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The Business Judgment Rule in Practice: Evaluating Directors' Decision-Making and its Legal Framework in India

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Abstract

Company law protects directors from personal liability for decisions made within their authority under the Business Judgment Rule (BJR). India's 63rd spot in the 2021 Ease of Doing Business index shows how regulatory frameworks affect investment trends. This method relies on directors' authority to take bold measures, which is shielded by the Business Judgment Rule (BJR) from court review. This option decreases the cost of hiring qualified directors and helps recruit highly experienced leaders. Despite its merits, the BJR raises questions and debates over its interpretation and execution. There are debates over whether it is a standard of review or non-review, its formalization, and if it should be a 'presumption in favor of directors' or a'safe harbor.' The BJR is more of a "standard of non-review" than a "standard of review." An study shows that Section 463 of the Indian Companies Act, 2013, which apparently formalizes the Business Judgment Rule (BJR), misrepresents it. In its deference to business decisions, the Indian judiciary does not explicitly follow the Business Judgment Rule (BJR). A formal Business Judgment Rule (BJR) code in India is not urgently needed. Instead, courts should utilize it as a 'presumption' in favor of directors. This paper clarifies BJR uncertainties to develop a more rational and efficient application in Indian corporations. This paper aims to explain the Business Judgment Rule and its implementation in India. The text discusses the BJR's origins, logic, and limits. This paper explains the BJR and its deployment in India to improve directors' decision-making and corporate governance.

Keywords: Business Judgment Rule, Ease of Doing Business, Judicial Review, Codification, Presumption in Favor of Directors

1. Introduction

The Business Judgment Rule (BJR) is a fundamental principle in corporate governance that safeguards directors' decision-making processes within a corporation. The Business Judgment Rule (BJR) is a legal principle that acknowledges the challenging and unpredictable nature of company decision-making by its leaders. The Business Judgment Rule (BJR) protects directors from unnecessary legal examination, allowing them to make reasonable business judgments without interference from the courts. This creates an environment that encourages directors to take strategic risks.[1] The BJR is a legal presumption that directors of a company act in good faith, on an informed basis, and in the honest belief that their actions are in the best interest of the company. The rule creates a strong presumption in favor of board decisions. Unless a decision cannot be "attributed to any rational business purpose," the BJR supports board decisions made by directors who are loyal and well-informed. The BJR protects directors from personal liability for decisions made in good faith, even if those decisions later prove to be unsuccessful. It applies when directors make business decisions, such as investments, mergers, acquisitions, or strategic choices.[2] The contours of the BJR in India have not been fully delineated, leading to avoidable transaction costs in terms of business decision-making. Directors must act in the finest interest of the company, putting the company's general interest above their personal interest. They should exercise independent judgment and avoid conflicts between personal and company interests. The BJR's importance in the global context is emphasized by its impact on the facilitation of business activities, a critical determinant of a country's economic appeal. India's significant influence is especially evident, as exemplified by its position in the 2021 Ease of Doing Business index. As discussions continue about the characteristics, implementation,

[1] Manning, B., 1984. Business Judgement Rule in Overview, The. *Ohio St. LJ*, *45*, p.615.
[2] Vasani, B. (2024). Business Judgment Rule: The Indian Context. *IndiaCorpLaw*.
https://indiacorplaw.in/2024/02/business-judgment-rule-the-indian-context.html

and formalization of the BJR (Business Judgment Rule), it is crucial to carefully examine its intricacies, particularly within the Indian context, in order to bring clarity and consistency to the field of business decision-making. This study undertakes a thorough examination of the BJR, elucidating its intricacies and discussing the different viewpoints about its interpretation and implementation. Ultimately, it aims to enhance our nuanced comprehension of this crucial legal principle.

Innovation requires taking risks. Risky decisions are often crucial to the success of a business. In order for businesses to grow, it is necessary to encourage the people leading the business to take risks. One doctrine that incentivizes directors to take risks is the Business Judgment Rule. Business Judgment Rule presumes that directors have acted in "good faith, in a disinterested manner, with due care, and without waste" in making business decisions. Business Judgment Rule was christened in the year 1742 in England in the case of Charitable Corp. v. Sutton[3] and later adopted in the United States (US) by the Louisiana Supreme Court in the year 1829 in the case of Percy v Millaudon.[4] In the year 1927, the Delaware Supreme Court in the case of Bodell v General Gas & Electric Corp[5] explicitly highlighted this principle by stating that "If in the particular case there is nothing to show that the directors did not exercise their discretion for what they believed to be in the best interest of the corporation, certainly an honest mistake of business judgment should not be reviewable by the Court." Business Judgment Rule is a judicial principle that safeguards directors from being held liable personally unless there is some evidence to show that they have violated their fiduciary duties[6]. In Delaware, it is one of the three standards of reviewing the decisions of the directors, the other two being enhanced scrutiny and entire fairness review. There are primarily two ways in which the principle is understood by the courts in the US; the Delaware version and the American Law Institute (hereinafter referred as ALI) version. Under the Delaware version, the Business Judgment Rule is “a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company”.[7] In jurisdictions where the principle is used as a presumption, the burden of proof of the director’s breach of fiduciary duties is on the plaintiff. The courts do not examine the merits of the decision unless there is substantial evidence of the breach of fiduciary duties by the directors.[8] As per the ALI version which is adopted by the Supreme Court of various states in the US,[9] a director or officer who makes a business judgment in good faith fulfils the duty of care if the director or officer was disinterested in the business decision, was reasonably informed about the decision and reasonably believed it to be appropriate under the circumstances and rationally believed it to be in the best interests of the corporation.[10] The ALI version of the principle is a safe harbour in contrast to the Delaware version where it exists as a presumption. In the ALI version, the burden of proof is on the defendant to show that the essentials of the principle are met and relief should be granted.[11] The components of the principle are: Firstly, there must be a business judgment. The term ‘business judgment’ has no institutional definition but the courts synonymously associate it with the terms such as commercial decisions or commercial judgment.[12] The courts in the jurisdictions where Business Judgment Rule is followed, infer ‘business judgments’ as those decisions which are taken by the directors from the lens of an entrepreneur[13] and hence dissuade themselves from reviewing such decisions.[14] Secondly, the decision must be made in good faith. The decision should have been made with a belief that it is in the best interests of the company.[15] Thirdly, the director should not have taken

