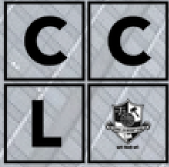

CENTRE FOR CORPORATE LAW
NATIONAL LAW UNIVERSITY ODISHA

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#IN SIGHTS

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Borrowed Clauses and Binding Consequences: SC's dictum on incorporation of arbitral clauses by reference

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You sign a contract. Buried in it is a clause that says all terms of some other agreement you have never seen will bind you. Somewhere in that unseen agreement sits an arbitration clause. You have just lost your right to approach a civil court, and you may not even know it. This is not a hypothetical concern. It is the logical consequence of the law on incorporation by reference.

In *Hirani Developers Pvt. Ltd. v. Nehru Nagar Samruddhi Co-operative Housing Society Ltd.* (2026 INSC 484), the Hon'ble Supreme Court ("**SC**") settled a question that has long made transactional lawyers uneasy: when a later contract incorporates "all terms and conditions" of an earlier one, does the arbitration clause travel with them? The answer is yes, and the implications reach further than the judgment itself acknowledges.

The Facts

Hirani Developers, entered into a Development Agreement with a cooperative housing society in Mumbai for redevelopment of its property. That agreement contained an arbitration clause providing for resolution of disputes through a sole arbitrator. Subsequently, the developer executed separate Permanent Alternate Accommodation Agreements ("**PAAs**") with the society and five individual members of the society. These PAAs did not independently contain an arbitration clause, but each included a provision ("**PAA Clause**") stating that all the terms and conditions of the Development Agreement shall be construed to form a part of these presents and all the clauses of the same shall be binding on the parties hereto.

The Rulings

The Bombay High Court dismissed the developer's applications under Section 11 of the Arbitration and Conciliation Act, 1996, holding that the individual society members were not privy to the arbitration clause contained in the Development Agreement. The High Court reasoned that a generic reference to an earlier instrument could not, by itself, demonstrate a binding commitment to arbitrate, and that the absence of a specific arbitration clause in the PAAs was fatal to the developer's case.

On appeal, the SC, set aside the High Court's order. Relying on its earlier decisions in *M.R. Engineers & Contractors Pvt. Ltd. v. Som Datt Builders Ltd.* (2009) 7 SCC 696 and *NBCC (India) Ltd. v. Zillion Infraprojects Pvt. Ltd.*(2024) 7 SCC 174, the SC reiterated three preconditions for a valid incorporation by reference: first, the later contract must contain a clear reference to the document housing the arbitration clause; second, the reference must clearly indicate an intention to incorporate the arbitration clause specifically, not merely a general reference; and third, the arbitration clause must be capable of application to the disputes under the later contract without being repugnant to its terms.

Applying these principles, the Court found that the PAA Clause was not a mere reference but an unequivocal importation. The language did not limit itself to substantive commercial terms; it expressly stated that all terms and conditions, and all clauses, would bind the parties. The SC described this as importing the Development Agreement "*body and soul*" into the PAAs. Since the arbitration clause was one such clause, it stood incorporated.

The Unanswered Questions

The decision is significant for what it says, but equally for what it does not say.

On the question of privity, while the Bombay High Court considers it, the SC's decision remains silent. The individual society members were seemingly strangers to the Development Agreement. They had never negotiated its terms, had no say in the drafting of the arbitration clause, and may well have been unaware of its existence.

Yet, by signing PAAs that incorporated "all terms and conditions" of the Development Agreement, they were held bound by the arbitration clause contained in it.

The legal logic is sound on its own terms. Parties who sign a contract are presumed to have read and understood what they are signing, including documents incorporated by reference. But the practical reality of real estate transactions in India, where individual flat buyers or society members often sign standard form agreements with limited bargaining power, makes one pause. The presumption of informed consent sits uneasily where homebuyers may not have even seen the Development Agreement whose arbitration clause now binds them.

The SC also has not delved into the consumer law dimension. The respondent-society members had stated that they wished to pursue their remedies before the consumer redressal forum. While the judgment is silent on whether they actually pursued such remedy, it also does not address the substantive issue: would consumers with a statutory right to approach the forum under the Consumer Protection Act 2019, find themselves bound by an arbitration clause they never individually agreed to?

While the existence of an arbitration clause does not bar the exercise of a statutory remedy, the interplay between these two regimes was left entirely unexamined. The SC proceeded straight to appointing an arbitrator without considering whether the respondent-society members' statutory remedy under consumer law ought to have been preserved, particularly in circumstances where the arbitration clause was not one they had independently agreed to but one that reached them through the mechanism of incorporation by reference.

