), culminating in the rejection of JSW's resolution plan and an order for liquidation.²²

The question arises was this the right thing to do. Was it not possible to sustain this success by retrospectively mandating compliance, imposing penalties, or rectifying procedural anomalies, rather than entirely nullifying the plan, could the court not have amended it to align with the IBC. It could have demanded disciplinary action against negligent professionals, guaranteed payment to operational creditors, or guided compliance through a judicially supervised mechanism but instead, it nullified a resolution plan that had made a struggling business

²⁰ **How SC Rejection of JSW Resolution Plan for Bhushan Steel Redefines Stakeholders' Accountability and IBC Sanctity**, *KNAL & Partners* (May 2024), <https://knallp.com/how-sc-rejection-of-jsw-resolution-plan-for-bhushan-steel-redefines-stakeholders-accountability-and-ibc-sanctity>

²¹ **Supreme Court's Bhushan Steel Verdict Exposes Systemic Rot but Leaves the IBC's Future Hanging**, *Times of India: Lawtics Blog*, <https://timesofindia.indiatimes.com/blogs/lawtics/supreme-courts-bhushan-steel-verdict-exposes-systemic-rot-but-leaves-the-ibcs-future-hanging/>

²² **How SC Rejection of JSW Resolution Plan for Bhushan Steel Redefines Stakeholders' Accountability and IBC Sanctity**, *KNAL & Partners* (May 2024), <https://knallp.com/how-sc-rejection-of-jsw-resolution-plan-for-bhushan-steel-redefines-stakeholders-accountability-and-ibc-sanctity>

viable again.²³ The current verdict of SC in BPSL case have raised following concerns:

a) Breach of Finality under Section 31 and Fresh start under Section 32A of the IBC:

According to clause (1) of Section 31 of IBC, once authorised, a resolution plan is binding on all parties involved, including governmental and regulatory authorities.²⁴ Potential resolution applicants may be discouraged from participating in future bankruptcy procedures as a result of the Bhushan Steel decision, which risks setting a precedent in which post-approval enforcement efforts jeopardise the corporate debtor's assets. For the successful resolution applicant, the IBC envisions a fresh start. Section 32A stipulates that “a corporate debtor is immune from prosecution for offences committed prior to the initiation of the insolvency resolution process, provided that an approved resolution plan results in a change of management or control to an individual who is neither a promoter, related party, nor implicated in the offence; Moreover, if the corporate debtor's assets are conveyed to a qualifying unrelated entity during the resolution or liquidation process, no actions (such as attachment or seizure) may be initiated against them for prior crimes”.²⁵ Section 32A was specifically enacted to provide the corporate debtor and its assets with post-resolution immunity. However, the Supreme Court ruling in BPSL Case lowers the protection, creating concerns about what would happen to assets following the resolution.

b) Undermining the precedence of Revival over Liquidation:

The primary objective of the IBC is to maintain ongoing enterprises rather than to liquidate them. The first and foremost objective of IBC is revival of the corporate debtor. Liquidation is considered a last resort when all attempts to revive a company has failed, IBC even goes to the extent of giving an option to sell a company as a going concern at the stage of Liquidation, which clearly reflects the sentiment of IBC regarding the liquidation of the company. Liquidation constitutes a risk-laden endeavour. The potency of BPSL's liquidation value has yet to be determined. Instead of terminating the Resolution Plan, the Supreme Court may have directed the Insolvency and Bankruptcy Board of India to investigate and initiate actions against the relevant persons, this would have been a considerably better outcome than demanding the liquidation of an already resolved distressed asset.²⁶

BPSL, with thousands of employees and a significant impact on industrial output, was a

²³ Neeti Shikha, **Why Bhushan Power Verdict Is a Legal and Economic Setback**, *Sunday Guardian Live*, <https://sundayguardianlive.com/business/why-bhushan-power-verdict-is-a-legal-and-economic-setback>