[3] 2 Atk. 400, 26 ER 642 (Ch. 1742).
[4] 8 Mart (ns) 68 (La. 1829).
[5] 15 Del Ch 420 (1927).
[6] Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993)
[7] *Aronson v Lewis* 473 A2d 805 (Del 1984).
[8] *Cinerama Inc v Technicolor Inc* 663 A2d 1156 (Del 1995).
[9] *Rosenfield v Metals Selling Corp* 643 A2d 1253 (Conn 1994); *Omnibank v United S Bank* 607 So 2d 76 (Miss 1992).
[10] American Law Institute, Principles of Corporate Governance: Analysis And Recommendations, s 4.01(c) (1994).
[11] Douglas M Branson, ‘A Business Judgment Rule for Incorporating Jurisdictions in Asia?’ (2011) 23 SAcLJ 687 < https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/344/Citation/JournalsOnlinePDF > accessed 13 July 2022.
[12] *Cobden Investments Ltd v RWM Langport Ltd* [2008] EWHC 2810 (Ch).
[13] *Overend* & Gurney Co *v Gibb* 1872 LR 5 HL 480.
[14] *Corwin v KKR Financial Holdings LLC* 125 A3d 304 (Del 2015).
[15] *Aronson v Lewis* 473 A2d 805 (Del 1984).

any personal monetary advantage from the decision.[16] Fourthly, the decision should have been a reasonable one.[17] On the other hand, an entire fairness review is done when the presumption under the Business Judgment Rule is overcome by the plaintiff by showing substantial evidence against the directors.[18] Unlike the Business Judgment Rule, it does not take into consideration whether the director was honest in discharging his duties or not.[19] An entire fairness review is an objective examination of the decisions of the directors wherein the courts analyse the substantive fairness of the decision.[20] Under this standard of review, the burden of proof is on the defendants.[21]

2. Standard of Review or Non- Review?

The controversy surrounding the Business Judgment Rule (BJR) centers on a crucial differentiation: whether it should be considered a "standard of review" or a "standard of non-review." This issue revolves around the fundamental question of how thoroughly courts should examine the decisions made by corporate executives. Supporters of the "standard of non-review" viewpoint argue that courts should abstain from examining the content of directors' actions unless there is proof of malicious intent, conflicts of interest, or extreme negligence. From this perspective, the Business Judgment Rule (BJR) acts as a safeguard, granting directors the liberty to make well-informed choices without the continual concern of judicial interference after the fact. The climate it creates promotes entrepreneurial risk-taking and strategic decision-making, which are crucial for organizational growth and innovation. Conversely, advocates of the "standard of review" advocate for increased court supervision, particularly in instances where there are claims of conflicts of interest, breaches of fiduciary obligation, or gross negligence. This viewpoint argues that a certain degree of examination is essential to ensure that directors are held responsible for their conduct, protecting the interests of shareholders and upholding the integrity of corporate governance.[22]

Understanding this complex terrain is essential for creating a careful equilibrium between granting directors the required independence to foster corporate expansion and upholding a level of responsibility that protects the interests of stakeholders. Achieving this balance is crucial not just for the legal foundations of corporate governance, but also for influencing the wider economic environment in which firms function. This discourse tries to provide clarification on the important part of corporation law known as the "standard of review" or "standard of non-review" argument within the business judgment rule (BJR).

There is a dichotomy in the understanding related to the standard of review vis-a-vis the Business Judgment Rule. Standard of Review is a test which the courts apply while reviewing a director’s actions to ascertain whether he should be held liable or not[23], i.e., it is viewed a standard of liability. The Delaware Courts understand that the Business Judgment Rule is a standard of review[24] whereas some authors comment that the Business Judgment Rule is perhaps a standard of non-review of the decisions of the directors.[25] It is necessary to understand the distinction between the two because by default the “principle of equity” requires a court to review the allegations against directors so that the stakeholders do not

[16] *Aronson v Lewis* 473 A2d 805 (Del 1984).
[17] *Aronson v Lewis* 473 A2d 805 (Del 1984).
[18] Shant H Chalian and Kristen M Bandura, ‘The Business Judgment Rule and the Entire Fairness Doctrine’ (Robinson & Cole) < https://rc.com/documents/Primer%20on%20Business%20Judgment%20Rule.pdf > accessed 13 July 2022.
[19] Bernard S Sharfman, ‘The Importance of The Business Judgment Rule’ (2017) 14(1) *NYU* JLB < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888052 > accessed 13 July 2022.
[20] Bernard S Sharfman, ‘The Importance of The Business Judgment Rule’ (2017) 14(1) *NYU* JLB < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888052 > accessed 13 July 2022.
[21] Bernard S Sharfman, ‘The Importance of The Business Judgment Rule’ (2017) 14(1) *NYU* JLB < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888052 > accessed 13 July 2022.
[22] Manning, B., 1983. Business Judgement Rule and the Director's Duty of Attention: Time for Reality. *Bus. Law.*, *39*, p.1477.
[23] *Melvin Aron Eisenberg, The Divergence of Standards of Conduct and Standards of Review in Corporate Law, 62 FORDHAM L. REV. 437, 437 (1993)*
[24] *Reis v Hazelett Strip–Casting Corp* 28 A3d 442(Del Ch 2011).
[25] Lyman Johnson, ‘The Modest Business Judgment Rule’ (2000) 55(2) Bus Law < https://www.jstor.org/stable/40687937 > accessed 13 July 2022.

suffer[26]. Business Judgment Rule acts as a limitation to the principle of equity as a result of which Courts dissuade themselves from reviewing the decision. The purpose of Business Judgment Rule is to incentivise directors to take risks and preclude courts from subjecting the directors to judicial scrutiny by default in all the cases of allegations of failure to comply with fiduciary duties. However, it is necessary to have a harmony between encouraging directors to take risky decisions for benefit of the company and protecting the interest of shareholders. If there isn't any such mechanism to limit the application of principle of equity, the lever would always tilt against the directors who would be dissuaded from taking innovative actions for the company because of the fear of coming under the radars of the court. Also, shareholders may not always get benefited from the application of equity other than those cases where they have got adequately compensated. This is because if directors do not have any incentive to take risks, then the chances of them coming with innovative ideas for the growth of the company would also be limited. In such a case, the shareholders would not get benefited other than the monthly dividend because the value of share would not increase in the market in the absence of newness and variation in strategy to run the business Hence, there has to be a harmony between both directors actions and stakeholders' interest for the advancement of both. As Business Judgment Rule establishes such harmony, let us understand whether it is a standard of review or standard of non-review.

