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Regulating Squeeze Outs In India: A Comparative Perspective

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REGULATING SQUEEZE OUTS IN INDIA: A COMPARATIVE PERSPECTIVE

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ABSTRACT:

Squeeze outs are both visible and palpable manifestations of a controlling shareholder's raw power within the corporate machinery – the ability to openly force minority shareholders to exit the company by accepting a certain price for their shares. Yet, squeeze outs can be value enhancing at times due to the benefits of enabling the controller to acquire the entire company. Perhaps due to this rather conflicted and dramatic background, squeeze out regulation takes on varying hues across multiple jurisdictions. In this article, we analyze the regulation of squeeze outs from a comparative perspective, with India as the primary frame of reference.

In India, the controllers can choose among several available transaction structures to implement a squeeze out. These include the compulsory acquisition mechanism, scheme of arrangement and reduction of capital. Unsurprisingly, the structure most commonly used by controllers is the reduction of capital, which provides the least protection to minority shareholders.

After analyzing the level of minority protection in a squeeze out in India, we explore potential reforms by examining how other jurisdictions such as the United States, European Union, the United Kingdom and Singapore regulate these transactions. The goal is to examine which approach (or combination of approaches) may present attractive options for India.

Drawing from these other jurisdictions, we suggest reforms for regulation of squeeze outs in India. Given the institutional landscape and ground realities in India, we conclude that it is perhaps more effective to reduce reliance on court decisions to protect minorities and rely on regulatory enforcement around greater decision-making powers to independent boards and to the minorities themselves.

Key-words: Squeeze-out, freeze-out, minority shareholders, comparative corporate law, India

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I. INTRODUCTION

There is a great deal of discussion surrounding controlling shareholders[1] ranging from the incredible vision and leadership they offer to their firms to the concerns raised for minority shareholders[2] when subjected to a controller who may be more interested in benefitting itself than the firm.[3] Corporate and securities laws across many countries reflect varied attempts to balance these competing visions of controllers. Nowhere is this seen more starkly than in the regulation surrounding "squeeze out" transactions.[4] Squeeze outs are situations where the controller undertakes a transaction by which it forcibly acquires the remaining shares in the company held by the minorities through one or more available methods.[5] Squeeze outs are both visible and palpable manifestations of a controller's raw power within the corporate machinery – the ability to openly force minorities to accept a certain price for their shares.[6] Yet, squeeze outs can be value enhancing at times due to the benefits of enabling the controller to acquire the entire company.[7] Perhaps due to this rather conflicted and dramatic background, squeeze out regulation takes on varying hues across multiple jurisdictions ranging from tight regulation, to heavy court oversight, to relying on approaches pursued by private parties. In this article, we analyze the regulation of squeeze outs from a comparative perspective, with India as the primary frame of reference.[8]

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[1] In this article, we use the expressions "controlling shareholder" and "controller" interchangeably.

[2] In this article, we use the expressions "minority shareholders" and "minorities" interchangeably.

[3] *See* Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785 (2003); Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV 1641 (2006).

[4] *See* Christian A Krebs, *Freeze-Out Transactions in Germany and the U.S.: A Comparative Analysis*, 13 GERMAN L J 941 (2012).

[5] Although the expression "squeeze out" is used for this type of transaction in the Commonwealth as well other countries around the world, the expression "freezeout" is more popular in the United States.

[6] *See* Vikramaditya Khanna, *The Growth of the Fiduciary Duty Class Actions for Freeze Out Mergers:* Weinberger v. UOP, Inc., in JONATHAN MACEY (ED.), ICONIC CASES IN CORPORATE LAW 193, 194 (2008) [hereinafter *Khanna, Weinberger v UOP, Inc.*].

[7] *See* Krebs, *supra* note 4, at 944 (noting that squeeze outs "can increase social welfare, and are therefore an important and legitimate component of the toolkit of corporate structural measures.")

[8] Much ink has been spilt in the economic, business and legal literature highlighting the importance of India's economy and its corporations in the global sphere, and we do not propose to add to that. Suffice it to say that the regulation of squeeze outs in India has wider implications beyond its shores, not least because a number of controllers who are attempting to squeeze out minorities in Indian companies are multinational companies (MNCs) from around the world who seek to obtain complete control over their Indian subsidiaries (whether listed or unlisted). *See* Reena Zachariah, *Delisting tough for MNCs as retail investors hold on to their shares*, THE ECONOMIC

In the Indian context the regulation of squeeze outs is of relatively recent vintage, but has become an area of increasingly intense interest and scrutiny. The number of squeeze outs in India has increased over the last decade or so with a great deal more press coverage and commentary of these events.[9] Indeed, given that most firms in India are controlled,[10] the prospect for more squeeze outs in the future is very high. In spite of this, and an increasing number of reform proposals, there has not been, to date, a sustained and detailed examination of the current law and potential reform proposals in the relatively unique Indian institutional and business context. This article aims to fill that gap and to provide a novel set of reforms for India to consider for regulating squeeze outs after taking into account the regulatory experience in other leading jurisdictions.

Part II begins by defining what a squeeze out is and discussing the concerns it raises for minorities as well as highlighting some of its potential benefits. This frames the discussion for how one regulates in this area in a manner that attempts to keep the desirable squeeze outs while reducing the undesirable ones. Part III then details India's current regulation of squeeze outs. Although there are at least three different routes to effectuate a squeeze out, we argue that none provides much protection to minorities. Part IV then explores the regulation of squeeze outs across a number of important jurisdictions including the United States (U.S.), the European Union, the United Kingdom (U.K.) and Singapore. There are some commonalities across these jurisdictions – in particular, the more favorable treatment given to squeeze outs

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TIMES (Apr. 5, 2011); Rajesh Mascarenhas, *Market rebound hits MNCs' delisting plans, many postpone buybacks*, THE ECONOMIC TIMES (May 23, 2014).

[9] *See, e.g.*, Somasekhar Sundaresan, *Minority Shareholders Can Be Thrown Out*, BUSINESS STANDARD (May 4, 2009); Sachin Mehta, *Minority Shareholders and the Threat of Squeeze Outs*, THE MINT (Sep. 1, 2008); Umakanth Varottil, *Squeezing Out Minority Shareholders: A Recent Judgment*, INDIACORPLAW BLOG (May 6, 2009), available at http://indiacorplaw.blogspot.sg/2009/05/squeezing-out-minority-shareholders.html; Priti Suri, *Easing Out Minority Shareholders: How Easy is it?*, AsiaLaw (July 2007), available at http://www.asialaw.com/Article/689739/Article.html; Nishchal Joshipura, *Majority Beware: Minority Rules!*, THE FIRM: CORPORATE LAW IN INDIA (Aug. 16, 2013), available at http://thefirm.moneycontrol.com/story_page.php?autono=936236.

[10] For a discussion on the concentration of shareholdings in Indian companies, *see*, Shaun J. Mathew, *Hostile Takeovers in India: New Prospects, Challenges, and Regulatory Opportunities*, 2007(3) COLUM. BUS. L. REV. 800; George S. Geis, *Can Independent Blockholding Play Much of a Role in Indian Corporate Governance?*, 3 CORP. GOVERNANCE L. REV. 283 (2007); Umakanth Varottil, *A Cautionary Tale of the Transplant Effect on Indian Corporate Governance*, 21(1) NAT. L. SCH. IND. REV. 1 (2009); N. Balasubramanian & R.V. Anand, *Ownership Trends in Corporate India 2001 – 2011: Evidence and Implications*, Indian Institute of Management, Bangalore, Working Paper No: 419, *available at* http://ssrn.com/abstract=2303684.

when they are accompanied by the approval of independent directors on the board and a favorable vote of disinterested shareholders (i.e., the minorities – sometimes called a "majority of the minority" (MoM) ratification). Part V then explores this as well as other reform proposals in India. We canvass a few approaches such as greater regulatory scrutiny, independent director oversight and MoM ratification and encourage greater discussion of these as India moves towards regulating squeeze outs and protecting minorities. Part VI concludes.

II. WHAT IS A "SQUEEZE OUT" AND WHAT CONCERNS DOES IT RAISE?

The term "squeeze out" refers to a transaction where the acquiring party is the controller of the firm to be acquired (i.e., the target firm).[11] For example, if the target firm is XYZ Ltd and it has a 55% controller (VU Ltd), then a squeeze out would arise if VU decided to acquire 100% control of XYZ. This often results in the non-VU shareholders of XYZ (i.e., the minorities) receiving cash for their 45% shares of XYZ. If all minorities were squeezed out, then in all likelihood XYZ would no longer be publicly traded and would "go private".

The precise *modus operandi* for a squeeze out may take on different forms. Here we discuss a few of the common forms.[12] *First*, the controller, VU, may simply acquire the shares of the non-VU shareholders by paying them cash (or sometimes other) consideration. This is a transaction between the controller and the minorities with no direct involvement by the company.[13] *Second*, the company XYZ may acquire and cancel the shares of the non-VU shareholders such that the capital of the company is reduced, thereby resulting in the controller VU becoming the sole shareholder holding the entire shares of XYZ. This transaction is essentially one between the company XYZ and the non-VU shareholders (minorities) wherein the controller VU has no direct role to play (except by exercising its voting power as a majority

[11] *See* WILLIAM T. ALLEN, REINIER KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 496 – 97 (4TH ED., 2012).

[12] Corporate and securities legislation in different jurisdictions permit (conditionally) or regulate one or more of these forms of squeeze outs.

[13] Such an acquisition of full control of the company may either follow as a sequel to a takeover offer by an acquirer who has recently acquired control or may be undertaken on a stand-alone basis by a long-standing controller.

shareholder of XYZ in approving such a transaction). *Third*, VU may decide to merge XYZ with itself. The merger will usually result in the non-VU shareholders receiving cash for their shares (although it is also possible that they may instead obtain shares in VU, so as to become minorities in that company, or another firm).[14] This is a tripartite transaction between the two companies, XYZ and VU, and the shareholders of XYZ. In all of these forms, VU starts with a majority shareholding in XYZ (here 55%) and ends with complete control (100%) over XYZ or its business.[15]

Whichever form they take, squeeze outs raise concerns for corporate law because the controller can determine the *timing* and *price* of the squeeze out, even against the wishes of the minorities, because in most jurisdictions approving a squeeze out only requires a majority vote in its favor – which a controller can usually manage.[16] This raises the prospect of opportunistic behavior by the controller against the minorities.

For example, a controller might decide to pursue a squeeze out knowing that the target is about to receive a very profitable opportunity – thereby denying the minorities the ability to share in these profits.[17] A controller might also propose a squeeze out right after a stock market decline in order to take advantage of the target's lower market price – even though the lower price may be transitory. There is some suggestion that the "going private" wave of the 1970s in the U.S. was an example of this.[18] Further, one can imagine controllers deliberately making

[14] Other kinds of consideration may be offered too, but quite often the consideration is cash. Such mergers have many synonyms in the literature including "cash out" merger, "squeeze out" merger, controlled merger and "going private" transaction. *See* ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 11, at 493 - 502. It is also possible to give shares in an unrelated company as consideration to the minorities for their shares held in the target XYZ.

[15] At this stage, it is worth noting that while the first two methods are quite prevalent in the Commonwealth, the third method is more prominent in the U.S.

[16] *See* Lucian Arye Bebchuk & Marcel Kahan, *The "Lemons Effect" in Corporate Freeze-outs*, NBER Working Paper 6938 (1999) 2, *available at* http://ssrn.com/abstract=226397; John C. Coates IV, *"Fair Value" as an Avoidable Rule of Corporate Law: Minority Discounts in Conflict Transactions*, 147 U. Pa. L. Rev 1251, 1274 (1999); Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 30 – 48 (2005). For a discussion of the historical background on freeze out mergers see ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 11, at 497 – 98; Subramanian, *supra* note 16, at 8 – 11.

[17] *See* ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 11, at 71 – 73 (discussing *Page* v. *Page* which presents a similar example of opportunistic behavior).