²⁴ Insolvency and Bankruptcy Code, No. 31 of 2016, Section 31, Acts of Parliament, 2016 (India)

²⁵ Insolvency and Bankruptcy Code, No. 31 of 2016, Section 32A, Acts of Parliament, 2016 (India)

²⁶ Trilegal, Supreme Court: Liquidation of Bhushan Power and Steel Limited – A Cautionary Tale, Trilegal, https://trilegal.com/knowledge_repository/trilegal-update-supreme-court-liquidation-of-bhushan-power-and-steel-limited-a-cautionary-tale/

profitable enterprise. The liquidation signifies a considerable setback for numerous stakeholders, beyond merely a loss of BPSL's production capability. Alongside it will impact suppliers and ancillary enterprises reliant on BPSL's operations, employees now confront uncertainty and potential job loss, while creditors encounter diminished prospects for recovery. It contradicts economic rationale and legal doctrines to dispose an asset despite its recovery.

c) Questions on the Committee of Creditors' Commercial Wisdom:

In *K. Shashidhar v. Indian Overseas Bank*²⁷, and various other cases, the judiciary has consistently affirmed that the “commercial wisdom” principle of the Committee of Creditors (CoC) is unquestionable. The Supreme Court in BPSL case has failed to uphold the recognised principle of the primacy of the “CoC's commercial wisdom” in approving the Resolution Plan and making decisions on its implementation. Allowing post-resolution meddling blurs the line between judicial activism and regulatory scrutiny, eroding the value of this commercial wisdom. By dismissing the CoC's commercial wisdom and the integrity of approved resolution plans, the decision may be slanted in favour of the investigating authorities. CoC's unfettered exercise of commercial discretion will be drastically restricted by this judgement. Following this verdict, lenders are going to be far more hesitant and cautious about IBC settlements and strict about compliance and timelines.

d) Impact on Investors' Confidence and Prospective Resolution Applicants:

Legal ambiguity caused by the possibility of unforeseen liabilities following resolution may discourage potential investors, particularly in the distressed asset market. For international investors, predictability in insolvency outcomes is a universal norm. Allowing post-resolution unravelling of the resolution plan undermines India's legal stability and may discourage foreign direct investment in distressed asset markets.

When distressed companies are acquired by investors such as JSW Steel, they expect to be protected from prior misconduct. Prospective bidders or resolution applicants are discouraged by the likelihood that enforcement agencies will seize such assets in the future. If a possibility of judicial reversal persists post-implementation, prospective resolution applicants may think twice before entering into such financial commitments. Over 1,100 enterprises have been resolved through the IBC so far and reopening closed cases poses the danger of transforming the Code into a litigation carousel.²⁸

²⁷ *K. Shashidhar v. Indian Overseas Bank*, (2019) 12 SCC 150

²⁸ Neeti Shikha, *Why Bhushan Power Verdict Is a Legal and Economic Setback*, Sunday Guardian Live,

e) **Undermining Public trust in judicial stewardship:**

Moreover, it undermines public trust in the judiciary's competence to regulate commercial laws. Judicial acts that diminish such legislative frameworks jeopardise institutional trust, posing a significant public policy issue. Investors, creditors, and bidders rely on the consistency of governmental institutions' actions and the law. Stakeholders may perceive Indian systems as unreliable if resolution plans, which were first approved by statutory bodies and executed in good faith, are subsequently reversed. Though it might be fair to ask in scenarios as these should the law remain perpetually unalterable to solidify business law, the response is of course no, but the same should be left to the legislature.²⁹ The IBC, a piece of meticulously written economic law, was passed after great deliberation. When courts rule that outcomes that were conducted within the specific parameters of such legislation are reversible, they risk entering the domain of overreach.