2.1 Standard of Review

There are two steps that the courts follow to understand whether the director has transgressed his fiduciary duties. In the first step, by way of application of Business Judgment Rule, courts have a presumption that directors have acted in good faith and on an informed basis[27]. The plaintiff bears the burden of overcoming this presumption by bringing evidence that the director's decision was tainted by fraud or illegality[28]. If the plaintiff is successful in establishing substantial evidence that shows that the directors have not complied with their fiduciary duties, the said presumption on director's honesty under Business Judgment Rule gets fractured. Courts then move on the second step. In the second step, the courts would apply a stringent standard of review which is "entire fairness" review (discussed below). Herein, there would be detailed examination by the courts on the substantive merits of the director's decisions (whether decision of director was independent and fair or not) to understand their liability[29]. The burden of proof will be on the defendants, i.e., directors to prove that they aren't liable. Entire Fairness Review is also one of the other standards of review applied in Delaware, in addition to Business Judgment Rule. In brief, in Entire Fairness Review, the courts examine in detail, i.e., whether the decision was fair or not[30]. It is a stringent standard of review. Unlike Business Judgment Rule that protects directors where the directors have acted on an honest belief, Entire Fairness Review would not look into the subjective components like the director acting with an honest belief. Herein, the Courts review the conduct objectively and look at the merits of the decision, i.e., whether it was a fair decision or not. The director has to prove that he discharged his fiduciary duties duly and the transaction was independent and there was fair dealing in terms of the structure and procedure in the course of the transaction and fair pricing with reference to the value of the stock.[31] BJR is a standard of review because the very presumption under it is the first step that the courts take before assessing a claim of director's breach of duty of care. Whenever there is an allegation that the director has breached his fiduciary duty, the principle guides the judicial review of the decision.[32] It is the legal basis to find whether the director is liable or not.[33]

[26] Bernard S. Sharfman, 'The Importance of the Business Judgment Rule' (2017) 14(1) *NYU* JLB JLB < https://papers.ssrn.com/sol3/papers.cfm?abstract_id= 2888052 > Last accessed 07 March 2024
[27] *Aronson v Lewis* 473 A2d 805 (Del 1984).
[28] *Technicolor, Inc., 634 A.2d at 361.*
[29] *Technicolor, Inc., 634 A.2d at 361.*

[31] Bernard S. Sharfman, 'The Importance of the Business Judgment Rule' (2017) 14(1) *NYU* JLB JLB < https://papers.ssrn.com/sol3/papers.cfm?abstract_id= 2888052 > Last accessed 07 March 2024
[32] Ibid.
[33] Robert J Rhee, 'The Tort Foundation of Duty of Care and Business Judgment' (2013) 88 Notre Dame L Rev < https://core.ac.uk/download/pdf/216976342.pdf > accessed 13 July 2022.

2.2 Standard of Non-Review

Others argue that the Business Judgment Rule is a standard of non-review of the decisions because it is an abstention doctrine. This is because the courts have a presumption that directors have conducted themselves in good faith and this presumption prevents the courts from reviewing the duty of care claims.[34] The courts would not review the merits of director's decisions (whether it was a fair decision or not) unless the directors were alleged to be involved in fraud, illegality, or conflict of interest[35]. Unless the plaintiff can rebut the presumption by showing that one of these conditions is met, the court will dismiss the duty of care claims without a further detailed review. [36] Business Judgment Rule precludes courts from taking up an entire fairness review[37] of the decision in the absence of substantive evidence, i.e. they do not go into the merits of the decision.[38] Since there exists a presumption that prima facie dissuades courts from reviewing the decisions of the directors by further applying f another standard of review such as "entire fairness", Business Judgment Rule is understood as a standard of non- review.

Having understood both sides of the argument regarding Business Judgment Rule as the standard of review and standard of non-review, we infer that the latter argument that Business Judgment Rule is a standard of non-review is more persuasive. This is because it draws a line to understand when and why the courts will not review the substantive merits of the decision of the director. The plaintiff's failure to rebut the presumption acts as a restriction for the courts to do a further enquiry into the claim. Put another way, the application of Business Judgment Rule serves as a point where the courts do not further review the decision of the director. Also, as further review of the director's decision would technically be an entire fairness review[39] wherein the courts would assess in detail whether the decision was independent and fair, Business Judgment Rule should not be considered as a standard of review. Perhaps, it is Entire Fairness Review that is rightly considered a standard of review. The purpose of Business Judgment Rule is to prevent review of the merits of the decisions by way of entire fairness review. If courts review a director's decision, then such a review forms a part of the Entire Fairness Review. This is because the plaintiff has successfully rebutted the presumption of director acting honestly and now courts have to review the director's decision in detail. Business Judgment Rule is the first principle that courts apply while dealing with cases of allegation against a director violating their fiduciary duties and when the presumption is overcome, the courts move on to actually reviewing the directors decision. Such a review forms part of the Entire Fairness Review and is the second step that courts take. As actual review takes place in the second step through application of entire fairness review, business judgment rule should be viewed as a standard of non-review.

3. Business Judgment Rule Vis-a-Vis Section 463 of the Companies Act 2013

Section 463 of the Companies Act, 2013[40] or its corresponding Section 633 of the erstwhile Companies Act, 1956[41] deals with the power of courts to grant relief in certain cases. Section 463 of the Companies Act, 2013, provides relief to the directors who though are technically guilty of negligence, default, breach of duty, etc. to be fairly relieved from the charges against them if they can satisfy the court that they have acted honestly and reasonably in the circumstances of the cases.[42] On a bare perusal of this provision, it might appear that this provision is a retelling of the principle of Business

[34] *Brehm v Eisner* 746 A2d 244 (Del 2000); *Citron v Fairchild Camera & Instrument Corp* 569 A2d 53 (Del 1989).
[35] *Shlensky v. Wrigley;* 237 NE2d 776 (Ill App Ct 1968).
[36] Stephen Bainbridge, *The New Corporate Governance in Theory and Practice* (OUP 2008).
[37] Supra n.17
[38] Bernard S Sharfman, 'The Importance of The Business Judgment Rule' (2017) 14(1) *NYU* JLB < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888052 > accessed 8 July 2022.
[39] Supra n.17
[40] Companies Act 2013, Section 463
[41] Companies Act 1956, Section 633
[42] *Visram Financial Services (P) Ltd v Rajendran and Ors* [2018] 147 CLA 211(Mad).