[18] *See* A.A. Sommer, Jr., Law Advisory Council Lecture, Notre Dame Law School (Nov. 1974) in [1974-75 Transfer Binder] Fed. Sec. L. Rep. (CCH) 80,010 at 84,695 (Nov. 20, 1974).

decisions that reduce the target's value in the short run (and hence driving down price) thereby reducing the price the controller would offer to the minorities in a squeeze out.[19]

If controllers could engage in such behavior with impunity, then we might expect minority investors to (i) be apprehensive about becoming minorities in controlled firms, (ii) require further safeguards (legal and/or business) before becoming minorities, or (iii) discount the price they pay for shares to account for the likelihood of being squeezed out opportunistically.[20] The fear of such behavior may make it more difficult to raise capital from dispersed minority investors (who are probably going to be passive) and thereby impede capital formation.[21]

If squeeze outs can generate such concerns then why not simply prohibit them? The problem is that squeeze outs may have beneficial effects and hence our approach needs to be more balanced. For example, sometimes a controller may only engage in a value-enhancing transaction if she does not have to share any of the gains with the minorities.[22] This will enable the controller to obtain the full benefits of synergy in taking over a target.[23] Consider a corporate decision that might benefit a firm by $100 million, but would cost the firm $75 million plus costing the controller $18 million in her own personal time and effort. This produces a net gain of $7 million and is worth pursuing. However, a controller owning 51% of the shares would obtain a *net loss* of $5.5 million by pursuing this transaction (i.e., 51% of the

[19] *See* Coates, *supra* note 16, at 1316; Subramanian, *supra* note 16, at 33 – 34.

[20] *See* A.C. Pritchard, *Tender Offers by Controlling Shareholders: The Specter of Coercion and Fair Price*, 1 Berkeley Bus. L.J. 83, 84 – 85 (2004).

[21] *See* Bebchuk & Kahan, *supra* note 16, at 5-6. The connection between investor protection and stock market development has generated much interest. For brevity we refer only to the articles often credited with bringing the issue to greater attention. *See* Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Legal Determinants of External Finance*, 52 J. FIN., 1131 – 50 (1997); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Law and Finance*, 106 J. POL. ECON., 1113 – 55 (1998).

[22] *See* Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 700 (1982); Benjamin Hermalin & Alan Schwartz, *Buyouts in Large Companies*, 25 J. LEGAL STUD. 351, 358 (1996).

[23] Eliminating minorities introduces flexibility to the controller, the target and other companies within the group to undertake financial restructuring and corporate reorganization among themselves without any impediments. *See*, Wan Wai Yee, *Effecting Compulsory Acquisition via the Amalgamation Procedure in Singapore*, [2007] SING. J. LEGAL STUD. 323, 327. A squeeze out also enables the use of the target's assets for leveraged financing for the takeover in the absence of outside shareholders. WAN WAI YEE & UMAKANTH VAROTTIL, MERGERS AND ACQUISITIONS IN SINGAPORE: LAW & PRACTICE 619 (2013).

$25 million net gain to the firm (or about $12.5 million) less $18 million personal cost for a net loss of $5.5 million). If, however, the controller were to squeeze out the minorities (and thereby get the whole $25 million for herself) then she would undertake the transaction because she would make a $7 million *profit* ($25 million less $18 million personal cost).[24]

Another potential benefit of a squeeze out is that the firm may carry a lesser regulatory burden when it sheds its minority shareholders. For example, publicly traded firms in India are subject to the regulations of India's securities regulator, the Securities and Exchange Board of India (SEBI). If the firm considers these regulations to be too costly then it may benefit by no longer being publicly traded.[25]

Thus, it is quite plausible that squeeze outs could sometimes be desirable and sometimes undesirable. This would lead one to regulate squeeze outs in a manner where we reduce the instances of undesirable squeeze outs while still keeping most of the desirable ones.[26] The question then arises whether the current state of regulation in India obtains this outcome.

III. CURRENT REGULATION OF SQUEEZE OUTS IN INDIA

In this Part, we examine the prevailing law in India regarding squeeze outs and consider the extent to which it protects the interests of minorities while accounting for the possible

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[24] It is conceivable that the firm could make a side payment to the controller to make the transaction worthwhile for her even without a squeeze out, but that is not as easy as it sounds and often the squeeze out may be the preferable course of action.

[25] For some discussion of the costs of the Sarbanes-Oxley (SOX) Act to the US equity markets see THE COMPETITIVE POSITION OF THE US PUBLIC EQUITY MARKETS, REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION, *available at* http://www.capmktsreg.org/research.html.

[26] See Bebchuk & Kahan, *supra* note 16; Coates, *supra* note 16; Gilson & Gordon, *supra* note 3; Pritchard, *supra* note 20; Subramaniam, *supra* note 16; Khanna, *supra* note 6. On the empirical side, *see*, Marianne Bertrand, Paras Mehta and Sendhil Mullainathan, *Ferreting out Tunneling: An Application to Indian Business Groups*, 117 Q. J. ECON. 121 – 148 (2002); Jordan I. Siegel and Prithwiraj Choudhury. *A Reexamination of Tunneling and Business Groups: New Data and New Methods*." 25 REV. FIN. STUD., 1763–1798 (2012); Vladimir Atanasov, Bernard Black, Conrad Ciccotello and Stanley Gyoshev, *How does law affect finance? An examination of equity tunneling in Bulgaria*, 96 J. FIN. ECON., 155- 173 (2010).

benefits of squeeze outs. Controllers can accomplish squeeze outs using different methods, and the nature of regulation varies according to the method adopted.

The various methods of squeeze outs are based on statutory provisions enshrined in India's companies' legislation. As of this writing, India's Parliament has enacted a new Companies Act, 2013 [hereinafter the *2013 Act*], which has become partially effective. The entire legislation is expected to become effective progressively once the Government of India notifies the relevant rules under the legislation. Until then, the previous legislation, the Companies Act, 1956 [hereinafter the *1956 Act*] will continue to be in force on such matters. Given the transitional stage of companies' legislation in India, our discussion in this Part encapsulates both the 2013 Act (which is set to operate going forward) and the 1956 Act (under which the judicial developments and market practice have evolved thus far).[27]

A. Delisting

We begin with a discussion on delisting, which is usually a prequel to a squeeze out. Delisting is advantageous for the controllers because the company is first brought outside the purview of the securities laws applicable to listed companies (which are administered by SEBI) that enables it to implement the squeeze out through a less onerous legal regime than when the company is listed.[28]

The SEBI (Delisting of Equity Shares) Regulations, 2009 (the "Delisting Regulations") enable a company to delist its equity shares on the stock exchange so long as the public (or non-controlling) shareholders[29] are given an exit opportunity. Apart from the target board's

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[27] References in this article to the "Companies Act" or the "Act" are intended to refer to both the 1956 Act and the 2013 Act.

[28] Although the usual sequence is a delisting followed by a squeeze out, that need not always be the case. Often, controllers also decide to launch a squeeze out when the company is listed, whereby delisting of the company's securities becomes a natural consequence of the squeeze out. In such a scenario, SEBI would have complete oversight over the squeeze out process.

[29] "Public shareholders" are holders of equity shares, other than controllers or holders of depository receipts issued overseas against equity shares held with a custodian and such custodian. Delisting Regulations, §2(1)(v). Controllers are more popularly referred to in India as "promoters". The expression carries legal significance, as

approval, the delisting proposal must be approved by a 75% majority of the votes cast by shareholders through postal ballot after disclosure of material facts. In addition, the delisting proposal must obtain at least a 2/3rds majority of the public shareholders.[30]

The delisting process is undertaken through an offer made by the controller to acquire the shares of the minorities.[31] In order to ensure that the exit price is fair to the public shareholders, the Delisting Regulations prescribe an elaborate price discovery process through the method known as "reverse book building".[32] Under this method, the company must fix a floor price, which is the minimum price at which the delisting occurs.[33] The public shareholders are then able to place their bids on the online electronic system at or above the floor price.[34] The final offer price shall be determined as the price at which the maximum number of equity shares is tendered by the public shareholders.[35] However, the controller has the ability to either accept or reject the offer. If the offer is accepted, then the controller has to acquire the tendered shares at the final offer price.[36]

The delisting process arguably confers undue advantage to the target and its controller. They can determine the time of delisting, benefit from the information asymmetry that operates in their favor, and exercise complete control over the delisting process.[37] However, these factors are arguably adequately counterbalanced in the Delisting Regulations, which

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promoters have additional disclosure and other obligations such as lock-in of shares when an Indian company engages in a public offering of shares.

[30] Delisting Regulations, §8(b). This would ensure that the controllers are not in a position to steamroll the minorities, whose substantial support will be required for the delisting.

[31] Delisting Regulations, §§ 10, 12.

[32] Siddhartha Sankar Saha, *Reverse Book Building: A Price Discovery Mechanism of De-listing of Securities in India*, THE CHARTERED ACCOUNTANT 684 (Nov. 2005), *available at* http://www.icai.org/resource_file/10347684-693.pdf.

[33] The floor price is determined based on the historic trading value of the company's stock over a specified period based on a prescribed formula, or the highest price paid by the controllers for acquisition of the company's shares during such period, and other parameters such as return on net worth, book value of the shares, earnings per share, and price to earning multiples compared with the industry average. Delisting Regulations, §15.

[34] Delisting Regulations, §15, Schedule II. The reverse bookbuilding process is conducted through an electronically linked transparent facility on the stock exchange.

[35] Delisting Regulations, Schedule II.

[36] *Id.* Alternatively, if the controller does not find the final price acceptable, it may reject the offer thereby resulting in a failure of the delisting.

[37] Some of these factors are even more acute in a squeeze out. *See*, *supra* Part II.

confer significant power on the public shareholders. Not only is the approval of the public shareholders separately required by way of a 2/3rds majority, furthermore the price is determined entirely by the public shareholders through the reverse book building process. It is therefore not surprising that the delisting mechanism is considered too onerous for controllers, due to which it has either not been invoked frequently, or has not resulted in a successful delisting as the controllers usually find the discovered price to be excessive.[38] Controllers have instead opted for other mechanisms to implement a squeeze out directly without going through the delisting process first.

B. Methods of Squeeze Out in India

The three primary methods of achieving a squeeze out are: (i) offers to the minorities resulting in a compulsory acquisition of shares, (ii) a scheme of arrangement, and (iii) a scheme of reduction of capital.

1. Compulsory Acquisition

Only a single statutory provision expressly contemplates a compulsory acquisition of shares held by minorities.[39] This is intended to enable an acquirer to dislodge minorities following a takeover offer made on the company. Accordingly, where an acquirer makes an offer to acquire shares of a company, which has been accepted within four months by at least 90% of the shareholders to whom such offer was made, the acquirer is entitled to serve notice upon the remaining shareholders (who have not so accepted the offer) to compulsorily acquire

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[38] *See*, Shaji Vikraman, *Reverse Book-building for Delisting Price*, THE ECONOMIC TIMES (Aug. 22, 2007); Ashish Rukhaiyar & Ashley Coutinho, *Small Companies Hop on to Delisting Bandwagon*, THE INDIAN EXPRESS (Jun. 8, 2013). Taking these criticisms into account, SEBI has initiated a public consultation process towards an overhaul of the regulatory regime governing delisting in India. Securities and Exchange Board of India, *Discussion Paper on 'Review of Delisting Regulations', available at* http://www.sebi.gov.in/cms/sebi_data/attachdocs/1399633833837.pdf.

[39] Companies Act, 2013, §235; Companies Act, 1956, §395. In this article, while the expression "squeeze out" refers generally to include all types of transactions whereby the minority's shares are forcibly acquired by the target or the controller, the expression "compulsory acquisition" refers to the specific types of transactions contemplated by these specific sections of the Companies Act. This distinction, however, is made solely for convenience and does not denote any technical terminology or an indication of the market practice.

their shares.[40] The compulsory acquisition must be on the same terms as the initial offer (whether in cash or shares).[41] There is no need for prior court approval, but dissenting shareholders can approach the court (whose jurisdiction is likely to be taken over by the National Company Law Tribunal (NCLT))[42] to seek appropriate remedies *ex post*.[43]

Although one might expect the compulsory acquisition mechanism to be popular (given that it expressly, and with little court involvement, allows for a squeeze out), it has scarcely been used in practice. The principal reason for this is the requirement that the acquirer must receive acceptances from shareholders holding 90% of the shares to whom the offer has been made.[44] This can be difficult to achieve, as we can see from an illustration. In case the acquirer, such as a controller, holds 70% shares in the company and wishes to squeeze out the remaining shareholders, it must first make an offer to the minorities holding 30% of the shares. In order for the acquirer to be eligible to effectuate a squeeze out, the offer must be accepted by shareholders holding at least 27% shares in the company (i.e. 90% of 30% shares).[45]

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[40] The acquirer has two months following the four-month acceptance period within which it can serve the notice of compulsory acquisition on the dissenting shareholders. Companies Act, 1956, §395(1); Companies Act, 2013, §235(1).