"Interest reipublicae ut sit finis litium" meaning "it is in the interest of the state that litigation comes to an end". BPSL verdict has brought the legal principle of finality in question and have raised concerns over thousands of resolution plans that were approved under IBC. It has raised serious questions on the finality and predictability of the outcomes under India's Insolvency and Bankruptcy Code. Uncertainty and unpredictability might arise not just from the introduction of ambiguous exceptions to established regulations, the reconfiguration of established regulations into a less solid and predictable form is even more problematic.³⁰ Hence, maintaining institutional coherence and addressing individual injustices should be balanced in judgements to preserve public confidence in legal systems. This decision may inadvertently convey to international investors that, in India, even resolution plans established for seven or eight years can be annulled for procedural reasons, irrespective of their real efficacy. The consequences are significant as India's insolvency framework is an essential aspect of its "ease of doing business" narrative, which is under global scrutiny.

VI. PRIOR INSTANCES UNDERMINING PREDICTABILITY AND LEGAL CERTAINTY

To foster investment, legal frameworks must be predictable and reliable. The Bhushan verdict undermines the established legal framework, particularly concerning the **predictability and legal certainty in corporate regime**. Consistent legal interpretations are crucial for business entities, financial creditors, and foreign investors to assess risk and undertake long-term

<https://sundayguardianlive.com/business/why-bhushan-power-verdict-is-a-legal-and-economic-setback>

²⁹ Rex Ahdar, Contract Doctrine, Predictability and the Nebulous Exception, The Cambridge Law Journal, Vol. 73, No. 1 (2014), pp. 39-60, <https://www.jstor.org/stable/24693965>

³⁰ Rex Ahdar, Contract Doctrine, Predictability and the Nebulous Exception, The Cambridge Law Journal, Vol. 73, No. 1 (2014), pp. 39-60, <https://www.jstor.org/stable/24693965>

obligations. Nevertheless, sporadic and retrospective legislations and judgements have intermittently defined India's legal system, prompting enquiries regarding the law's clarity. Similar losses to India's reputation have occurred previously. Following are the illustrative instance of few of the important similar legislative and judicial setbacks:

In *Vodafone International Holdings B.V v Union Of India & Anr.*³¹, the Supreme Court ruled that Vodafone was exempt from Indian taxes for its indirect acquisition of Indian assets. The Supreme Court ruling was annulled by retroactive tax modifications. In response to overturning the verdict, the government enacted retroactive amendments to the Income Tax Act of 1961. The unjust amendment nullified the SC's correct judgement and induced regulatory upheaval and diminished judicial authority. Restoring investor confidence post that took a corrective legislation and over a decade. Numerous international investment treaty arbitrations arose from the damage inflicted on investor sentiment, notwithstanding the eventual repeal of the legislation in 2021, after 9 years of the amendment, following the order of the Permanent Court of Arbitration in favour of Vodafone upholding that the retrospective taxation was not fair and valid.³²

*Devas Employees Fund US LLC v Antrix Corporation Limited*³³, wherein the Hon'ble High Court affirmed the annulment of an arbitral award due to fraud committed long before the arbitration. Devas was dissolved as a result of fraudulent activities. The overarching conclusion was that a state entity (Antrix) seemingly unilaterally rescinded a contract, which incited international arbitration claims and tarnished India's reputation, despite the merits potentially warranting such an action. Subsequently, following the Supreme Court's ruling, Devas's foreign investors launched a new BIT claim against India, asserting that the nation is exerting improper efforts to obstruct the enforcement of a commercial arbitration award that Devas secured against Antrix in 2015 under the International Chamber of Commerce (ICC) regulations. However, throughout the BIT arbitration tribunals, India did not raise the matter of fraud or corruption at any point.³⁴

In *Cairn Industries* case, the retrospective amendment that affected Vodafone also resulted in a retroactive tax demand in this case as well. Following which India was mandated to

³¹ *Vodafone International Holdings B.V v Union Of India & Anr* , CA No.733 OF 2012.