The Takeaways

The drafting lesson is straightforward: if parties want to include an arbitration clause, they can state without qualification that all terms and conditions of the earlier agreement shall form part of the new contract and bind its parties; if they want to exclude it, they can specify a different dispute resolution mechanism in the later agreement or expressly limit the scope of incorporation to substantive commercial terms, excluding procedural or jurisdictional provisions.

But here is the uncomfortable truth that *Hirani Developers* leaves unaddressed The law now permits an arbitration clause to bind someone who never saw the contract containing it, never negotiated it, and never consciously agreed to arbitrate. The SC did not pause to consider whether statutory protections under consumer law ought to act as a check on this outcome. The elegant maxim that every incorporation contains a reference but, not every reference amounts to an incorporation tells us where the doctrinal line falls. It shies from clarifying whether that line is drawn in the right place. For parties with unequal bargaining power, that remains an open and urgent question.

INSOLVENCY & BANKRUPTCY

The Insolvency and Bankruptcy Board of India ("IBBI") amends the framework governing Valuations and Registered Valuer Framework.

Recently, IBBI has notified amendments easing the requirement of appointing two sets of registered valuers for Micro, Small and Medium Enterprises (“MSMEs”) undergoing liquidation proceedings, Corporate Insolvency Resolution Processes (“CIRP”) and Pre-Packaged Insolvency Resolution Processes (“PPIRP”). It has notified the amendment through three separate regulations, i.e., the IBBI (Liquidation Process) (Third Amendment) Regulations, 2026; the IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2026; and the IBBI (Pre-Packaged Insolvency Resolution Process) (Second Amendment) Regulations, 2026.

Prior to the amendments, there was no distinction between MSMEs and other corporate debtors for the appointment of registered valuers, with the framework contemplating the appointment of two valuers for each asset class. This added to the burden and cost of the insolvency process, especially for smaller enterprises where such valuation requirements were often disproportionate to the scale of assets involved.

Under the amended framework, for MSMEs, the liquidator and the Resolution Professional (“**RP**”) are required to appoint only one registered valuer or one set of registered valuers as applicable. The relevant committee may permit the appointment of two valuers or two sets of valuers, provided its reasons are documented in writing. Under PPIRP, the RP should appoint a set of registered valuers within three days of appointment. The amendment also bars certain categories of persons, like related parties, auditors of corporate debtor in the preceding five years and people associated with the RP’s insolvency professional entity, from being appointed as valuers.

Moving forward, the amendments are expected to ease the cost and procedural burden of valuation for MSMEs, thereby facilitating faster resolution and liquidation processes. The stricter requirements for valuers in PPIRP are also expected to improve the reliability for fair value and liquidation value assessments.

The Supreme Court ("SC") holds that the corporate veil may be lifted during insolvency proceedings to include subsidiary assets for safeguarding homebuyers' interests. [Link]

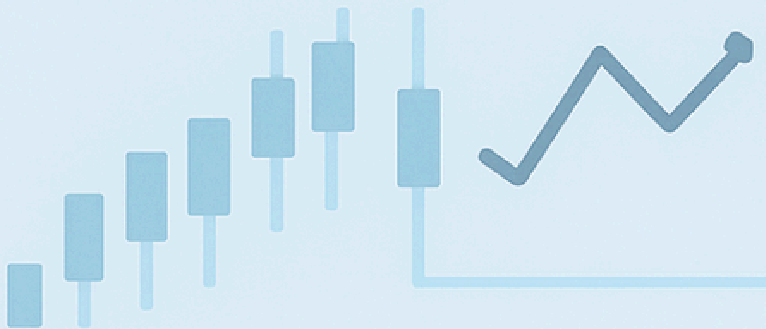
The SC has held that in appropriate circumstances, the corporate veil may be lifted during a Corporate Insolvency Resolution Process ("**CIRP**"), allowing assets held by subsidiary companies to be treated as part of the corporate debtor's asset pool, where the economic reality and degree of control warrant such treatment.

The issue arose in the insolvency of a real estate developer whose projects were structured through multiple subsidiary entities. Proceedings under the Insolvency and Bankruptcy Code ("**IBC**") proceeded on the basis that each company is a separate legal entity and the assets of the first cannot be treated as assets of the second. This made the entire process more complicated, where more than one affiliated entity is involved in the business or where project development and execution were done via several entities. The National Company Law Appellate Tribunal ("**NCLAT**") had held that the assets and leasehold rights of the subsidiaries shall not be part of the CIRP of the holding company. This led to the present appeal before the SC.