[41] Companies Act, 1956, §395(2); Companies Act, 2013, §235(2).

[42] Under the 1956 Act, the jurisdiction to hear objections to compulsory acquisitions under the Companies Act, 2013, § 235 is with the High Court that exercises jurisdiction over the state in which the company is incorporated. Companies Act, 1956, §10. The role of the High Court in such cases is to be taken over by the NCLT under the 2013 Act. The NCLT will also take over the role of the High Court on other matters relating to review and sanction schemes of arrangements under the Companies Act, § 230, approving a reduction of capital under the Companies Act, 2013, § 66, as well as the role of the Company Law Board on various matters. Although the constitutional validity of the establishment of the NCLT was previously upheld by the Supreme Court of India, subject to certain conditions and modifications in *Union of India v. R. Gandhi*, [2010] 100 SCL 142 (SC), its potential establishment under the 2013 Act has been challenged again more recently before the courts, which makes it likely that there would be further delays before the NCLT can see the light of day. *See* Indu Bhan, *What's the role of tribunals?*, THE FINANCIAL EXPRESS (Jan. 22, 2014). For the purposes of this article, references to the court or High Court will include references to the NCLT, once it is established and becomes operational.

[43] Dissenting shareholders must approach the court (or the NCLT, as the case may be) within one month of receipt of the notice for compulsory acquisition. Companies Act, 1956, §395(1), (3); Companies Act, 2013, §235(2). In considering such applications, courts or the NCLT may either refuse to interfere, in which case the compulsory acquisition may proceed, or they may restrain the compulsory acquisition. Based on the practice hitherto followed by the courts, it is not likely that the courts or the NCLT will alter the terms and conditions of the offer.

[44] Companies Act, 1956, §395(1); Companies Act, §235(1).

[45] Moreover, the compulsory acquisition mechanism is available only if the requisite percentage of shareholders positively assents to the offer (and not if they merely remain silent). For example, shareholders, usually individuals, may be untraceable for a number of reasons, including due to death, disability, change of address, and the like. *See* MARK A. WEINBERG, M.V. BLANK AND LAURENCE RABINOWITZ, WEINBERG & BLANK ON TAKEOVERS AND MERGERS 2050 (2008).

Indeed, given the onerous nature of the provisions relating to compulsory acquisitions, acquirers have attempted alternate deal structures to get around its strictures (e.g., shares held by related parties are not expressly counted as the controllers' under the provision and acquirers have tried to count these shares in the 90% acceptances), but the Indian courts have stepped in to fill the gap and deter such structures. [46] In light of this, it is unlikely that the compulsory acquisition mechanism will be resorted to except in straightforward cases where the controller is able to muster the requisite acceptances.

2. Scheme of Arrangement

The Companies Act contains detailed provisions that permit a company to enter into compromises and arrangements with its shareholders or creditors.[47] In the context of squeeze outs, a company may propose a scheme that permits either a controller or the company itself to purchase shares held by the minorities thereby effecting a squeeze out. The process begins with the company applying to the High Court to convene meetings of the various shareholder classes.[48] The scheme must be approved by a majority in number representing 75% in value of each class of shareholders present and voting, in separate meetings for each class.[49] Once

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[46] *See supra* note 44, and accompanying text. Alternate structures have included offers made by acquirers to acquire shares held by related parties together with those held by minorities. For instance, an offer was made by an acquirer to acquire shares held by its parent in the target (to the extent of 90%) and the minority shareholder (who held 10%). *See AIG (Mauritius) LLC v. Tata Televenture (Holdings) Ltd.*, 103 (2003) DLT 250 (Delhi) [hereinafter *AIG (Mauritius)*]. If a parent holding 90% shares in a target had itself attempted a squeeze out of the minority shareholder holding 10% shares, it would have failed as it required at least a 9% acceptance (i.e. 90% of the 10% shares held by the minority shareholder). In *AIG Mauritius*, the Delhi High Court observed:

> … it is extremely important that the 90 per cent majority should comprise of different and distinct persons since this would then fall in line with the rationale of the section and justify overriding the rights and interests of the dissentients. It is also imperative that this majority should not be the same as the party seeking to acquire the shares. The offeror must be substantially different to the majority.

Id., at ¶15. In arriving at this conclusion, the court extensively relied on the English case of *In re Bugle Press* [1960] 3 All ER 791 where the court did not permit the parties to use a similar structure in squeezing out minorities under section 209 of the English Companies Act, 1948 (which is similar in concept to the compulsory acquisition provision under the Companies Act). *See also*, Sachin Mehta, *Minority shareholders and the threat of squeeze-outs*, THE MINT (Sep. 1, 2008).

[47] Companies Act, 1956, § 391; Companies Act, 2013, §230.

[48] For a more detailed discussion regarding classification of shareholders and its relevance, *see infra* notes 62-63, and accompanying text.

[49] This represents a dual majority requirement. The scheme must be approved by a majority of shareholders in number from among those who are present and voting. At the same time, those voting in favor of the scheme must also hold at least 75% in value of the aggregate shares (held by those who are present and voting).

approval is obtained, the company must again approach the High Court for sanction of the scheme. The High Court will hold hearings in which interested parties may represent themselves[50] and, if satisfied, issue an order sanctioning the scheme.[51]

Although a scheme of arrangement also requires a high voting threshold (more than 50% in number of shareholders and 75% in value of shares held, hereinafter referred to as the *scheme majority*), it is less onerous than the 90% required for a compulsory acquisition and many controllers may be well placed to meet the scheme majority threshold. Further, the scheme majority requirement is not specifically applicable to minorities (unless they have a different class of shares) and in that sense is not as protective as the 90% requirement. Moreover, if a scheme of arrangement involves the company (as opposed to the controllers) acquiring shares from the minorities, the funds available with the company are utilized towards the squeeze out without any direct impact on the controller's finances. This permits the controllers to enjoy the full benefits of the squeeze out without incurring a direct financial cost (other than the diminution in the value of their shareholding in the company as a result of the payout to the minorities). In light of this, we have witnessed controllers being willing to use a scheme of arrangement as a method of squeeze out.

3. Reduction of Capital

The Companies Act provides for the reduction of share capital of a company.[52] Such a reduction involves a repurchase of some (not all) shares by the company and a consequent cancellation of those shares. A reduction of capital may be effected on several grounds,[53] which

[50] The 2013 Act imposes a significant impediment to the remedies of minorities as any objections to a scheme of arrangement can be made only by shareholders holding not less than 10% of the shareholding, which is arguably too onerous on the minorities. Companies Act, 2013, § 230(4) proviso.

[51] Companies Act, 1956, §391(2); Companies Act, 2013, §230(5), (6).

[52] Companies Act, 1956, §§100 to 105; Companies Act, 2013, §66.

[53] Companies Act, 1956, §100(1); Companies Act, 2013, §66(1). This includes extinguishing or reducing the liability in respect of shares, cancelling any paid-up share capital, which is lost or unrepresented by available assets, or where capital is in excess of the wants of the company.

are only illustrative in nature, and companies do possess sufficient flexibility to reduce share capital for other reasons.[54]

In order to initiate a reduction of capital, the company must first propose the reduction to be approved at a meeting of shareholders. Such approval of shareholders must be by way of a special resolution at a general meeting, which requires a majority of 75% of the votes cast at the meeting. Thereafter, the company is required to make an application to the relevant High Court for its approval. If the High Court is satisfied after hearing the relevant parties, it will accord its sanction to the reduction of capital. The reduction will take effect once the court's order is filed with the Registrar of Companies.[55]

A reduction of capital is an attractive method of accomplishing a squeeze out. *First*, the required majority for shareholders' approval is the least onerous, as it merely requires a majority of 75% of the votes polled by the shareholders (not 75% of the votes polled by each class of shareholders like a scheme of arrangement or the consent of 90% of the minorities as in a compulsory acquisition). Hence, a significant controller will be in a position to singlehandedly obtain sufficient support in favor of a squeeze out without the requirement of any support or concurrence whatsoever from the minorities. *Second*, the funds of the company are utilized to pay shareholders whose shares are being compulsorily acquired (as is the case in some types of schemes of arrangement). The controllers do not suffer any direct financial cost although they benefit by obtaining full ownership rights of the company. In view of the lower standards imposed on reduction of capital as a method of squeeze out, it is being increasingly employed

[54] *See infra* notes 77-78, and accompanying text. Using a reduction of capital for a squeeze out raises the question of whether courts should allow this given that there is a specific provision for squeeze out in the form of the compulsory acquisition mechanism. However, courts have overwhelmingly held that selective reduction of capital is permissible under the relevant provisions of the Act, thereby blessing its use as a method of squeeze out. *See In re Reckitt Benckiser (India) Ltd*, 122 (2005) DLT 612 (Del), at ¶26 [hereinafter *Reckitt Benckiser*]; *In re Panruti Industrial Company (Private) Limited*, AIR 1960 Mad 537 [hereinafter *Panruti*].

[55] Courts have held that, in a reduction of capital, controllers are not required to provide minorities with the option to decide whether to exit or remain in the company. [Cites]. Moreover, if a controller does provide such a choice, it is not required to have an affirmative minority vote in favor – even their silence may be counted as consent. The courts have adopted a similar approach for schemes of arrangement.

by controllers such that an overwhelming number of the reported squeeze outs in the last decade in India have followed this method.[56]

C. Safeguarding the Interests of Minorities

In each of the squeeze out methods, the law seeks to balance the interests of the controllers and the minorities. Courts in India tend to allow squeeze outs when they are satisfied on two counts: (i) fairness in process; and (ii) fairness in price.[57] We now analyze various features of each of the squeeze out methods against the parameters of process as well as price and seek to establish that they do not adequately safeguard the interests of minorities.

1. Minority Shareholder Voting

Until recently, there was no general statutory or case law requirement in India that disqualified a shareholder (such as a controller) from voting even if that shareholder was interested in the transaction. Although recent reforms have emboldened minority protection in case of related party transactions by disentitling interested shareholders from voting,[58] these

[56] The three methods discussed above are not the only ones that can be used for squeeze outs. Parties have tried at least two other methods – (i) scheme of amalgamation and (ii) amendment of the articles of association. In a scheme of amalgamation, the target can be merged with the controller (if that is an Indian company) and the minority receives cash. Such an approach is inefficient because it not only requires the same process to be followed as a scheme of arrangement (discussed earlier), (*see supra* notes 47-51, and accompanying text) but it also attracts tax liability. *See* Income Tax Act, 1961, §2(1B). The other approach involves an amendment to the articles of association (by way of a special resolution requiring the approval of 75% majority of votes cast at a shareholders' meeting) permitting the controller to compulsorily acquire the shares of the minority. This is subject to a number of limitations. *See Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 656 (noting that the power to amend the articles "must be exercised not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole"); *Greenhalgh v. Arderne Cinemas* [1951] Ch. 286). This has rarely been used in India (the authors are not aware of any instance where this has been used in a squeeze out in India, at least in the case of public listed companies).

[57] It is not as if the courts have expressly laid down these tests for squeeze outs, but their application can be deduced from decisions of the courts.

[58] *See* Companies Act, 2013, §188(1). The 2013 Act lists out a set of related party transactions between the company and related parties (such as directors or controllers), which can be entered into only with the approval of the shareholders through a special resolution wherein the related party is not entitled to exercise its vote. *See* Companies Act, 2013, §188(1), second proviso. For listed companies, the corporate governance norms set out in clause 49 of the standard form listing agreement (that listed companies enter into with stock exchanges) have been modified with effect from October 1, 2014 so as to make those norms consistent with the provisions of the Companies Act on various aspects of corporate governance and, more particularly, related party transactions.

reforms do not apply, at present, to the squeeze out structures customary in India.[59] This is because the 2013 Act reforms apply to transactions between the company and a related party, not a scheme of arrangement or reduction of capital where the company simply acquires or reduces the shares held by the minorities. Similarly, SEBI's recent reforms relate to specific transactions with controllers, and do not cover the classic squeeze out methods in Indian companies where the controller is not a party (but rather the resultant beneficiary). In any event, SEBI's regime governs only listed companies, and not those that undertake squeeze outs post-delisting.[60]

In light of this, minority voting support is statutorily required in only one type of squeeze out – the compulsory acquisition. This is because the Companies Act[61] requires, in effect, that 90% of the shareholders to whom an offer is made (i.e., 90% of the minorities) must accept. To that extent, it truly represents voting by a "majority of the minority". Of course, this means that some truly value enhancing squeeze outs may not go forward, but virtually no value reducing transactions are likely to go forward as well.