³² *Vodafone International Holdings B.V. v Union of India: Case Analysis*, iPleaders), <https://blog.ipleaders.in/vodafone-international-holdings-bv-v-union-of-india-case-analysis/>

³³ *Devas Employees Fund US LLC v Antrix Corporation Limited*, FAO(OS) (COMM) 289/2022; March 17, 2023

³⁴ *Devas v. Antrix: Lessons for India in Navigating Bilateral Investment Treaty Disputes*, Observer Research Foundation (ORF) (Sept. 28, 2020), <https://www.orfonline.org/research/devas-v-antrix-lessons-for-india-in-navigating-bilateral-investment-treaty-disputes>

compensate damages following a ruling by an international arbitration panel in favour of Cairn.³⁵ The tribunal concluded it possessed jurisdiction over the issue and that Cairn's claims were permissible. The tribunal determined that India did not fulfil its responsibilities under the UK–India BIT and international law, namely breaching the Fair and Equitable Treatment requirement as outlined in BIT Article 3(2).³⁶ India's dedication to investor-state dispute channels was undermined by its first refusal to comply with the award, subsequently followed by enforcement efforts in other jurisdictions.

The White Industries Australia Ltd. case involved claims under the Australia-India Bilateral Investment Treaty due to a delay in the implementation of an ICC arbitral ruling in India. The tribunal held India liable for contravening the "effective means" of rights enforcement.³⁷ This marked India's first loss in a BIT claim, revealing deficiencies in judicial efficiency and affecting investor perceptions of dispute settlement mechanisms. Apart from these cases, The Bhatia International case³⁸, and Satyam Computer case³⁹ rulings were among the most vehemently criticised decisions on Indian Arbitration law. They bore exclusive responsibility for the postponement and incapacity to implement the ICC award in White Industries case. The Calcutta High Court annulled the international award based primarily on the principles established in the Satyam Computer case. These award serves as a warning to the judiciary for exceeding its boundaries in interpretation of statutes.⁴⁰ Whereas, the Cairn Energy and Vodafone Arbitrations, these instances arose from the repercussions of legislative overrides of judicial verdicts, albeit not directly involving court decisions. The predictability of legal outcomes diminished due to subsequent arbitral rulings and enforcement proceedings abroad before international forums, which highlights unpredictability and depict India as a country willing to alter established views for retroactive advantage.

The Bhushan case risks perpetuating this pattern and suggesting that rulings rendered in India may be overturned even after achieving finality. India has achieved significant legislative advancement through reforms such as the IBC. Hence, a significant obstacle still persists in the form of judicial unpredictability, evidenced by inconsistent rulings, protracted enforcement,

³⁵ Cairn v. India, Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India, PCA Case No. 2016-7

³⁶ Trishna Menon, UNCITRAL Tribunal Finds India in Breach of India-UK BIT in Proceedings Brought by Cairn Entities, IIDS Investment Treaty News, [https://www.iisd.org/itn/2021/03/23/uncitral-tribunal-finds-india-in-breach-of-india-uk-bit-in-proceedings-brought-by-cairn-entities/#:~:text=Decision%20and%20costs,BIT%20Article%203\(2\)](https://www.iisd.org/itn/2021/03/23/uncitral-tribunal-finds-india-in-breach-of-india-uk-bit-in-proceedings-brought-by-cairn-entities/#:~:text=Decision%20and%20costs,BIT%20Article%203(2))

³⁷ White Industries v. Republic of India, Final Award, November 30th, 2011.

³⁸ Bhatia International v. Respondent: Bulk Trading S.A. and Anr., (2002) 2 SCR 411

³⁹ Satyam computer Case, Civil appeal number 3678 of 2007

⁴⁰ Aditya P. Arora, Case Comments on White Industries v. Republic of India, Lawctopus, <https://www.lawctopus.com/academike/case-comments-white-industries-v-republic-india/>

and a disregard for legislative meaning. To become a genuine global investment destination, India must not only implement progressive legislation but also ensure judicial consistency, uphold corporate autonomy, and facilitate timely adjudication.