Judgment Rule or is the Indian version of Business Judgment Rule as some argue.[43] Whether this notion, prima facie is correct or not, will be examined herewith.

Under Section 463 (1), the officer files an application to the court praying to relieve him of the liability incurred by him after the proceedings have been initiated for “negligence, default, breach of duty, misfeasance or breach of trust” or when there is an apprehension that a proceeding might be initiated under section 463(2).[44] In the case of Dulal Chandra Bhar and Ors. v. The State of West Bengal and Anr.,[45] the Calcutta High Court overruled the order passed by the Presidency Magistrate who had granted relief to the directors under Section 633 for their defaults under Sections 162(1)[46], 168[47], 210(5)[48], and 220(3)[49] of the Indian Companies Act, 1956. The Court held that the contention of the directors that they failed to comply with the statutory obligations on account of internal dispute amongst them was not sustainable as the directors had not acted honestly or reasonably in discharging their responsibilities and hence could not be granted relief. The procedure followed by the courts to do an enquiry to ascertain whether the person has committed any offence and thereby decide to grant or reject the application for relief under Section 463 is as per Section 4(2) of the Code of Criminal Procedure, 1973[50] (“Code”) as Section 463 is silent on the rules to be followed for such an enquiry.[51] Under this provision, the director has to undergo a trial to satisfy the court that he is protected by this provision. In the case of Sanatan Ganguly v State, the High Court of Calcutta[52] while hearing an appeal filed by the director for relief under Section 633(1) dismissed the order passed by the learned Chief Metropolitan Magistrate, Calcutta who had disposed of the application only on the basis of arguments made in the application and the written objections to it. The High Court emphasized that the power under Section 633 should not be exercised casually by placing reliance on the application under Section 633 and the written objections to it. The case should be decided by placing reliance on the evidence presented during the trial including the evidence submitted by the accused who files the application for relief under Section 633. While Section 463(1)/633(1) provides relief in those cases where a proceeding has been initiated, Section 463(2)/633(2) deals with those cases where then the officer apprehends that a proceeding might be initiated. Section 633 (2) comes to the rescue before a proceeding is initiated, for instance, a director can apprehend a proceeding when a show-cause notice is issued by the Registrar of Companies like in the case of Gautam Kanoria and Ors. v Assistant Registrar of Companies and Anr.[53], wherein the petitioners had received a show-cause notice for not holding the annual general meeting and not filing annual returns. The petitioners replied that since the management of the company was taken over pursuant to the Textile Undertakings (Taking Over of Management) Ordinance, 1983, which was published in the Central Gazette, they could not comply with the law. On apprehending a proceeding, the petitioners filed for relief under Section 633(2). The Bombay High Court held that though the petitioners were technically guilty, they could not comply for reasons beyond their control and hence granted the relief under Section 633(2) of the Companies Act, 1956.

3.1 Illusion of similarity between Section 463 and the Business Judgment Rule

On perusal of the provision, it is inferred that there is a common thread between Section 463/633 and the business judgment rule. The object of Section 463/633 is to grant relief to the directors who though are technically guilty of breach

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[43] Bharat Vasani, Esha Himadri, ‘Vicarious Liability of Non-Executive Directors: A Case for Reform of Law’ (*Cyril Amarchand Mangaldas*, 11 November 2020) < https://corporate.cyrilamarchandblogs.com/2020/11/vicarious-liability-of-non-executive-directors-a-case-for-reform-of-law/#:~:text=Section%20463%20of%20the%20Act,connected%20with%20his%20appointment%2C%20he > accessed 13 July 2022.

[44] *Mau Cold Storage & Khandsari Sugar Factory (P) Lt v Registrar of Companies* (1984) 10 ALR 629 (All).

[45] (1962) 32 Comp Cas 1143.

[46] Companies Act 1956, Section 162(1)

[47] Companies Act 1956, Section 168

[48] Companies Act 1956, Section 210(5)

[49] Companies Act 1956, Section 220(3)

[50] Code of Criminal Procedure 1973, Section 4(2)

[51] *Sanatan Ganguly v State* (1984) 56 Comp Cas 93

[52] *Ibid.*

[53] (2002) 108 Comp Cas 260.

of duty, negligence, misfeasance or breach of negligence or any default but have acted honestly and reasonably and in light of the circumstances, ought to be relived.[54] Business Judgment Rule, along with protecting the directors from being liable even when their business decisions are not favourable to the company, intends to prevent the review of decisions of directors. To receive the protection of the Business Judgment Rule, the directors must have acted in a disinterested manner, on an informed basis, and in good faith for a rational business purpose.[55] Business Judgment Rule additionally precludes the review of the substantive quality of the decisions taken by the directors.[56] Under Section 463, the director's decision is reviewed and on the basis of analysis of the facts and circumstances of the case, the courts decide to grant or decline relief to the directors. If in the trial the plaintiff is able to rebut the director's arguments of having acted honestly and reasonably, then the director is not given the protection of this provision. While reviewing applications for relief under Section 463/633, the courts consider whether the director has acted honestly or reasonably. The Bombay High Court while reviewing an application for relief under Section 633 relied on the cases of Dovey v. Cory[57] and Re City Equitable Fire Insurance Co. Ltd.[58] which settled the position that the director must act honestly and with some degree of skill and diligence.[59] The care expected is that of reasonable care i.e. care an ordinary man is expected to take in the circumstances. He should not be held liable for mere mistakes in judgment.[60] There should not have been any doubt and he must have conducted himself with an honest belief.[61] Also, the Companies Act, 2013 has incorporated the duties of the directors in Section 166[62]. Section 166 in essence provides that a director should act with due and reasonable care, in good faith to advance the best interests of the corporation, without a conflict of interest with the company, directly or indirectly, and should not have an undue gain for himself or his associates. This is similar to the duty of care and duty of loyalty which is recognized as the fiduciary duties of the directors in Delaware. In Delaware, duty of care entails that a director must be reasonably informed and it is not expected that a director must be informed of each and every fact. It includes considerations such as whether the director devoted sufficient time to make a decision[63], conducted comprehensive discussions with the legal advisors[64], etc. The courts review the claims related to the violation of the duty of care by reviewing the procedure followed by the directors.[65] The courts evaluate by ascertaining whether the director has acted in a grossly negligent manner in arriving at a decision.[66] In Delaware, duty of loyalty stipulates that there should not be any conflict of interest between the director and the corporation. The interest of the corporation should supersede his own interest.[67] If the director fails to comply with the fiduciary duties in good faith i.e. knowing that he is violating his fiduciary duties, it constitutes a breach of the duty of loyalty. Section 144 of the 'Delaware General Corporation Law, 1899'[68] deals with transactions with interested directors. As per Section 144(a) of the Delaware General Corporation Law, corporate transactions in which a director has an interest are not invalidated due to participation by such interested director in the meeting if the interested director discloses his interest to the board and the