The scheme of arrangement does not, on its face, provide this kind of protection. However, it could, if courts were creative, grant some protection to minorities via the requirement of separate shareholder class voting.[62] Courts normally consider shareholders to belong to different classes if their interests are so dissimilar that they cannot be expected to decide in a common meeting or if they are being provided differential treatment under the

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Securities and Exchange Board of India, *Corporate Governance in listed entities - Amendments to Clauses 35B and 49 of the Equity Listing Agreement*, CIR/CFD/POLICY CELL/2/2014 (Apr. 17, 2014), *available at* http://www.sebi.gov.in/cms/sebi_data/attachdocs/1397734478112.pdf. One could quibble about some continuing differences in the regimes under the Companies Act and SEBI's corporate governance norms, but that is not intrinsic to our core arguments in this paper.

[59] For a discussion of the unavailability of these protective measures to customary squeeze out transactions, see *infra* note 60, and accompanying text.

[60] *See* Securities and Exchange Board of India, *Scheme of Arrangement Under the Companies Act, 1956 – Revised requirements for the Stock Exchanges and Listed Companies – Clarification*, Circular CIR/CFD/DIL/8/2013 (May 21, 2013).

[61] *See* Companies Act, 1956, §395(1); Companies Act, 2013, §235(1).

[62] *See* Companies Act, 1956, §391(1); Companies Act, 2013, §230(1), (6).

scheme.[63] Minorities arguably ought to be treated as a separate class in a scheme of arrangement as the scheme metes out a different treatment to them compared to controllers. Although a potential method of protection, no court has yet ruled on whether such separate class voting for minorities and controllers is necessary in a scheme of arrangement.[64]

Minorities are most vulnerable in a reduction of capital.[65] The Companies Act does not expressly envisage class meetings of shareholders and no shareholder is disqualified from voting. Minorities have often challenged squeeze outs through reduction of capital on the ground that this process is unfair to minorities who have been steamrolled by the voting strength of the controllers. They have argued that since the reduction of capital is not uniform due to the separate treatment conferred on controllers and minorities respectively, they ought to be treated as separate classes. The overwhelming judicial approach, subject to a few rare exceptions,[66] has been to reject this argument and treat all equity shareholders as part of the same class.[67] In view of this, the passage of a resolution for reduction of capital is a *fait accompli* when the controller holds at least 75% voting power, which is often the case when they initiate a squeeze out.[68]

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[63] *See Miheer H. Mafatlal v. Mafatlal Industries Limited*, [1996] 87 Comp. Cas. 792 (SC) [hereinafter *Miheer Mafatlal*]; *In re Maneckchowk and Ahmedabad Mfg. Co. Ltd.*, [1970] 40 Comp. Cas. 819, noting:

> Speaking very generally, in order to constitute a class, members belonging to the class must form a homogenous group with commonality of interest. If people with heterogeneous interest are combined in a class, naturally the majority having common interest may ride rough shod over the minority representing a distinct interest.
>
> *Id.*, at ¶41.

[64] It might be that companies have generally refrained from approaching the courts with schemes of arrangement involving cancellation of minorities' shares where both the controllers and minorities are treated as part of the same class for voting purposes.

[65] For this reason, this method has been extensively employed by controllers to squeeze out the minority.

[66] *See Sandvik Asia Ltd.*, [2004] 121 Comp. Cas. 58 (Bom) [hereinafter *Sandvik Asia*].

[67] The ruling in *Sandvik Asia Ltd.*, *supra* note 66 was overturned by an appellate bench of the Bombay High Court in *Sandvik Asia Ltd. v. Bharat Kumar Padamsi*, 111(4) Bom L.R. 1421 [hereinafter *Sandvik Asia Appeal*]. The Supreme Court refused to grant leave to appeal against this ruling. *See also*, *Wartsila India Limited v. Janak Mathuradas*, [2010] 104 SCL 616 (Bom), at ¶21 [hereinafter *Wartsila India*]; *Reckitt Benckiser*, *supra* note 54, at ¶29 (although on the facts of that specific case separate meetings of the controllers and minorities were in fact held); *In re Elpro International Limited*, [2009] 149 Comp. Cas. 646 (Bom) [hereinafter *Elpro*].

[68] Even in cases where controllers hold less than 75% voting shares, they may nevertheless possess *de facto* control when a substantial part of the minorities are unlikely to exercise their vote.

In sum, while significant steps have been taken more recently in Indian corporate law and securities regulation to introduce the concept of disinterested shareholder vote, those steps are of no avail to minorities due to the limited availability of these protective mechanisms in the context of the typical squeeze out in India.

2. Oversight by Courts

There is some residual judicial oversight of squeeze outs that varies with the method used to conduct the squeeze out.[69] Although under a compulsory acquisition no court approval is necessary to effectuate a transaction, a dissenting minority may still approach the court *ex post* to restrain such a squeeze out. The court's jurisdiction is fairly circumscribed and it can either dismiss the application or allow it and prevent the squeeze out.[70] A court exercises such a power only if the proposal is found to be highly destructive or damaging to the interests of the *company*[71] or is designed in a manner that *unfairly benefits the controllers*.[72] Courts are generally not inclined to modify the terms of the offer or even determine the fair value of the shares so as to compel the controller to acquire the minority shares at a fair price.[73]

On the other hand, the role of the courts in a scheme of arrangement and reduction of capital are more extensive. *First*, the court's approval is a prerequisite to the implementation of the squeeze out. In other words, the court performs its role *ex ante*. *Second*, there is a fairly evolved jurisprudence on the role of Indian courts in approving schemes of arrangement and reductions of capital. The court's jurisdiction is more extensive under a scheme of arrangement than under a reduction of capital.

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[69] *See supra* note 57 and accompanying text, observing that in such cases courts would generally look at the fairness of the process and price.

[70] *See Leela Mahajan v. T. Stanes & Co. Ltd.*, AIR 1957 Mad 225, at ¶5 [hereinafter *Leela Mahajan*].

[71] *See Bugle Press*, *supra* note 46.

[72] *See AIG (Mauritius)*, *supra* note 46.

[73] *See Leela Mahajan*, *supra* note 70, at ¶5. *See also*, *S. Viswanathan v. East India Distilleries and Sugar Factories Ltd.*, AIR 1957 Mad 341, at ¶24. Having said that, there is limited jurisprudence on the role of the court in a compulsory acquisition in view of the limited usage of the mechanism for effecting a squeeze out.

In a scheme of arrangement, a court has the power to examine incidental and ancillary questions, and to be satisfied that the scheme is *bona fide* and in the interests of shareholders. However, courts generally act on the presumption that the scheme is in the interests of the shareholders, and it is for the party challenging the scheme to affirmatively show that the scheme is unfair.[74] In *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*,[75] the Supreme Court observed that while the court cannot act as a rubber stamp and automatically approve a scheme, it cannot exercise appellate jurisdiction and minutely scrutinize the scheme.[76]

In a reduction of capital, the court's role is still more limited. The general rule is that a reduction is considered a domestic matter for the company, and the court will exercise its discretion only to examine whether the reduction is fair and equitable.[77] In doing so, it will not be concerned with the motive of the controllers.[78]

That leads us to the question of whether these powers of oversight are sufficient to safeguard the interests of minorities in a squeeze out. As we have seen, courts exercise their powers cautiously. They tend to rely on statutory interpretation and construction of the law and are hesitant to follow a principles-based approach. This is at variance with the practice followed in other jurisdictions, such as Delaware, where courts perform a more prominent role in the development of law and in defining the rights and obligations of various corporate actors.

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[74] *See In re Sidhpur Mills Co. Ltd.*, AIR 1962 Guj 305. The onus on the challenger is quite significant because, in order to merit a rejection, the "scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence". *In re Sussex Brick Co. Ltd.*, [19611 1 Ch. 289, at 292.

[75] *Supra* note 63.

[76] The Supreme Court added:

> It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a court of appeal and sit in judgment over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate.

Id., at ¶28.

[77] *See British and American Trustee*, (1894) AC 399; *In re Indian National Press (Indore) Ltd.*, [1989] 66 Comp. Cas. 387 (MP), at ¶21 (recognizing that while the "company has the right to determine the extent, the mode and incidence of the reduction of its capital", the court must "see that the interests of the minority … are adequately protected and there is no unfairness to it, even though it is a domestic matter of the company").

[78] *See Panruti*, *supra* note 54; *Reckitt Benckiser*, *supra 54*, at ¶20; *Elpro*, *supra* note 67, at ¶14.

Given the absence of a wider judicial role, one doubts the extent to which the judiciary can play a role in safeguarding minority interests.

3. *Valuation and Pricing*

In considering whether a squeeze out transaction is fair to the minorities, the price at which they are being squeezed out assumes great importance. The manner of price determination depends on the nature of the process followed.

The compulsory acquisition mechanism provides for equality of treatment in that the minorities are to be squeezed out on the same terms and conditions as the offer made to shareholders whose acceptances led to the squeeze out. In such an arrangement, there is no risk that minority dissenting shareholders will be penalized for staying outside the initial offer. They cannot therefore be coerced into accepting the controller's offer.[79]

On the other hand, different factors operate when a squeeze out is initiated through a scheme of arrangement or a reduction of capital. In both these cases, courts have adopted broadly similar principles. Although the pricing of squeeze outs is often challenged, courts tend to defer to the expert valuation reports of accounting firms or investment bankers. Hence, it is customary for any squeeze out either through a scheme of arrangement or reduction of capital to be accompanied by at least one - if not more - valuation reports that justify the price being offered for the squeeze out. Courts are comfortable with valuation reports that consider a combination of relevant methodologies and assign requisite weights for each in arriving at the fair valuation of shares.[80] Moreover, courts refrain from interfering with valuation where a sufficient majority of shareholders have approved the squeeze out.[81]

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[79] In other words, the risks that exist in a typical two-tier offer do not apply here. For coercion that typically arises in a two-tier offers, *see* Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 797 (2006); Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 252-253 (1989).

[80] For example, in *Miheer Mafatlal*, *supra* note 63, the Supreme Court referred to Pennington's 'Principles of Company Law' to indicate that methods such as the earnings per share method, the net worth or breakup value

The limited scope of review emanates from the Supreme Court's decision in *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.*,[82] where the court stressed that "[a] company court does not exercise an appellate jurisdiction. It exercises a jurisdiction founded on fairness. It is not required to interfere only because the figure arrived at by the valuer was not as better as it would have been if another method would have been adopted."[83] This standard has been widely followed by courts in India while approving squeeze outs through either a scheme of arrangement or reduction of capital.[84] Therefore, in the absence of a patent error or illegality in the valuation exercise, minorities are unlikely to be successful in challenging the price at which the squeeze out is being implemented. Given the subjectivity of the valuation process, which is based on the information provided by the company (i.e., the controller), minorities can obtain little comfort that they are getting a fair price and that their interests have been protected.

The limited scrutiny by courts results in another phenomenon. For example, in the context of a delisting followed by a squeeze out, this is likely to result in wide disparity between the price at which a controller first delists the company and the squeeze out price. While minorities have a voice in determining the price for a delisting, it is substantially weakened in the case of a squeeze out. In a delisting offer, the controller is to discover the price through the "reverse book building" process under the Delisting Regulations.[85] As the process is transparent, the minorities are able to monitor prices at which other shareholders are making their bids before determining the price at which they make their own bid. In other words, they

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method and the market value method would be generally acceptable. In addition, the discounted cash flow method and the comparable companies method have also been accepted. *See Wartsila India*, *supra* note 67, at ¶26.

[81] *See Reckitt Benckiser*, *supra* note 54, at ¶¶34-36; *Elpro*, *supra* note 67, at ¶17.

[82] AIR 1995 SC 470 [hereinafter *Hindustan Lever*].