VII. COMPARISON OF SUPREME-COURT'S DECISION IN THE BHUSHAN POWER STEEL LTD. CASE WITH THE ESTABLISHED LEGAL PRINCIPLES AND GLOBAL NORMS

While appreciating the Bhushan verdict in terms of the global insolvency norms, the concept that the corporate debtor must be free of past liabilities after resolution in order to be revived is supported by jurisdictions all over the world, including the United States under Chapter 11 and the United Kingdom under the Insolvency Act. Section 32A of the IBC was an attempt by the Indian legal system to reflect this, but the latest decision reinterprets its meaning in a way that contradicts international principles. The Supreme Court's decision in Bhushan Steel case, is an apparent departure from the Insolvency and Bankruptcy Code, 2016 (IBC) rule of finality and certainty in insolvency resolution.

Whereas, fundamental concepts of corporate insolvency derived from the Cork Report on Employee Protection and Insolvency (1982) in the United Kingdom states that, the insolvency law aims to promote the protection of creditors' and collective interests. The principles are exemplified in Cork's objectives, which assert that the aims of insolvency law are to acknowledge and safeguard the interests of creditors and other affected parties in corporate insolvency, while also facilitating the rehabilitation or continuance of a sustainable company. The cork report advocating for a "rescue culture" is said to commence with the objective of aiding corporate debtors in sustaining and divesting their enterprises as viable entities to retain employment for a their workforce.⁴¹ In the current case, BPSL, with thousands of employees and a significant contribution to industrial output, was a viable enterprise. Despite its recovery, the liquidation of such an asset contradicts both economic and legal principles.⁴²

In US case of *Morey v. Doud*⁴³, Justice Frankfurter articulated in his inimitable manner, a sentiment that was subsequently reaffirmed in the *R.K. Garg* case⁴⁴ in India: "In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative

⁴¹ R. V. UPEX, THE CORK REPORT: Employee Protection and Insolvency, *Industrial Law Journal*, Volume 11, Issue 1, 1982, Pages 268–270, <https://doi.org/10.1093/ilj/11.1.268>

⁴² Neeti Shikha, **Why Bhushan Power Verdict Is a Legal and Economic Setback**, *Sunday Guardian Live*, <https://sundayguardianlive.com/business/why-bhushan-power-verdict-is-a-legal-and-economic-setback>

⁴³ *Morey v. Doud*, 354 U.S. 457

⁴⁴ *R.K. Garg Etc. Etc vs Union Of India & Ors.*, 1981 AIR 2138, 1982 SCR (1) 947

responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events-self- limitation can be seen to be the path to judicial wisdom and institutional prestige and stability." Whereas, BPSL judgement contradicting this, undermines public trust in the judiciary's capacity to regulate business policy. Judicial acts that diminish legislative frameworks jeopardise institutional trust, presenting a significant public policy issue.

When we talk about the foundational concept of predictability in corporate laws, the House of Lords, way back in 1897, in *Salomon v. Salomon & Co.*⁴⁵, upheld corporate personality, despite public apprehension and discomfort, recognising the importance of uniformity and predictability in corporate law. This verdict reinforced a foundational concept that predictability in corporate laws is paramount. The Bhushan ruling, on the other hand, favours ambiguity under the guise of procedural integrity.

The concept of legal certainty is also codified in EU law. The idea of legal certainty is a fundamental tenet of EU law, designed to guarantee that situations and legal relationships regulated by EU law remain predictable. Consequently, it is imperative that the institutions adhere to the idea that they cannot modify actions they have enacted that influence the legal and factual circumstances of individuals, signifying that they may revise such acts alone in compliance with the regulations governing competence and procedure.⁴⁶