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[54] *Omprakash Khaitan v Keshariya Investment Limited* [1978] 48 Comp Cas 85 (Delhi).
[55] *Aronson v Lewis* 473 A.2d 805 (Del 1984).
[56] Mucahit Aydın, 'Striking A Balance on Due Care Liability of Corporate Directors in Delaware' (SJD Dissertation, University of Kansas 2014) < https://www.semanticscholar.org/search?q=Mucahit%20Ayd%C4%B1n%2C%20%E2%80%98Striking%20A%20Balance%20on%20Due%20Care%20Liability%20of%20Corporate%20Directors%20in%20Delaware%E2%80%99&sort=relevance > accessed 13 July 2022.
[57] [1901] AC 477.
[58] [1925] 1 Ch D 407 (CA).
[59] *Re Tri-Sure India Ltd* [1983] 54 COMP CAS 197 (BOM).
[60] *Re City Equitable Fire Insurance Co. Ltd* [1925] 1 Ch D 407 (CA).
[61] *Dovey v Cory* [1901] AC 477.
[62] Companies Act 2013, Section 66
[63] William M Lafferty, Lisa A Schmidt, Donald J Wolfe Jr, 'A Brief Introduction to the Fiduciary Duties of Directors under Delaware Law' (2012) 116 (3) Dick L Rev < https://ideas.dickinsonlaw.psu.edu/dlra/vol116/iss3/6/ > accessed 13 July 2022.
64 William M Lafferty, Lisa A Schmidt, Donald J Wolfe Jr, 'A Brief Introduction to the Fiduciary Duties of Directors under Delaware Law' (2012) 116 (3) Dick L Rev < https://ideas.dickinsonlaw.psu.edu/dlra/vol116/iss3/6/ > accessed 13 July 2022.
65 *Brehm v Eisner* 746 A.2d 244 (Del 2000).
66 *Brehm v Eisner* 746 A.2d 244 (Del 2000).
67 *Cede & Co v Technicolor Inc* 634 A2d 345 (Del 1993).
[68] Delaware General Corporation Law 1899, Section 144

board in good faith authorizes the corporate transaction involving the interest of the director. Similarly, in India, the provision related to disclosure of interest by the interested director is given in Section 184 of the Companies Act, 2013. Section 184(2) of the Companies Act, 2013, provides that an interested director shall not participate in the meeting of the board. However, as per a circular issued by the Ministry of Corporate Affairs, an interested director in the case of a private company, may participate in the meeting after disclosure of such interest.[69] This means that even in India, an interested director is not barred from participating in the meeting if such a corporate transaction involving the interest of the director has been ratified by the board. Thus, in India also, there is a similar stance with reference to the fiduciary duties of the directors of a company.

3.2 Breaking the Illusion

Under Section 463/633, courts relive a director for having acted in good faith which is similar to the first step that courts in Delaware while dealing with allegation of violation of due care. However, under Section 463/633, the director undergoes a trial to justify that relief should be granted under the provision. However, in jurisdictions where Business Judgment Rule is used, in the absence of evidence on part of the plaintiff, the defendant director gets relief in the pre-trial stage. For instance, a director might file for summary judgment when a shareholder files a suit. In support, the directors might show a report of the Chief Financial Officer who had approved the decision of the director and also share the certification of the board resolution by the Company Secretary. If the court, on prima facie evaluation, finds the evidence persuasive, it can grant a summary motion. However, if the evidence is not convincing, then a trial is conducted.[70] The presumption under the principle places a heavy burden on the plaintiff to satisfy the preponderance of evidence standard. If the director presents any evidence, then the courts will provide greater deference to the director and the plaintiff would be required to present more evidence to rebut the director's evidence.[71] Business Judgment Rule as a result acts as a filter for the courts to discard cases bearing no merit.[72] Further, unlike an application under Section 463/633, the courts applying the Business Judgment Rule do not review the substantive merits of the decision when a director has complied with his fiduciary duties.[73] Under Section 463/633, since a trial is conducted, it is natural that a court does look into the merits of the case. Further, Section 463/633 provides relief from liability in respect of offenses committed under the Companies Act, 1956/ Companies Act, 2013 and not any other law.[74] Relief under Section 463/633 can be when a proceeding has been initiated or if there is an apprehension of a proceeding, unlike the Business Judgment Rule which comes to the rescue of directors only after a proceeding has been initiated.

Apropos the above, it is inferred that though the object and components of Section 463/633 and Business Judgment Rule are similar, there are differences with respect to the procedure followed in reviewing the director's decisions. It can thus be said that it does not entail Business Judgment Rule in its true sense.

4. Does the deference shown by Indian courts to directors' decisions align with or diverge from the principles of the Business Judgment Rule?

To understand the true nature of Section 463/633 of the Companies Act, a thorough analysis of the orders passed by courts with respect to the provision was done but it did not provide much help in understanding the interpretations of the provision. On perusal of the cases related to Section 463/633, it is inferred that in most of the cases, the relief pleaded was against the show cause notice issued by the Registrar of Companies. The cases dealt with violation of the mandatory

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[69] Ministry of Corporate Affairs, (F.No.1/1/2014-CL.V, 5 June 2015) < https://www.mca.gov.in/Ministry/pdf/Exemptions_to_private_companies_05062015.pdf > accessed 13 July 2022.
[70] Douglas M Branson, 'The Rule That Isn't a Rule - The Business Judgment Rule' (2002) 36(3) Val U L Rev < https://scholar.valpo.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1312&context=vulr > accessed 13 July 2022.
[71] R Franklin Balotti and James J Hanks, 'Rejudging the Business Judgment Rule' (1993) 48 (4) Bus Law < https://www.jstor.org/stable/40687428 > accessed 13 July 2022.
[72] Douglas M Branson, 'The Rule That Isn't a Rule - The Business Judgment Rule' (2002) 36(3) Val U L Rev < https://scholar.valpo.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1312&context=vulr > accessed 8 July 2022.
[73] *Cede & Co v Technicolor Inc* 634 A2d 345 (Del 1993).
[74] *Rabindra Chamriae & Ors v Registrar of Companies West Bengal & Ors* AIR 1992 SC 398.

statutory provisions and were not specifically related to any commercial decisions or business decisions. As explained previously, business decisions are taken from the lens of an entrepreneur and can be in relation to any statute. Thus, for a better understanding, let us learn the approach of courts and regulatory authorities with respect to the business decisions taken by the directors of the company.