[83] *Id.*, at ¶3.

[84] *See e.g.*, *Organon*, [2010] 101 SCL 270 (Bom), at ¶43 (noting that "[m]erely because some other method of valuation could be resorted to, which would possibly be more favourable, that alone cannot militate against granting approval to the scheme propounded by the company. The court's obligation is to be satisfied that the valuation was in accordance of the law and it was carried out by an independent body."); *Wartsila India*, *supra* note 67, at ¶26 (observing that "the role of the court whilst approving such schemes is limited to the extent of ensuring that the scheme is not unconscionable or illegal or unfair or unjust. Merely because the determination of the share exchange ratio or the valuation is done by a different method which might result in a different conclusion, it alone would not justify interference.").

[85] For a discussion of the reverse book building process, *see*, *supra* notes 32 to 36, and accompanying text.

can not only exercise their choice in an educated manner, but also it is they who discover the price for delisting.

Contrast the reverse book building process in a delisting with the valuation-based process adopted in a squeeze out through a scheme of arrangement or reduction of capital. Shareholders do not have any choice *a priori*. The controllers determine the pricing, albeit with the support of expert valuation reports. Minorities only possess reactive powers to challenge the valuation, with the onus lying upon them to demonstrate errors in the valuation process followed if they find it to be unfair to their interests. The lack of opportunity for minorities to participate in the price discovery mechanism raises the risk that such shareholders may be coerced into selling their shares in a delisting offer rather than holding on to them following the delisting. This is also because courts have refused to consider the price at which the company was delisted while dealing with a subsequent squeeze out, even if the squeeze out price is far lower than the delisting price.[86]

In all, there is no objective mechanism for arriving at a fair price in a squeeze out that protects the interests of the minorities. Courts have carved out for themselves only a limited role. This and the subjectivity involved in the price determination process leaves minorities in a rather vulnerable position.

4. Regulatory Supervision

In addition to judicial and shareholder oversight, it is possible for governmental authorities and self-regulatory organizations to exercise a supervisory role over squeeze outs. Although no such role is envisaged in the compulsory acquisition mechanism, powers of certain regulatory authorities come into play in a scheme of arrangement or reduction of capital.

[86] *See Wartsila India*, *supra* note 67, at ¶23.

In a scheme of arrangement, the court is required to consider the representations of the Central Government (operating through the Regional Director, Ministry of Company Law Affairs).[87] Specific to an arrangement involving a squeeze out, it has been recognized that the Central Government has the "statutory duty and interest to see that the interest of investing public should be protected and that laws are not violated".[88] However, the Central Government can only put forward its representations to the court, and cannot independently affect the outcome of the squeeze out. Moreover, the Central Government's objections in practice relate to matters of company law and compliance, and not necessarily with the fairness of the scheme to the minorities. To that extent, it is not clear if the Central Government can be considered to be a guardian of minority shareholder interest in a squeeze out.

SEBI is the regulatory authority with the mandate for investor protection and, although it has significant powers under securities legislation,[89] its track record in squeeze out transactions does not generate much optimism for minorities. When SEBI appealed against a squeeze out order involving a scheme of arrangement and reduction of capital, the court refused to recognize any power of SEBI in representing itself before the court (a power that it sought to undertake with a view to safeguarding the interest of the investors).[90] Deprived of any role in such schemes, SEBI amended the standard form of the listing agreement that public listed companies are required to enter into with stock exchanges.[91] Companies are now required to file any scheme of arrangement or proposal for reduction of capital with the stock exchanges at least one month before filing it with any court or tribunal for approval.[92] This is to

[87] Companies Act, 1956, §394-A. Under the 2013 Act, notice of a meeting of shareholders considering a scheme must be sent to the Central Government, SEBI, the stock exchanges, and several other authorities. Companies Act, 2013, §235(5). The process of obtaining the comments from the Central Government has been further streamlined recently. Ministry of Corporate Affairs, Government of India, *Report u/s 394A of the Companies Act, 1956*, General Circular No. 1/2014 (Jan. 15, 2014).

[88] *Securities and Exchange Board of India v. Sterlite Industries (India) Ltd.*, [2003] 113 Comp. Cas. 273 (Bom) [hereinafter *Sterlite Industries*], at ¶11.

[89] These include the Securities and Exchange Board of India Act, 1992 and the Securities Contracts (Regulation) Act, 1956.

[90] *See Sterlite Industries*, *supra* note 88, at ¶¶8-10 (on the basis that sections 391-394 of the Companies Act, 1956 do not envisage any role for SEBI).

[91] Securities and Exchange Board of India, *Amendment to the listing agreement regarding disclosure pertaining to schemes of arrangement/merger/amalgamation /reconstruction filed before the Court*, SEBI/SMD/Policy/List/Cir -17/2003 (May 8, 2003).

[92] *See* Listing Agreement, clause 24(f).

ensure that stock exchanges have the opportunity to examine whether the proposal for squeeze out violates any provisions of the securities laws or stock exchange requirements.[93] Although it is not clear if the stock exchanges have a wider mandate to safeguard the interests of minorities, they have undertaken to do so on occasion.

In the *Elpro* case,[94] the Bombay Stock Exchange challenged a reduction of capital proposal in the court on the ground that the silence of the minorities was being considered acceptance of compulsory purchase of their shares.[95] The Bombay High Court upheld the proposal of the company and approved the reduction capital, but clarified that the stock exchanges were at liberty to take recourse to their rights under the listing agreement if they found a violation of securities laws. Since the stock exchanges nevertheless refused to bless the squeeze out, Elpro was left with no option but to withdraw the squeeze out proposal.[96] The Elpro episode establishes that on occasions the stock exchanges can indeed successfully display a sense of activism in favor of the interests of minorities who are being squeezed out.

More recently, the regulatory oversight over schemes of arrangement and reduction of capital has been considerably strengthened.[97] In addition to the stock exchanges, SEBI itself has assumed a larger role by indicating its observations on the proposal to the company. The company is required to notify its shareholders as well as the court regarding the observations of SEBI and the stock exchanges, so that any regulatory concerns may be taken into account both when the shareholders consider the proposal for their approval and the court consider it for its sanction. Although these measures do bring in the much-required robustness in regulatory

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[93] *See* Listing Agreement, clause 24(g).

[94] *Supra* note 67.

[95] Although the stock exchanges did not provide a favorable response to the reduction of capital, the company nevertheless filed it with the court after the one-month period specified in the listing agreement. Note that the requirement is only to file the proposal with the stock exchanges prior to submission to the court; there is no requirement to obtain the approval of the stock exchanges.

[96] *See* Elpro International, *Outcome of Board Meeting* (Dec. 19, 2007), *available at* http://www.moneycontrol.com/stocks/stock_market/corp_notices.php?autono=146772.

[97] Securities and Exchange Board of India, Securities and Exchange Board of India, *Scheme of Arrangement Under the Companies Act, 1956 – Revised requirements for the Stock Exchanges and Listed Companies*, Circular CIR/CFD/DIL/5/2013 (Feb. 4, 2013); Securities and Exchange Board of India, *Scheme of Arrangement Under the Companies Act, 1956 – Revised requirements for the Stock Exchanges and Listed Companies – Clarification*, Circular CIR/CFD/DIL/8/2013 (May 21, 2013).

supervision of squeeze outs, they are arguably devoid of the required rigor. Both SEBI and the stock exchanges possess the role of commenting on the company proposal, but they do not have the ability to restrict or prohibit a value-reducing squeeze out. Moreover, it is not clear what type of consequences a company would face if it chooses to ignore the comments or observations made by SEBI and the stock exchanges.

In any event, the role of the stock exchanges (or even SEBI) is limited to listed companies.[98] Yet, squeeze outs are implemented quite often in unlisted companies where the stock exchanges and SEBI do not have a supervisory role. Squeeze outs are generally implemented after a delisting offer pursuant to which the company's securities are delisted from stock exchanges. In the case of such unlisted companies, regulatory supervision is minimal, thereby making the minorities more vulnerable.[99]

5. Taking Stock of Minority Shareholder Rights in India

Given the relative ease with which squeeze outs can be achieved using the reduction of capital route, it is not surprising that controllers in most companies are adopting that route. Courts have generally permitted the use of reduction of capital for squeeze outs. So long as the controllers are able to establish fair process and fair price (determined in the manner discussed in this Part), courts tend to approve proposals for reduction of capital. Although minorities do have the power to challenge such proposals, they have rarely been successful in seeking greater scrutiny of squeeze out transactions effectuated via reductions of capital.[100] At most, they have been able to persuade the court to order a reexamination of the price by appointing a separate

[98] For example, the *Elpro* case involved a squeeze out by a listed company.

[99] Although the Central Government may possess powers to make representation in a scheme of arrangement even in the case of an unlisted company, those powers are limited, as we have discussed earlier. *See supra* note 88, and accompanying text.

[100] Although the Bombay High Court signified acceptance of greater rights of minorities in a reduction of capital in *Sandvik Asia*, *supra* note 66, that too was overruled on appeal in *Sandvik Asia Appeal*, *supra* note 67.

valuer.[101] Even in those circumstances, disputes have not been satisfactorily resolved, and valuations continue to be disputed.

Table 1 provides an overview of the current state of protection under Indian law for squeeze outs, highlighting that the general level of protection is fairly weak.

TABLE 1 – COMPARING METHODS OF SQUEEZE OUTS IN INDIA

	Shareholder Voting	**Use of Corporate Funds**	**Valuation & Pricing**	**Court scrutiny**	**Regulatory Scrutiny**
Compulsory Acquisition	*90% of minority*	*Not allowed*	*Same price as main offer*	*Ex post and weak*	*SEBI and Exchanges until delisting*
Scheme of Arrangement	*Majority in number of shareholders of each class, with them holding 75% of shares of that class (present & voting (p & v))*	*Allowed*	*Supported by expert valuation report*	*Ex ante and weak*	*SEBI and Exchanges until delisting*
Reduction of Capital	*75% of all shareholders or those holding 75% shares (p & v)*	*Allowed*	*Supported by expert valuation report*	*Ex ante and weak*	*SEBI and Exchanges until delisting*

[101] For example, in the case involving the reduction of capital of Cadbury India Limited, following objections raised by the minorities regarding the price offered by the company, the court ordered an independent valuation to be conducted. *See* Maulik, *Bombay High Court asks E&Y to submit Cadbury valuation report*, THE ECONOMIC TIMES (Jul. 9, 2011). However, since the minorities did not accept the valuation proposed by the court-appointed valuer, the dispute remains unresolved. To our knowledge, the proposal for reduction of capital of Cadbury continues to be pending before the Bombay High Court, although it has been nearly 5 years since the company proposed a squeeze out of the minorities through a capital reduction.

In concluding this Part, we find that various methods are available to controllers to initiate a squeeze out of minorities. The method that is most utilized by controllers is one that provides least protection to minorities. This puts minorities in a vulnerable position without adequate protection of their interests under corporate law.

IV. Regulation in Other Jurisdictions

Given the lack of significant minority protection in squeeze outs, we explore potential reforms by beginning with how other jurisdictions regulate these transactions. To obtain a better and deeper understanding of these alternatives we examine the regulation of squeeze outs in the U.S., European Union, the U.K. and Singapore. Discussing both Western markets and Asian markets on the one hand as well as common law systems and civil law systems on the other aids in obtaining a broad sense of the existing regulatory approaches. One of our key goals is to examine which approach (or combination of approaches) may present attractive options for India given India's institutional and corporate structure.

A. United States

Minorities in the U.S. can avail two methods of protection in the context of squeeze outs. First, minorities can claim appraisal rights, which entitle them, in certain scenarios, to have the courts provide them with the "fair value" of their shares. Second, minorities can claim that the controller has breached the fiduciary duty owed by it to the minorities and seek a remedy.

1. Appraisal Rights

State corporate law statutes provide for appraisal rights entitling dissenting shareholders in a merger (including a squeeze out merger) to compel the controller to pay them a court-determined "fair value" for their shares.[102] However, the appraisal rights process has a number of problems.[103] Given these limitations, appraisal provides quite attenuated protection for minorities. Perhaps, in part, because of this, the Delaware courts crafted another remedy.