The SC reversed the NCLAT's decision, holding that the principle of separate legal entity could not be mechanically applied when the subsidiaries function merely as instruments of the holding company. The Court noted that the nature of the underlying commercial transaction is to be the focus of the insolvency proceedings and not its formal structure. Based on this principle, it reasoned that the subsidiaries' assets can be deemed part of the corporate debtor's assets and that the approved resolution plans can be restored.

Moving forward, this decision is important for groups of companies and real estate projects where the companies are organized under separate corporate personality, because economic reality and substantive control may triumph over the separate corporate personality, in doing so, enabling the effective resolution of the companies and ensuring the protection of the interests of the stakeholders.

SECURITIES LAW



The Securities and Exchange Board of India ("SEBI") releases a consultation paper on modifications to the regulatory framework for Online Bond Platform Providers ("OBPPs"). [Link]

SEBI recently released a consultation paper suggesting changes to the regulations governing OBPPs for promoting their ease of doing business. Currently, OBPPs are governed under Regulation 51A of the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021 ("**NCS Regulations**").

Hitherto, OBPPs are not allowed to offer products or securities regulated by the International Financial Services Centres Authority ("**IFSCA**") and only a qualified Company Secretary could be appointed as a compliance officer for OBPPs. Additionally, there was an ambiguity as to whether OBPPs could offer bonds issued under Section 54EC of the Income Tax, 1961 ("**IT Act**"). Section 54EC Bonds are tax-saving bonds issued by government notified entities. The consultation paper proposes changes to these provisions.

It is proposed that OBPPs be allowed to offer products or securities services regulated by IFSCA as per the Foreign Exchange Management Rules, 1999 ("**FEMA Rules**") and the Liberalised Remittance Scheme. Secondly, the consultation paper suggests that Chartered Accountants can be allowed to become compliance officers for OBPPs. This is with the view to bring uniformity in the appointment of compliance officers for stock brokers.

Additionally, it is clarified that, along with other products and securities offered by the Financial Sector Regulator, OBPPs will be allowed to offer Section 54EC Bonds. In issuing these bonds, OBPPs would be required to disclose the lock-in period, investment limit, tax features, etc.

Through this consultation paper, SEBI seeks to expand the scope of operation of OBPPs. This move ensures that OBPPs do not become open marketplaces but still increases access of investors to debt products, bonds, etc. If implemented, these changes will enhance the ease of doing business for these platforms.

CCL

SEBI has introduced the Fast-Track Framework for the launch of Alternative Investment Fund ("AIF") Schemes. [Link]

SEBI has introduced a new fast-track mechanism for processing Private Placement Memorandums ("**PPM**") of AIF schemes to reduce the time required to launch new fund schemes.

Earlier, SEBI undertook a detailed scrutiny of the PPMs and supporting documents required to launch a new scheme. After reviewing them thoroughly, SEBI would issue comments and/or mark defects wherever necessary. This often took multiple rounds of review and revision, which led to significant delays.

This 'Lodge and Launch' model applies to Angel Funds and most categories of AIFs, while Large Value Funds for Accredited Investors remain outside its scope. Under this new framework, AIFs can launch and circulate their schemes 30 days after filing their PPMs with SEBI, provided no objections have been raised during this period. However, if SEBI issues any comments within this 30- day review period, the AIFs must incorporate those changes as directed. For first-time schemes, the launch can take place only after obtaining AIF registration or upon completion of the 30-day review period, whichever is later. Additionally, the first-close must be announced within 12 months of the AIF becoming eligible for the launch of the scheme.

SEBI has also prescribed a mandatory set of documents that must accompany the PPM. This includes the submission of a due diligence certificate from the merchant banker, fit and proper declaration, details of the continuing interest commitment, identification documents and a standard disclaimer as prescribed by SEBI.

The Lodge and Launch framework is expected to reduce regulatory delays and provide investors with faster access to new investment opportunities. New AIF schemes can be launched in the market much faster, making business easier and smoother. SEBI also promotes greater efficiency and transparency through this framework.