In the case of Fidaali Moiz Mithiborwala v Majolica Properties (P) Ltd. and Ors.,[75] the petitioner who was the Managing Director of the company filed a petition against his brother who was the Whole-time Director of the company (the second respondent), alleging a case of oppression and sought direction to the second respondent to resign from the board of the petitioner as he was neither the shareholder of the company nor a nominee of the Majolica Impex (P) Ltd. (majority shareholder) and grant permission to the petitioner to appoint two directors of his choice. The National Company Law Tribunal (NCLT) hesitated to interfere in the matter because the company was run by the two brothers and interfering in the matter and directing the removal of the respondent director would have repercussions on the functioning of the company. The NCLT emphasized that the decision of the court has to be with reference to the business realities and tested on the fulcrum of business judgment rule. There can be situations when the interest of the company is not in consonance with the interest of the shareholders. The yardstick was to see whether the director has acted in a mala fide or unfair manner or with a motive to have an unlawful gain or unlawful loss. Further, in the case of M.S.D. Chandrasekar Raja v Shree Bhaarathi Cotton Mills P. Ltd. and Anr,[76], a petition was filed under sections 397 and 398 of the Companies Act, 1956 alleging that the affairs of the company are being conducted in a manner oppressive to the petitioner and prejudicial to the interest of the company. The Company Law Board on perusal of the matter concluded that though there was a deadlock in the company, the conduct of the respondent was not oppressive. It was observed that there was no adequate material to show that the second respondent acted in bad faith. The facts revealed that the agenda before the board of directors was passed timely and unanimously. In the absence of evidence of directors acting in bad faith, the Company Law Board could not interfere in the business decisions of the directors. In another case, the Supreme Court of India had stated that even if the decision of the director has not been favourable to the company, the Court would draw a line and not interfere unless it is tainted by prejudice and unreasonableness.[77] Furthermore, the Supreme Court of India in another occasion, drew an analogy and equated the directors as cricketers and the courts as an umpire in a cricket match wherein the umpire checks whether the game is being played as per the rules and does not encroach upon the role of the cricketers who decide how the game is to be played.[78]

The analysis of the above cases and a few others[79] reveal that courts have followed an attitude of deference towards reviewing the business decisions taken by the directors. This is no doubt a welcome trend and has potential to influence corporate risk taking. But it can also be seen that though there is an attitude of deference, it is nowhere close to the Business Judgment Rule in the US. There is no presumption in favour of the directors in the same sense as it exists in the Delaware version of the Business Judgment Rule. Also, courts follow a practice of non-interference with the decision and not non-review. The difference between the two though subtle is a significant one. In case of the former, courts may examine the decision and choose not to interfere but in the latter case there is no examination at all. It is also important to understand that there is a difference in the stage of the proceedings when the Business Judgment Rule is applied in the US and when courts in India try to portray an attitude of deference. In the case of the former, the same is at the very first stage of the proceedings, while in the later; most observations of the courts are during examination of merits of the issues in question in the particular cases. It is also evident that courts in India have never defined "Business Judgment Rule" in any of the cases. The observations talk nothing more than a general attitude of deference of courts in interfering with the commercial decisions of the directors of the company and there exists no strict requirement of adherence to such a policy of deference in the absence of a well-defined principle to that extent either developed by the judiciary or in the statutes. Thus, there exists a gap in the Indian legal system for the recognition of the rule in its true form despite the attitude of deference of courts towards commercial decisions of companies.

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[75] [2017] 138 CLA 289.
[76] (2007) 138 Comp Cas 881 (CLB).
[77] *Fertilizer Corporation Kamgar Union, Sindri & Ors v UOI & Ors* AIR 1981 SC 344.
[78] *Miheer H Mafatlal v Mafatlal Industries Ltd* AIR 2004 SC 3933.
[79] *In the matter of Taneja Aerospace and Aviation Limited – in respect of (1) Mr. Salil Taneja and (2) Mr. C. S. Kameswaran* 2016 SCC OnLine SEBI 11; *Cyrus Investments Pvt. Ltd. V Tata* Sons 2018 SCC OnLine NCLT 24460.

5. Is there a need for a codified Business Judgment Rule in India?

As mentioned above, Section 463 of the Companies Act, 2013 resembles the Business Judgment Rule, but its aim and application differ. This raises the question of whether India needs a codified Business Judgment Rule without a matching statute. The principle of separate legal existence of a company is well established in India.[80] By virtue of this, a company has rights and duties associated with its existence.[81] The remedy for breach of a company's rights can be pursued by the company itself.[82] However, there can be instances when it would be against the interests of the directors of the company to pursue legal remedies for the enforcement of rights of the company. Therefore, there is room for pursuance of such remedies through actions made by shareholders on behalf of the company. One of such measures is the use of derivative suits. In India, there is no clear statutory recognition of derivative action. Some argue that suits are subsumed within Section 241 of the Companies Act, 2013 which deals with the "oppression and mismanagement" while some others argue that the scope of derivate actions is too broad to be subsumed within the particular provision. It would not be wrong to say that derivative litigations in India remain highly unexplored and even if pursued, there is a considerable degree of judicial deference to allow such suits. Moreover, the concentrated shareholding pattern of most companies in India makes the filing of derivate suits in India highly improbable.[83] It is argued that in the absence of a system which statutorily recognises derivative suits and where derivative suits are not encouraged by the courts, one of the important justifications for the existence of Business Judgment Rule loses its strength. The argument being that Business Judgment Rule protects director from "credible threat of being sued".[84] In the absence of a "credible threat of directors being sued", the implementation of the rule in a codified form can bring with it unintended costs. Although the Business Judgment Rule is aimed at reducing litigation, there can be increase in litigation as the implementation of rule requires the compliance of certain conditions. A number of these conditions are subjective in nature which can give rise to increase in litigation as has been seen in the case of Australia.[85] The increase in lawsuits has the potential to dis-incentivize individuals to take up directorship which goes against the very objective of the implementation of the Business Judgment Rule. In the absence of threat, the codification of Business Judgment Rule can create threats that did not exist before its implementation. Therefore, Business Judgment Rule may be implemented in countries which do not have any protection for directors viz. civil law jurisdictions, but in a country like India, where there is a well-established line of case laws as seen under the previous head which show an attitude of deference of courts in second-guessing the decisions of directors, the implementation of Business Judgment Rule as a codified rule is unnecessary. Another reason which makes a strong case for non-codification of the Business Judgment Rule is the existence of different versions of the rule in the country where it originated.[86] Each one of the versions has their own advantages and disadvantages. And each rule seems to be the best rule according to the facts and situation of a given case. Therefore, there exists a structural problem in accommodating each of the models into one particular provision. If the task is with the legislature, there is a risk of creating a rule which is too narrow in its scope and might favour a particular class over others, if it is left to the judiciary; there are better chances of having a rule which can be applied flexibly.