2. *Fiduciary Duty Class Actions*

The general contours of the Delaware fiduciary duty class action (FDCA) for squeeze out mergers have evolved over the last four decades.[104] Although FDCAs first became available against controllers for squeeze outs when the plaintiff could make some showing of fraud or over-reaching by the controller, that condition has in practice been whittled away to where the FDCA is available in most squeeze outs.[105] FDCAs have resulted in a number of suits and appear to have several advantages over appraisal.

First, FDCA suits are available regardless of the transactional structure or consideration used. Second, these are class actions, which overcome one of the key obstacles in using appraisals by allowing cost sharing and claim aggregation amongst plaintiffs.[106] Third, remedies for breach of fiduciary duty can be crafted quite flexibly. Finally, an FDCA places the burden for

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[102] *See* ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 11, at 485.

[103] *See* Coates, *supra* note 16, *passim* (discussing concerns with the calculation of fair value and minority discounts and putting forward proposals for reform); Lawrence A. Hamermesh & Michael L. Wachter, *The Fair Value of Cornfields in Delaware Appraisal Law*, 31 J. CORP. L. 119 (2005). The problems pertaining to appraisal include that: (i) it can be circumvented by structuring the transaction as a sale of assets rather than a merger, or by offering stock in another publicly listed firm; (ii) even where appraisal is available, shareholders have to file individual claims as there is no method for aggregation of suits; (iii) there are several challenges to the determination of "fair value", particularly with the use of the Delaware Block Method, which attempts to avoid reliance on future cash flows. *See* Khanna, *Weinberger v UOP, Inc.*, *supra* note 6 at 196-199.

[104] *See Singer* v. *Magnavox Co.*, 380 A.2d 969 (Del. 1977); *Tanzer* v. *International General Industries, Inc.* 379 A.2d 1121 (1977).

[105] *Cf.* ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 11, at 486 – 87. *See Rabkin* v. *Olin Corp.*, C.A. No. 7547, 1990 WL 47648, at *12 (Del. Ch. Apr. 17, 1990). Further, fiduciary duty suits, as a concept, predate the statutory appraisal rights so unless the appraisal statutes completely obliterated fiduciary duty suits some of them may have remained. Fraud and over-reaching did not appear explicitly excluded and fiduciary duty suits were available in such situations.

[106] *See* ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 11, at 487.

showing the transaction was entirely fair (i.e., fair process and fair price) on the controller.[107] This is often perceived to be a heavy burden to bear.

In light of the weight of this burden, controllers often take steps that serve to either shift the burden of proof to the plaintiff or work to prove entire fairness themselves (thereby avoiding liability). These steps may include:

(i) having an independent committee negotiate with the controller where the committee has access to funds to obtain its own outside advice and is negotiating without pressure from the controller in a manner that appears "arm's length"; and

(ii) having the squeeze out conditioned on obtaining the majority of the minorities to vote in favor of the squeeze out.

Whether both steps are necessary and exactly what is likely to satisfy a court tends to depend greatly on the facts. However, the more the squeeze out looks like an "arm's length" transaction that was approved by an independent committee and the minorities, the more likely it is that the squeeze out will receive favorable treatment from the courts.

As an example of what courts might expect to provide more favorable scrutiny consider *Kahn* v. *Lynch.*[108] The court noted that the defendant (i.e., the controller) in a squeeze out

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[107] *See Singer, supra* note 104; *Tanzer, supra* note 104; *Weinberger v. UOP, Inc.*, 457 A. 2d 701, 711 (Del. 1983).

[108] 638 A. 2d 1210 (Del. 1994). In *Kahn v. Lynch*, Alcatel was the controller of Lynch (owning 43% of it's stock) and had a veto over any merger because Lynch's charter required 60% shareholder approval to consummate a merger. Alcatel wished to merge Lynch with one of its wholly owned subsidiaries and then Lynch created an independent committee to advise it. The independent committee negotiated with Alcatel (relying on its own advisors) and the offering price rose from $14 per share to $15.50 per share. The committee appeared to want a higher price, but Alcatel made it clear that it would proceed with an unfriendly tender offer at a lower price if the committee did not recommend this price. The committee consulted its advisors and decided that it was best to take the $15.50 per share offer. This was, in part, due to the fact that, given Lynch's charter (requiring 60% shareholder approval) and Alcatel's current holdings (43%), Alcatel had a veto on anyone else acquiring Lynch. Following this, some minorities brought suit alleging breach of Alcatel's fiduciary duty to them.

merger bears the burden of proving the transaction is entirely fair (with respect to process and price). Indicia of fairness can include approval of the merger by the majority of the minority or when a controller creates an independent committee to negotiate on behalf of the target firm on an arm's length basis. If this happens then the burden of proving entire fairness would shift from the controller to the plaintiffs.[109]

One of the reasons for this approach is a notion that *Lynch* elaborates: inherent coercion. The idea is that even if the controller does not engage in any over-reaching the minority might still feel compelled to agree to the transaction because the minority knows the controller has other ways in which to punish and expropriate the minority (e.g., taking a higher salary for himself). In light of that, squeeze out mergers cannot really be truly arm's length because of inherent coercion.

More recent decisions continue to rely on these factors (while adding on a few more factors, at times), but have been more willing, if these factors are met, to offer even more favorable scrutiny to squeeze outs than *Lynch*. In *Kahn v. M&F Worldwide Corp.*,[110] the Delaware Supreme Court affirmed a decision of the Delaware Chancery Court in *In Re MFW Shareholders Litigation*.[111] In that case, the courts were concerned with determining the appropriate standard of review for a squeeze out merger.[112] The two primary choices were the *Lynch* standard where the plaintiff must show the transaction is not entirely fair or the business judgment rule (BJR) where the plaintiff faces a higher burden in bringing a successful suit

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[109] For the treatment of majority of minority ratification see *Rosenblatt* v. *Getty Oil*, 493 A.2d 929 (Del. 1985). On the facts of *Lynch*, the court held that the independent committee's behavior did not indicate true independence. This was because independence implies that the controller must not be able to dictate terms and the committee must have real bargaining power approximating an arm's length bargain. The facts indicated the committee did not have such power because Alcatel was able to obtain the committee's favorable recommendation only after threatening a lower priced tender offer. Thus, the controller still had the burden of proving entire fairness.

[110] 88 A.3d 635 (Del. SC, 2014)

[111] 67 A. 3d 496 (Del. Ch. 2013).

[112] The brief facts of the case are that through a merger, MacAndrews & Forbes Holdings, Inc. ("M&F"), a 43% shareholder of M&F Worldwide Corp. ("MFW") sought to acquire the remaining shares of MFW thereby effectively taking the company private. Two protective conditions were included as part of the transaction process, i.e. that (i) the merger be negotiated and approved by a special committee of independent MFW directors (the "Special Committee"), and (ii) the merger be approved by a majority of shareholder not affiliated with M&F (i.e. non-controlling shareholders).

against the squeeze out.[113] The Court held that BJR would be the appropriate standard if the defendant controller had put in place significant minority protections, such as an independent committee approving the transaction and a majority of the minority ratification.[114] This allows for the BJR standard to be applied, which is more favorable for controllers, but only if many minority protections are provided.

In sum, while the standards against which controllers' conduct will be judged in a squeeze out in the U.S. appear to have been progressively relaxed in favor of controllers, these standards will be available only if certain pre-requisites have been placed in order to protect the minorities. It may arguably strike a balance that permits value-enhancing squeeze out mergers but potentially restricts value-reducing ones.

B. European Union

The European Union's (EU's) regulation of squeeze outs is generally considered more restrictive than that in Delaware.[115] The two primary methods of obtaining a squeeze out in the EU are under (i) Articles 3 and 4 of the Third Council Directive Concerning Mergers of Public

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[113] The application of the BJR standard usually amounts to a decision in favor of the defendant controller. *See* Steven M. Haas, *Toward a Controlling Shareholder Safe Harbor*, 90 VA. L. REV. 2245, 2279 (2004); Gilson & Gordon, *supra* note 3 at 790-791.

[114] The standard of review as well as the minority protections it is conditional upon are summarized by the Delaware Supreme Court:

> To summarize our holding, in controller buyouts, the business judgment standard of review will be applied if and only if: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority. [footnote omitted]

Kahn v. M&F Worldwide Corp., *supra* note 110 at 645. One could argue that conditioning the BJR on the presence of these protections is not really the BJR per se, but rather a listing of what needs to be shown by the defendant controller under the entire fairness standard to succeed in a suit against a squeeze out. Indeed, one wonders what else a controller would need to show under entire fairness to succeed.

[115] Marco Ventoruzzo, *Freeze-Outs: Transcontinental Analysis and Reform Proposals*, 50 VA. J. INT'L L. 841, 846 (2010) (containing an extensive comparison of freezeout regulation in the E.U. and in Delaware).

Limited Liability Companies[116] (Third Directive) and (ii) Articles 5 and 15 of the Thirteenth Directive on Takeovers[117] (the Takeover Directive).

1. Articles 3 and 4 of the Third Directive

The Third Directive applies to a "merger by acquisition" and in a "merger by the formation of a new company". These must not be cash out mergers (thereby eliminating one type of squeeze out option)[118] and applies where two firms are merging rather than the controller directly acquiring the minority's shares (which is addressed in Section 2). The shareholders of both corporations must receive shares of the remaining corporation according to an exchange ratio approved by both sets of boards and shareholders. The exchange ratio must be set in a manner that appears fair and a judicially appointed independent expert is required to examine the ratio and opine on its fairness before shareholders vote on it.[119]

The enforcement of dissenters' rights is not particularly well laid out in the EU. Each Member State has its own rules, but they are expected to regulate the civil liability of executives, directors and independent experts for merger misconduct. Thus, shareholders can seek damages if the exchange ratio is unfair, although shareholder litigation is not relied on extensively in the EU.

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[116] Third Council Directive 78/855/EEC, 1978 O.J. (L 295) 36.

[117] Directive 2004/25/EC of the European Parliament and of the Council on Takeover Bids, art. 5 and 15, 2004 O.J. (L 142) 12, 21.

[118] *See id.* at 877.

[119] *See* Venturozzo, *supra* note 115 at 877 Finally, cash consideration cannot be provided for more than 10% of the nominal value of the shares. *Id*. at 877. However, if the surviving entity is not listed (e.g., a private firm) then the EU Takeover Directive has further requirements. Article 27 envisions four things. First, the directors and shareholders of the target have a right to vote. Second, detailed disclosure must be provided, under the EU Directive, to the parent firm's non-voting shareholders prior to the vote. Third, the EU requires substantial documentation and disclosure be provided to all shareholders. Finally, the normal approval process can be required if a request is made by qualified minorities of the acquiring firm (usually no more than 5%, although Member States can set the percentage lower). *See id*. at 880-881.

2. Takeover Directive

The Takeover Directive provides a two step regulatory approach. First, Article 5 requires that anyone who acquires control of listed firm must also launch a tender offer for the remaining shares (including those with limited voting rights) – known as the mandatory bid. The price must equal or exceed the highest price paid by the bidder in the last six months (in some Member States up to 12 months).[120] As an alternative to the squeeze out following a mandatory bid, one could predicate the squeeze out on obtaining the approval of the majority of the minorities following appropriate disclosure.[121] Member States are free to choose from either of the two approaches.

A special case is presented in Article 15 of the Takeover Directive, which provides that, under certain conditions (e.g., following a mandatory bid under Article 5), a shareholder acquiring 90% (or more) of the voting shares of a listed corporation via tender offer may be able to squeeze out the minorities at a fair price using cash. This bears some similarities to SEBI's Takeover Code in India.

In sum, the EU regime extensively regulates squeeze outs and arguably provides greater protection to minorities in comparison with other jurisdictions, especially in light of the mandatory bid rules and the protections offered under Articles 3 and 4 of the Third Directive.[122] It also seems to involve a lesser degree of judicial intervention than the U.S. in protecting minorities.

[120] The consideration may be either cash or securities in a listed and traded firm(s) or both. *See* Article 5(5), *supra* note 117.

[121] *See id*. at 889.

[122] There is also a separate regime for cross-border acquisitions. *See* Directive 2005/56/EC of the European Parliament and of the Council 2005 on Cross Border Mergers of Limited Liability Companies, 2005 O.J. (L 310).

C. United Kingdom (U.K.)

In the U.K., controllers may utilise one of several methods to squeeze out minorities. These methods are similar to those used in India.[123] They are: (i) the compulsory acquisition mechanism, (ii) scheme of arrangement, and (iii) reduction of capital.