Reiterating an "extra-judicial remark" by "Lord Goff of Chieveley" in *Commercial Contracts and the Commercial Court* (1984): "We are there to help businessmen, not to hinder them; we are there to give effect to their transactions, not to frustrate them; we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil."⁴⁷ It is noteworthy that the Indian SC ended the epilogue in the *Swiss Ribbon Case*⁴⁸ with telling observations: "To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation; We are happy to note that in the working of the Code, the flow of financial resource to the commercial sector in India has increased exponentially as a result of financial debts being repaid. The figures in past year show that the experiment conducted in enacting the Code is proving to be largely successful". While analysing BPSL verdict, it should be highlighted that

⁴⁵ *Salomon v Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22

⁴⁶ Case C-413/14 P, *Intel Corp. v. European Commission*, ECLI:EU:C:2017:632, 56, <https://curia.europa.eu/juris/document/document.jsf?docid=186430&doclang=EN>

⁴⁷ Goff, R, "Commercial Contracts and the Commercial Court" [1984] LMCLQ 382, 391

⁴⁸ *Swiss Ribbons Pvt. Ltd. vs Union Of India*, AIR 2019 SUPREME COURT 739, 2019 (4) SCC 17

the IBC, a meticulously draughted economic law, was passed after great deliberation to further the wider economic goals, by invalidating the outcomes within the stated framework of such established laws sets a slippery precedent. One of the main reasons why businesses choose English law over other law for their contracts and English courts to decide their disputes is because they know where they stand legally and can rely on judges who have dealt with businesses before to apply their knowledge.⁴⁹

VIII. CONCLUSION

Corporate law predictability is more than a theoretical ideal, it is a necessary condition for investor trust, the rule of law, and economic growth. The Supreme Court's ruling in Bhushan Power and Steel undermines the IBC's precisely calibrated objectives by reducing clarity and finality. The court and legislature must collaborate in the future to restore predictability and maintain India's reputation as a dependable and investor-friendly state. The Supreme Court's verdict in the Bhushan Power & Steel case caused concern in the market. It throws into doubt the enforceability of immunity agreements, the integrity of the settlement process, and the scope of executive intervention following the resolution. While combating fraud and money laundering is critical, investor protection and legal certainty must not suffer as a result. From a completely legal standpoint, Supreme Court might have raised several significant legal issues while setting aside the resolution plan. However, the timing for the same may be too late, it is challenging to undo a complex restructuring that resulted in tremendous value for all parties involved, and JSW invested heavily in reviving a struggling asset. It is commercially absurd to reverse money or transactions that have already been used or transferred to investors. The BPSL case will be noted for revealing systemic failures and reigniting the discussion on whether liquidation, the proposed solution, can at times be more detrimental than the problem at hand. Regulators, judges, and insolvency experts must engage in profound introspection moving forward. The system cannot tolerate another such major collapse. More importantly, the verdict will considerably hurt IBC image as a resolution tool and seriously undermine investor confidence in participating in CIRPs. In addition to the risk of perhaps reopening more previously adopted resolution plans, this could affect ease to do business in India. There is an urgent need for a comprehensive strategy that promotes the rule of law and the IBC's commercial objectives. To restore trust in India's insolvency system and corporate legal predictability, the legal position of Section 32A of IBC must be clearly explained.

⁴⁹ Principles of Commercial Law: Predictability & Flexibility, Studocu, <https://www.studocu.com/en-gb/document/university-of-chester/commercial-law/principles-of-commercial-law-predictability-flexibility/16025461>

The judiciary's interpretation of the IBC must be consistent with the aim of the legislation, which is to ensure prompt resolution and value maximisation without resorting to lengthy litigation. Following the adoption of Section 32A, which was intended to protect resolution applicants from the corporate debtor's past mistakes, legislature may consider changing the IBC to define the scope of immunity from judicial action once a resolution plan is adopted. The Court's decision to liquidate instead of rectifying may be an enigma. In a globalised economy, where legal clarity is essential, this conveys a message of unpredictability. Investors and lenders may reasonably express concerns regarding the finality of insolvency resolutions in India. It is necessary to maintain the essential corporate law principle of predictability, without which India's aim to become a major international investment hub may not be achieved.