It would not be wrong to say that the broad approaches of the corporate law regime in India and in the US are starkly different from each other. It has been argued by many that the US Corporate Law regime follows a director primacy

[80] *Life Insurance Corporation v Escorts Ltd. & Ors* 1986 AIR 1370.
[81] *Bharat Coking Coal Ltd. v Madanlal Agrawal* 1997 (1) SCC 177.
[82] Ibid.
[83] Vikramaditya Khanna, Umakanth Varottil , 'The Rarity Of Derivative Actions In India: Reasons And Consequences' *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge University Press, 2012) <http://bit.ly/1NcNW7X> accessed 10 July 2022.
[84] Aurelio Martinez Gurrea, 'Re-examining the law and economics of the business judgment rule: Notes for its implementation in non-US jurisdictions' (2018) (2) JCLS < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2720814> accessed 1 July 2022.
[85] D Branson, 'A business judgment rule for incorporating jurisdictions in Asia' (2011) (23) SALJ < https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/344/Citation/JournalsOnlinePDF> accessed 1 July 2022.
[86] Aurelio Martinez Gurrea, 'Re-examining the law and economics of the business judgment rule: Notes for its implementation in non-US jurisdictions' (2018) (2) JCLS < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2720814> accessed 1 July 2022.

approach[87] while the Indian corporate law regime follows a stakeholder primacy approach.[88] One of the reasons for such difference in approach is based on the fact that in the United States, the corporate culture comprises of large corporations which have diversified shareholders. An emphasis on centralised decision-making authority solves the organizational challenge of information asymmetries and differing interests to a large extent. It is also argued that there are political and economic reasons for having this kind of an approach in the US. Section 166 of the Companies Act, 2013 seems to suggest that a stakeholder approach is followed. The mere existence of the provision has not radically shifted the approach away from a shareholder primacy approach as has been argued by many. Elsewhere, the difference in corporate culture argument was used to justify the non-codification of Business Judgment Rule in Nigeria.[89] It has been argued that when applied to a regime where shareholder primacy approach is present, a codified Business Judgment Rule "will make directors lack the gravitas required for the management of corporations and will encourage moral hazards".[90] This conclusion hints at the fact that codification of the business judgment rule can potentially negatively affect corporate risk taking than encourage it.

5.1 'Presumption' or 'Safe Harbour'

The difference between the rule existing as a presumption and a safe harbour needs to be understood. In the US, the Business Judgment Rule is used both as a presumption and as a safe harbour. The Delaware model uses it as a presumption[91] whereas the ALI version deems it as a safe harbour provision.[92] The Delaware version which exists as a presumption is again used in two ways. As discussed previously, the Delaware version may either be used as an abstention doctrine[93] or standard of liability.[94] When it is used as an abstention doctrine, the merits of the decisions of the board of directors are not substantively reviewed by the courts unless the good faith presumption is rebutted by the plaintiffs.[95] If the plaintiff establishes that there is existence of illegality, fraud or self-dealing in the making the decision, the burden of proof will shift to the directors. When the same is used a standard of liability, the merits of the decisions taken by the directors can undergo some objective review. However, as far as ALI version is concerned, it operates as an immunity doctrine.[96] Under this version, directors are protected from any liability arising out of a claim for a breach of duty if it is proved that in taking the particular decision, the director believed that the decision taken was in the best interest of the company, the decision was appropriate under such circumstances and there was no conflict of interest. These conditions however need to be proved by the directors and therefore unlike the Delaware version, the burden of proof needs to be discharged by the directors and not the plaintiff. It is seen that jurisdictions like Germany[97], Australia[98] and South Africa[99] follow a Business Judgment Rule which is more inclined towards the safe harbour approach while in the United Kingdom, the rule is used as a presumption.[100] Which approach should then be followed? The answer to the

[87] Stephen M Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance* (OUP 2008).
[88] Umakanth Varotolli, 'The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochtony' (2015) NUS Working Paper Series, No.15/01 < https://law.nus.edu.sg/wp-content/uploads/2020/04/001_2015_Umakanth_Varottil.pdf > accessed 10 July 2022.
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[90] Ibid.
[91] *Aronson v. Lewis* 473 A.2d 805, 812 (Del. 1984).
[92] American Law institute, Principles of Corporate Governance 2008. s 401(k)(c).
[93] Stephen M Bainbridge, 'The Business Judgment Rule as Abstention Doctrine' (2004) 57(1) V & L Rev.
[94] Ibid.
[95] Ibid.
[96] Lori McMillan, 'The Business Judgment Rule as an Immunity Doctrine' (2013) 521 (4) Wm. & Mary Bus. L. Rev <https://scholarship.law.wm.edu/wmblr/vol4/iss2/5> accessed 1 July 2022.
[97] German Stock Corporation Act 2005, a 93 (1).
[98] Australian Corporations Act 2001, s 180(2).
[99] South African Companies Act 2008, s 76 (4) (a).
[100] A Keay, J Loughrey , 'The Concept of Business Judgment, (2019) 39 (1) Legal Studies <https://eprints.whiterose.ac.uk/129655/3/Concept%20of%20BJ%20-%20LS%20paper%20submitted%20post%20reviewing.pdf> accessed 1 July 2022.