Under the compulsory mechanism prescribed in the Companies Act 2006 (U.K.),[124] when the controller makes an offer that is accepted by shareholders holding at least 90% in value of the shares for which the offer has been made, then the controller may proceed to compulsorily acquire the shares of the remaining shareholders. Similar to the case of India,[125] the extent of acceptances required in the offer is quite high, as the 90% requirement relates not to the total number of shares outstanding in the company but to 90% of the shares for which the offer has been made.

In order to overcome the onerous nature of this requirement, controllers have sought to make innovations in transaction structures, which have been struck down by courts. For instance, in *Re Bugle Press Ltd*,[126] when the minorities challenged a somewhat convoluted transaction structure,[127] the court intervened to invalidate the squeeze out.[128]

As an alternative to this is where an acquirer or controller may utilise the scheme of arrangement route to acquire full control of the company as part of a single transaction. In other words, the acquirer either obtains full control (100% ownership) or it does not acquire any control as the scheme of arrangement entitles the acquirer to follow an "all-or-none"

[123] Given that India's Companies Act, 1956 was based on the then existing Companies Act, 1948 in the U.K., broad similarities in the methods of squeeze out in the two countries should not come as a surprise.

[124] Chapter 3 of Part 28, §§979-982.

[125] *See supra* notes 44 to 46, and accompanying text.

[126] *Supra* note 46.

[127] In *Re Bugle Press*, *supra* note 46, the controllers of a company holding 90% in the target established a new company in which they obtained complete ownership. The new company made an offer to all shareholders of the target. Since the offer related to all of the shares of the target and not just to those held by the minorities, the new company was able to receive acceptances worth 90% from the controllers so as to make the offer successful and to then proceed to compulsorily squeeze out the minority.

[128] Although the new company was in law distinct from the controllers, it was in substance the same as the controllers as regards its interest in the target. The facts of *Re Bugle Press*, *supra* note 46, as well as the outcome are similar to the Indian case of *AIG*, *supra* note 46.

approach. The scheme of arrangement confers some basic level of protection on minorities.[129] These include (i) a substantial say to the minorities as they will be categorized as a separate class for approval purposes, (ii) disclosure and transparency rules that require the company to provide appropriate information to the shareholder before obtaining their approval, (iii) a higher majority requirement in each class being a majority in number representing 3/4ths in value, and (iv) the sanction of the court which will consider various affected interests, including that of the minorities.

In a scheme of arrangement, the "majority of the minority" rule is imposed through the classification requirement. Controllers cannot vote together with the minorities if the impact of the scheme on these two constituencies is different. In *Re Hellenic and General Trust Ltd*,[130] the court held that the wholly owned subsidiary of the acquirer had a distinct interest from the minorities and hence each must constitute a separate class. Such an interpretation has not yet met with approval in India.

The final method, capital reduction, can also potentially be utilised to achieve a squeeze out under the company law in the U.K. The courts have deferred to the decision of the company to decide the manner of reducing capital, including by engaging in selective capital reduction.[131] While this may signal a rather liberal approach towards the use of capital reduction to squeeze out minorities, there is evidence of courts seeking to impose constraints on controllers so as to protect minorities. For instance, since the controllers and minorities have differing interests in a reduction of capital, with the controllers' shares being untouched while the minorities' shares being reduced and cancelled, it has been argued that the controller and minorities must be treated as constituting separate classes as was the case with a scheme of arrangement.[132]

[129] *See supra* Part IIIB.2.

[130] [1976] 1 WLR 123. This case involved a scheme of arrangement of cancellation of shares of existing shareholders and the issue of shares to an acquirer. At the same time, the existing controller was a wholly owned subsidiary of the acquirer, which voted along with all shareholders as part of the same class while approving the scheme.

[131] *See British and American Trustee v. Couper*, [1894] AC 399.

[132] While this argument may hold good in a scheme of arrangement which requires classification of shareholders through explicit statutory provisions, matters become somewhat compounded in a reduction of capital that does not contain explicit classification requirements.

Indeed, an English court has not hesitated to make observations seeking to impose the classification requirements for reduction of capital as well.[133] Hence, the preference of the English courts appears to favor a scheme of arrangement (containing greater minority shareholder protection) over reduction of capital (with relatively minimal minority shareholder protection).[134]

While there is a fair amount of similarity between the English and Indian regulation on squeeze outs, there is considerable variance in the precise manner in which they are regulated. While the Indian courts have displayed considerable flexibility in permitting squeeze outs through reduction of capital with limited shareholder protection, the English courts have adopted a more interventionist approach and invalidated squeeze outs where they have been carried out in a manner that harms minorities' interests, especially when controllers have sought to circumvent minority protections. The track record of the English courts in closely scrutinizing squeeze out transactions provides a considerable source of comfort to minorities, an aspect that is lacking in the Indian scenario.

D. Singapore

The law pertaining to squeeze outs in Singapore[135] largely tracks that of the U.K.[136] The squeeze out methods available are (i) compulsory acquisition through acceptances by 90% of the shares in respect of which an offer has been made,[137] (ii) scheme of arrangement,[138] and

[133] *See Re Robert Stephen Holdings*, [1968] 1 WLR 522, 524-525, where Plowman, J. expressed the view:

> [I]t is desirable in cases like the present to proceed by way of a scheme of arrangement, for although no doubt it is true that a dissentient minority shareholder can come to the court and object to confirmation of a reduction, nevertheless the interests of the minorities are better protected under [the section pertaining to scheme of arrangement].

[134] Note the exact opposite outcome that prevails in India by virtue of the *Sandvik Asia Appeal*, *supra* note 67, wherein the Bombay High Court permitted squeeze out through a reduction of capital without requiring a classification of shareholders.

[135] For a detailed discussion of the law governing squeeze outs in Singapore, *see* WAN & VAROTTIL, *supra* note 23, at 615-660.

[136] For this reason, the discussion in *supra* Part IVC above would largely hold for Singapore as well.

[137] Companies Act, Cap. 50B, 2006 Rev. Ed. (Sing.), § 215.

[138] *Id.*, § 210.

(iii) capital reduction.[139] Although squeeze out transactions have not been subjected to litigation to the same extent as they have in the U.K., it seems likely that Singapore courts would confer protections upon minorities similar to those in the U.K.[140] Moreover, controllers in Singapore have rarely followed the capital reduction route, preferring instead the compulsory acquisition or scheme of arrangement routes. [141]

In concluding this comparative analysis, we find that a number of other jurisdictions studied herein confer significant benefits to minorities in squeeze out transactions which are unavailable to minorities of Indian companies. Either the laws in some jurisdictions restrict the permissible types of squeeze outs (E.U.), introduce measures such as disinterested board approval or a "majority of the minority" shareholder vote (e.g. the U.S.), or confer upon the courts substantial jurisdiction to oversee the interests of minority, which they have in practice invoked without hesitation (e.g. the U.K., Singapore and Hong Kong).[142] This comparative analysis suggests that while the substantive law in India confers a great amount of discretion to controllers in conducting squeeze outs, neither the courts nor the regulators have imposed the necessary checks and balances to rein in abuses by controllers and to protect minorities from value-reducing squeeze outs.

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[139] *Id.*, §§ 78A-78I.

[140] Despite the scant nature of squeeze out litigation in Singapore, there is ample evidence of the willingness of the Singapore courts to intervene in case of abuse of minorities. There are several examples where schemes of arrangement involving creditors have been invalidated due to lack of adherence to due process so as to protect minority interests. *See Wah Yuen Electrical Engineering Pte Ltd. v. Singapore Cables Manufacturers Pte Ltd.*, [2003] 3 SLR(R) 629; *Re Econ Corp Ltd.* [2004] 1 SLR 273; *The Royal Bank of Scotland NV v. TT International*, [2012] 2 SLR 213.

[141] Although it is hard to speculate whether the lack of usage of capital reduction for squeeze outs is due to the fear of court intervention and invalidation, it puts Singapore at the opposite end of the spectrum from India (where capital reduction is the preferred route in practice despite its limited protection of minorities).

On a related note, another Asian jurisdiction, Hong Kong, also follows similar approaches towards squeeze outs. David Friedlander & Hayden Flinn, *Public Takeovers and Mergers in Hong Kong*, 24-SPG INT'L L. PRACTICUM 54 (2011). Moreover, in Hong Kong, courts too have on occasion exercised their jurisdiction to invalidate transactions that are value reducing to minorities. A privatization transaction structured as a scheme of arrangement was found by a court to be invalid due to vote manipulation that undermined the issue as to whether the shareholders were fairly representing at a class meeting that approved the scheme. *See Re PCCW Limited*, [2009] HKCU 720.

[142] It is also striking that while India's substantive laws on squeeze outs are substantially similar to the other countries in the Commonwealth examined in this article, there is a wide divergence in the manner in which they are enforced (substantially due to differing approaches in judicial intervention).

V. POTENTIAL REFORMS

The protection of minorities in squeeze out transactions in India seems quite attenuated, especially when compared with the other countries surveyed in this article. Moreover, a squeeze out is easier to observe and regulate than other allegations of abuse or expropriation by controllers (e.g., tunneling). It thus seems that reform of squeeze out regulation is a worthy way to enhance minority protection.

A. Review by a Committee of Independent Directors

Many jurisdictions place emphasis on an approval of a squeeze out by a special committee of directors who are independent of the controllers rather than by the entire board.[143] Currently, while company and securities laws in India prescribe board independence requirements generally,[144] squeeze out transactions are not required (or incentivized) by the law to obtain an approval by a committee of independent directors. We find merit in the review of squeeze outs by an independent committee empowered to decide in a manner simulating an "arm's length" transaction. This means that in addition to being independent of the controller, they should act in an un-coerced and informed manner (keeping in mind the interests of the minorities) and they should be able to appoint independent financial and legal advisers at the firm's expense. In particular, being able to have the fairness of the squeeze out price assessed by an independent financial advisor would add to the independence and credibility of the decision-making process.[145]

[143] *See supra* Part IVA for the position in the U.S. Elsewhere in the U.K., a committee of independent directors of Essar Energy plc had been working to prevent an undervalued offer from the controllers to acquire the minorities' shares. Tapan Panchal, *Essar Global Unit to Acquire Essar Energy Minority Shares*, THE WALL STREET JOURNAL (Mar. 14, 2014).

[144] Companies Act, 2013, §149; Securities and Exchange Board of India, *Press Release – Review of Corporate Governance Norms in India for Listed Companies*, PR No. 12/2014 (Feb. 13, 2014).

[145] This process may be similar to that of obtaining fairness opinions in transactions pertaining to mergers and takeovers. *See* Steven M. Davidoff, *Fairness Opinions*, 55 AM. U. L. REV. 1557 (2006); Joan MacLeod Heminway, *A More Critical Use of Fairness Opinions as a Practical Approach to the Behavioral Economics of Mergers and Acquisitions*, 12 TRANSACTIONS: TENN. J. BUS. L. 81 (2011).

Although using special independent committees for conflicted transactions (such as squeeze outs) has hardly been prevalent in India, this is likely to change in the near future because of the greater emphasis on board independence under the 2013 Act and moves by SEBI to increase the reliance on independent directors.[146] Given that independent directors on Indian corporate boards are poised to take on expanded roles and responsibilities, their influence cannot be more crucial than in the case of squeeze outs that put controllers in direct conflict with the minorities.

The primary concern one may have with this approach is that the independent committee is probably going to be selected by the controlling shareholder and that raises the specter of the committee voting in favor of the party who appointed them (a problem common to countries requiring independent committees for squeeze outs). One approach is to take the selection of the independent committee out of the controller's hands and another is to supplement the committee with other protections – it is to this that we now turn.

B. "Majority of Minority" Vote

Many jurisdictions appear to grant more deferential scrutiny to squeeze outs if they are accompanied by a majority of the minority (MoM) vote in favor. While India is progressively introducing MoM for related-party transactions, its current applicability to squeeze outs is limited.[147] MoM votes are required for compulsory acquisitions, but, as of now, not for schemes of arrangement or reductions of capital.

However, even if MoM votes were required by statute, that still leaves the question of whether such a voting requirement would be *effective* in protecting minorities. This depends, in part, on whether minorities in India are likely to use the shareholder franchise. Although one wonders whether minorities would exercise their vote in the context of other alleged abuses by the controller (e.g., tunneling, high salary), it seems more likely they would vote in the squeeze

[146] *See id*.
[147] *See supra* notes 58-60, and accompanying text.

out context.[148] This is due, in part, to the fact that squeeze outs are public events and are thus easier to observe than other less-public controller behavior (e.g., tunneling) and many minorities in India are likely to be less dispersed than in the U.S. and U.K. and hence more likely to monitor controllers. Further, policing squeeze outs is straightforward because minorities need only examine the price and timing of the squeeze out, whereas for other controller behavior (e.g., paying himself a high salary) there are many other factors to consider in determining whether the behavior was, in net terms, a good decision. These reasons suggest that minority voting on squeeze outs may overcome some of the standard collective action problems with voting.

Another concern with MoM voting is that some larger minorities may not vote in the same direction as other minorities. Indeed, there may be some risk that some minorities may be co-opted to vote in favor of the transaction even though it may not benefit the minority shareholders as a whole. This is a standard concern with voting when there is more than one minority shareholder. The most common method of addressing such a concern is to require disclosure of any connections between controllers and the minority. Some have suggested that further disclosure may be warranted (by significant minorities) so that other shareholders can learn whether the significant minority may have other interests at stake.[149] These measures might be considered in India too, especially where some minority shareholders may have other business interests with the controller besides their investment in the target firm.

Yet another concern with MoM voting is inherent coercion – the sense noted in some U.S. cases that minorities may vote in favor of transactions (which harm them) out of fear that if they do not the controller could find other (more painful) ways to extract value from the firm. There is no simple solution to this concern and in the U.S. the approach has been to club MoM voting with other protections (e.g., independent committee approval). This has also been the

[148] This is consistent with some evidence of greater activism among shareholders in India in recent years. *See* Umakanth Varottil, *The Advent of Shareholder Activism in India*, 6 JOURNAL ON GOVERNANCE 582 (2012).

[149] *See* Andrew Ross Sorkin, *For Activist Investors, a Wide Reporting Window*, DEALBOOK, NEW YORK TIMES, May 19, 2014, available at: http://dealbook.nytimes.com/2014/05/19/for-activist-investors-a-wide-reporting-window/.

case in other jurisdictions (e.g., the EU requiring a particular method of calculating squeeze out prices). India could certainly provide these other protections – indeed, the Takeover Code in India already has certain pricing provisions that seem similar to the EU's approach and independent committee are becoming more popular in India as witnessed in the 2013 Act and newer SEBI regulations.

C. Fiduciary Duty Actions?

Another reform might be to recognize fiduciary duties from controllers to the minorities as a group.[150] This would enable actions against the controller in a manner similar to that discussed in the Delaware context.[151] Although these actions might be desirable, they face certain institutional challenges in the Indian context. First, these actions tend to work best when the adjudicator makes decisions quickly. In the context of court decisions in India, this does not seem a likely outcome.[152] Moreover, even the Company Law Board (CLB) [153] does not have a reputation for acting that quickly either. Second, these actions are highly fact dependent and tend to work better when the adjudicator has substantial expertise in corporate matters. India's courts are primarily generalist courts and do not tend to specialize in corporate matters (beyond the CLB or NCLT).

Hence, while we call upon the courts in India to play a greater role in examining various types of squeeze out transactions, particularly as to their fairness in process and price, we

[150] *See* Varottil, *supra* note 10, at 49.

[151] Currently, fiduciary duties in India are imposed only on directors and not only shareholders (whether controlling or otherwise), except in very limited circumstances. Hence, they type of fiduciary duty class actions against controllers (that are prevalent in Delaware) are altogether alien to Indian corporate law.

[152] An extensive literature documents the colossal delays and backlogs before Indian courts. *See e.g.*, Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 GEO. J. LEGAL ETHICS 57, 70 (2010); John Armour & Priya Lele, *Law, Finance, and Politics: The Case of India*, 43 LAW & SOC'Y REV. 491, 496.

[153] Under the Companies Act, the Company Law Board is foisted with the function of determining certain specific types of shareholder disputes such as those for oppression and mismanagement. The *oppression* remedy is available to minorities if they can demonstrate that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any shareholders. Companies Act 1956, §397(1); Companies Act, 2013, §241(1)(a). The *mismanagement* remedy is available where a material change has taken place in the management or control of the company and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to the interests of the shareholders. Companies Act 1956, §398(1); Companies Act, 2013, §241(1)(b).

believe these measure may not be sufficient in and of themselves given the aforesaid discussion, and they should be supplemented by greater regulatory scrutiny, to which we now turn.

D. SEBI as Regulator

Another potential reform would be to grant SEBI greater powers in regulating squeeze outs. Of course, SEBI can only regulate listed firms and several listed firms first delist and then later conduct a squeeze out. In such situations, the squeeze out is outside of SEBI's jurisdiction because it involves the behavior of a private firm not a listed one. One potential reform could be to enact a legislative provision stating that SEBI has supervisory and regulatory power over delisting (as it currently does) and over any follow on squeeze outs conducted within one year of the de-listing (or a longer period, if appropriate). Giving such a window helps to assuage concerns that squeeze outs conducted within such period following a delisting are designed to remove SEBI scrutiny before an exploitative squeeze out.

Enhancing SEBI powers helps to overcome some of the weaknesses of the MoM approach and the fiduciary action approach because both require smaller minorities to act, which may be difficult given their size. Having the regulator operate as an additional protection may prove valuable.

E. Financial Solutions?

The reforms discussed thus far all assume that the minority will eventually be squeezed out of the target and the issue is simply what level of legal or regulatory protection will be granted. An alternative (or supplement) may be to only squeeze out the minority from having *voting rights* in the firm, but provide them some time bound *cash flow* rights in the firm to address concerns about the price and timing of squeeze outs.

To follow on from our previous illustration[154] where the target XYZ is controlled by VU (a shareholder with 55% of the shares), let us assume that the non-VU shareholders comprise three groups of minorities – A, B, and C – each having 15% (for a total of 45% between the three of them). VU wishes to squeeze out the minority of XYZ in any one of the methods possible in India. Let us assume Indian law allows such a squeeze out upon obtaining 50% or more of the vote (of all shareholders) in XYZ (which VU surely will achieve). However, the law requires that as A, B, and C give up their shares in XYZ for the consideration in the squeeze out that they are also provided with stock options (with no voting rights) in XYZ. As an example, assume XYZ is required to give the minority 2 options for every share extinguished – one option exercisable in one year and the other exercisable in two years. The exercise price could be set at the level of the squeeze out price.

These options provide minorities with the right to continue to receive some of the gains from XYZ for two years after they are squeezed out (thereby reducing the potential harm from strategic timing or pricing by the controller). The gains they receive would come from exercising their options and receiving cash payments from the company to extinguish their options (much like stock appreciation rights given to executives as part of their option compensation packages in the US).[155] However, the minority would not have voting rights and thus would not be able to interfere with the controller's decision making (an oft-stated rationale for the squeeze out). In this manner the stock options operate as a floating lien of sorts.

Such a requirement might work reasonably well for firms that squeeze out minorities but still remain listed because stock market prices can be used to determine if the option is valuable. However, many firms that engage in squeeze outs may do so as part of a delisting or after a delisting. In such situations, there is no exchange determined stock price. Here, one would need to rely on the disclosures of the now unlisted firm to assess what its valuation is

[154] *See supra* Part II.

[155] David I. Walker, *Evolving Executive Equity Compensation and the Limits of Optimal Contracting*, 64 VAND. L. REV. 611, 630-632 (2011); David I. Walker & Victor Fleischer, *Book/Tax Conformity and Equity Compensation*, 62 TAX. L. REV. 399, 404-405 (2009); Calvin H. Johnson, *The Disloyalty of Stock and Stock Option Compensation*, 11 CONN. INS. L.J. 133, 147 (2004-2005).

and what that would imply for a stock price to make the options valuable. To address this concern, the law could also require that SEBI retain jurisdiction over XYZ for two years following the squeeze out and provide (or require an investment bank to provide) a valuation report each year to determine what the notional stock price would be.

Although this option might work in theory, one can imagine concerns arising during its implementation because minorities may not want to wait up to two years to receive their final payments and also controllers may prefer not to have on-going scrutiny by SEBI (which may be one of the reasons to "go private" in the first place). To assuage both concerns one could imagine providing the controller with a choice when planning to conduct a squeeze out: either (i) the company issues options as discussed above or (ii) condition the squeeze out on obtaining a MoM vote in favor of the squeeze out and so forth. Whichever option the controller chooses could become the relevant standard administered by SEBI. In either case, the minorities are in a better position than the status quo ante.

The proposed reforms here are not meant to be prescriptive in nature or to provide definitive solutions to the concerns raised by squeeze outs in the Indian context, but rather to provide a menu of options for addressing these concerns in a balanced manner. Our initial reaction is that – given the institutional landscape in India – it is perhaps more effective to reduce reliance on court decisions to protect minorities and rely on regulatory enforcement around greater decision-making powers to the minorities or around options. In this light, the optimal mix of reforms relating to squeeze outs in India may, at the very least, consist of: (i) mandatory review of squeeze out proposals by a committee of independent directors of the target, who must be aided by the advice of an independent financial advisor as to the fairness of the squeeze out price; (ii) MoM voting on the squeeze out proposal; and (iii) scrutiny of squeeze out proposals by SEBI or the stock exchanges from the perspective of investor protection, and where required by law, the scrutiny of the courts. In addition, our more far-reaching suggestions regarding the continued regulatory domain of SEBI for a specified period following the squeeze out as well as financial solutions may be considered for implementation through wider consultation and debate.[156]

F. Longer-term Legislative Reforms

While we have set out some of the more substantive reforms to address the problems emanating from squeeze outs in India, in the longer term there is a need to streamline this area of the law through legislative intervention. As we have seen, the law relating to squeeze outs in India is fragmented. While the law relating to compulsory acquisitions is the only statutory provision that expressly contemplates a squeeze out of minorities and was intended specifically for that purpose, the practice indicates that it has been used least in India. Instead, other transaction structures such as schemes of arrangement and reduction of capital, which were intended for other purposes, have been used to effect squeeze outs. Since those mechanisms were not intended for squeeze outs in the first place, they confer limited protection to minorities, as we have sought to demonstrate. Given this situation, the laws relating to these various transaction structures have evolved independent of each other without any common thread. This has conveniently provided a tactical advantage to controllers to engage in structural arbitrage by choosing from a menu of options to effect squeeze outs.

Moving forward, greater certainty can be introduced in the law governing squeeze outs by legislative reform that attempts to streamline the various methods into a more coherent set of principles. Preference should be given to consolidation rather than fragmentation of the law. Until legislative consolidation is achieved, it would augur well for courts and regulators interpreting these provisions to do so in a consolidated manner so as to ensure the maximum protection to minorities. Instead of applying different principles for the various methods of squeeze outs in a disparate fashion, the legislature, regulators and courts could simply conflate

[156] Indeed, one could imagine minorities and controllers adopting some of these changes by contract. But, to the extent that the contract requires court enforcement, it is likely to face enforcement challenges. Moreover, if there are dispersed minorities then the likelihood of such contracts eventuating are less because the minorities may suffer from collective action concerns.

these principles with a view to a distilled set of safeguards to be applied for squeeze out irrespective of whichever method has been adopted by the controllers.

VI. Conclusion

Squeeze outs are an example of the type of controller transaction that can potentially harm minorities. Across the world there are different approaches to balancing the concerns associated with protecting minorities and concerns with not preventing value enhancing squeeze outs. These responses range from those relying on fairly simple rules (e.g., the mandatory bid), to voting by minorities, to more full-scale court supervision and intervention. In India the protection for minorities in squeeze outs is fairly weak by global standards and there is a strong case that can be made for enhancing protection.

The key problem is which solution(s) to pursue given the ground realities and institutional challenges in India. We are generally not enamored by approaches that rely for their effectiveness on quick and expert resolution through the courts. Instead, we consider some mix of greater regulatory supervision combined with voting or other protections to be most desirable in the Indian context. In this article we have sketched out a preliminary approach to addressing the concerns raised by squeeze outs in India. There are a number of refinements that can be envisioned to enhance the balance between minority protection and encouraging value enhancing squeeze outs, but we leave that for future work.

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