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question depends on a number of factors. The factors that need to be seen are (i) existence of diversified shareholders (ii) existence of institutional investors and (iii) status of derivative litigation.[101]

As far as India is concerned, though the exact percentage of institutional investing cannot be known, it has been predicted that institutional investors account for majority of private equity in companies in India.[102] Only a small percentage comes from retail investors.[103] The institutional investing is also diversified to an extent. The existence of diversified institutional investors promotes risk taking by the corporations.[104] The risk-taking appetite is reduced in the presence of a rule which does not provide a presumption in favour of directorial decision making. Where there is a presence of large number of non-diversified retail investors, the need for risk taking is reduced significantly and thus the requirement of an additional level of protection in the form a safe harbour is not warranted.

Derivative litigation as mentioned earlier is not a popular tool in India.[105] Derivative litigations can be of two kinds viz. one in which the shareholders want to sue a third party and the second where shareholders want to sue a member of the board.[106] In this section we are concerned with the second kind of derivative litigation which is internal to the corporation. Generally, there exists a demand requirement where the demanding shareholders have to place the claim before a panel which decides whether to go ahead with the litigation.[107] In such a situation it is extremely important to ensure that the directors are unbiased i.e. they do not have any conflict of interest, they take the decision based on evidences before them and their decision is not influenced by fraud or malice. Here, since the chances of conflict of interest, fraud and biasness and the incentive to engage in any of these is higher than any other decision-making process, the burden of proof may be placed on the directors to prove that these factors are not present. But as it is mentioned that the status of derivative litigation in India is in a very nascent stage, the need for such a rule does not seem to arise at this point of time.

6. Conclusion

In conclusion, our exploration into the implementation of the Business Judgment Rule (BJR) in India unravels critical nuances that warrant careful consideration. Despite the presence of Section 463 in the Companies Act, 2013, our analysis reveals that its alignment with the true essence of the BJR is illusory, paving the way for a more flexible and judicious adoption. Advocating for a non-statutory evolution of the BJR through judicial interpretations, we posit that such an approach resonates better with the dynamic socio-economic landscape of India. The existing judicial inclination towards deference to commercial decisions augurs well for the seamless integration of the BJR within the legal framework. However, the malleability of our proposed conclusions must be acknowledged. Factors such as the prevalence of derivative litigations and the evolving corporate law regime, with a focus on stakeholder or director primacy, could potentially reshape the landscape of BJR implementation. The dynamic nature of legal frameworks and the economic landscape underscores the need for adaptability in embracing the BJR. The rule's potential to stimulate business growth and economic progress remains contingent on its ability to eliminate hurdles in decision-making processes. In a climate where courts already exhibit a reluctance to intervene in commercial decisions, the formal adoption of the BJR emerges as a catalyst for promoting a more conducive environment, fostering economic prosperity through informed and decisive directorial judgment.

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[101] Aurelio Martinez Gurrea, 'Re-examining the law and economics of the business judgment rule: Notes for its implementation in non-US jurisdictions' (2018) (2) JCLS < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2720814> accessed 1 July 2022.

[102] Vikas Vardhan, 'Major Shareholders of Indian Stock Market', Value Research <https://www.valueresearchonline.com/stories/28417/major-shareholders-of-indian-stock-market/> accessed 1July 2022.

[103] Ibid.

[104] Faccio, Mara, Maria-Teresa Marchica, Roberto Mura, 'Large Shareholder Diversification and Corporate Risk-Taking', (2011) 24 (11) The Review of Financial Studies <http://www.jstor.org/stable/41301995> accessed 1 July 2022.

[105] Vikramaditya Khanna, Umakanth Varottil , 'The rarity of derivative actions in India: Reasons and Consequences' in Dan W. Puchniak, Harald Baum, Michael Ewing-Chow (eds), *The Derivative Action in Asia: A Comparative and Functional Approach* (CUP 2012) <http://bit.ly/1NcNW7X> accessed 10 July 2022.

[106] Mark A. Underberg, 'Business Judgment Rule in Derivative Suits Against Directors', (1980) 600 (65) Cornell L <http://scholarship.law.cornell.edu/clr/vol65/iss4/> accessed 1 July 2022.

[107] Ibid.

In the quest to ascertain the compatibility of Section 463 of the Companies Act, 2013 with the true essence of the Business Judgment Rule (BJR), our analysis delves into the complexities surrounding its implementation in the Indian legal landscape. The observation that Section 463 creates an illusion of the BJR but with a distinct scope prompts an exploration of whether this statutory provision serves as a hindrance or a facilitator for the adoption of the BJR. The realization that the existence of Section 463 is not a bar to the implementation of the BJR underscores the need for a nuanced and flexible approach. While a statutory adoption might be the conventional route, our analysis advocates for an evolution grounded in judicial interpretations. This departure from a codified rule aligns with the intricate socio-economic realities of India, recognizing the need for adaptability in legal frameworks.

The well-established judicial attitude of deference to commercial decisions in Indian jurisprudence emerges as a favorable backdrop for the seamless integration of the BJR. The judiciary's familiarity with granting directors a degree of autonomy further supports the notion that the BJR's adoption need not be a cumbersome process. However, the conclusion emphasizes the inherent fluidity in legal principles, acknowledging that the answers to the questions posed may evolve with changing circumstances. The efficacy and credibility of any rule, including the BJR, depend on the prevailing dynamics of the period. The status of derivative litigation is identified as a pivotal factor influencing the inclusion and implementation of the BJR. The prospect of a surge in derivative litigations in the future could significantly reshape the approach to implementing the BJR, necessitating a more adaptive framework.

Furthermore, the conclusion highlights the potential influence of the broader corporate law regime on the BJR's adoption. The contrast between a stakeholder primacy and a director primacy approach underscores the need for a rule that is versatile enough to align with diverse corporate governance paradigms. Ultimately, the paper emphasizes the overarching goal of any adopted rule—to incentivize the growth of businesses by eliminating hurdles in decision-making processes, thereby contributing to the economic progress of the nation. Despite the courts' inherent reluctance to review commercial decisions, the adoption of the BJR is positioned as a tool that can reduce judgmental interventions, promoting a conducive environment for directors' decision-making and, consequently, fostering economic prosperity. In navigating the intricate legal landscape, the conclusion advocates for a balanced and adaptive approach to the implementation of the BJR, recognizing the ever-evolving nature of legal frameworks and economic dynamics.

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