TAXATION LAW

SC holds that Goods and Services Tax ("GST") is leviable on the full value of stakes in online gaming and fantasy sports, irrespective of whether the underlying activity involves skill or chance. [*Directorate General of Goods and Services Tax Intelligence (HQS) and Ors. v. Gameskraft Technologies Private Limited and Ors.*] [Link]

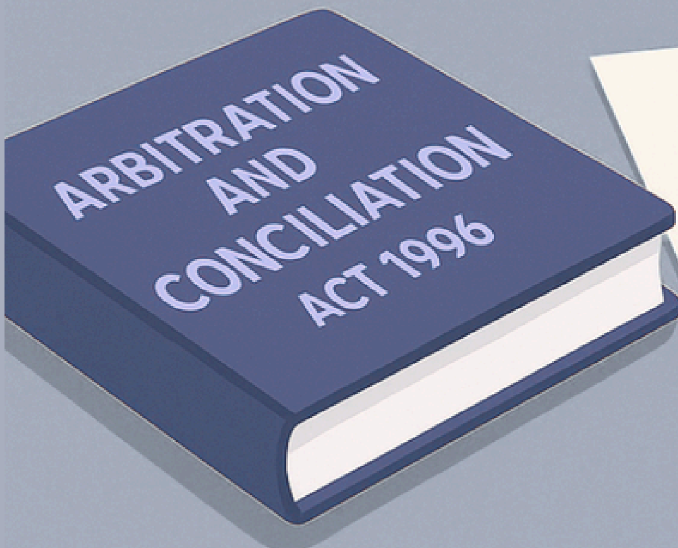
In this case, a two-judge bench of the SC considered whether organised online gaming activities, including fantasy sports and casino games, amount to "betting and gambling" within the meaning of the Central Goods and Services Tax Act, 2017 ("**the GST Act**"), and whether the levy of GST on actionable claims arising from such activities is constitutionally and statutorily valid.

Setting aside the Karnataka HC's judgment, the SC held that the character of betting and gambling turns not on whether a game involves skill or chance, but on whether money or money's worth is staked upon an uncertain outcome. On this basis, organised online gaming activities involving pooled stakes, including fantasy sports, were held to constitute betting and gambling for GST purposes regardless of the skill involved in achieving the outcome.

The Court further held that Sections 2(31), 2(52), 7, 9 and 15 of the GST Act validly bring actionable claims arising from betting and gambling within the GST net, tracing this power to Article 246A of the Constitution. Gaming operators were held to be suppliers of such actionable claims in their own right rather than mere intermediaries, with the entire stake amount constituting consideration without any deduction for prize money or payouts. The valuation mechanism under Rule 31A was upheld as intra vires, and the 2023 amendments introducing Rules 31B and 31C were held to be clarificatory and therefore retrospective in operation.

The judgment lands on an online gaming industry that's already under pressure following the 2025 ban on real-money gaming, and the revived tax demands add a further financial burden on top of that. The judgment does, however, provide an element of regulatory certainty going forward, as it resolves the skill-versus-chance ambiguity that had previously contributed to elevated compliance costs and litigation risk within the sector.

ARBITRATION LAW



SC notes that the import of the ‘body and soul’ of a document in a later contract would also imply the import of the arbitration clause. [*Hirani Developers v. Nehru Nagar Samruddhi CHS Ltd. and Anr.*] [Link].

In a recent decision, the SC observed that a generic adoption of terms of a previous contract into a subsequent contract would also extend to include the arbitration clause. Through this judgment, the Apex Court laid out the distinction between ‘reference to a document’ and incorporation of a document.

Earlier, the Bombay High Court (“HC”) had dismissed the application for appointment of an arbitrator noting the absence of an arbitration agreement between the parties. Although it was already established that arbitration clauses can be adopted by reference, the significance of this judgment lies in the clarity that it offers regarding the nature of such reference.

It was observed that when reference to another document shows intention to adopt the referred document in its entirety, such reference would also extend to the adoption of the arbitration clause contained therein. However, in cases where parties demonstrate the intention to adopt only specific portions of the referred document, such a reference will not automatically include the arbitration clause. Thus, the intention to incorporate the arbitration clause into the contract must be demonstrated.

Through this observation, the judgment adds another layer of clarity to Section 7(5) of the Arbitration and Conciliation Act, 1996 (“the Arbitration Act), which deals with arbitration by reference. Further, the court also gave an illustrative list of instances to explain the distinction between the generic import of clauses and particular reference. It also reiterates the core principle of party autonomy because the decision regarding the adoption of an arbitration clause would be decided as per the intention of the parties.

SC holds that an arbitral award passed without leave of court during a pending civil suit is non-est in law and cannot be used to defeat the suit [*Ashok and Ors. v. Padam Chand and Ors.*] [Link]

In this case, a division bench of the SC considered whether an arbitral award passed under the Arbitration Act, 1940 ("**the 1940 Act**") during the pendency of a civil suit, without the leave of the court as mandated by Section 21 of the Act, could be relied upon to settle or defeat that suit.

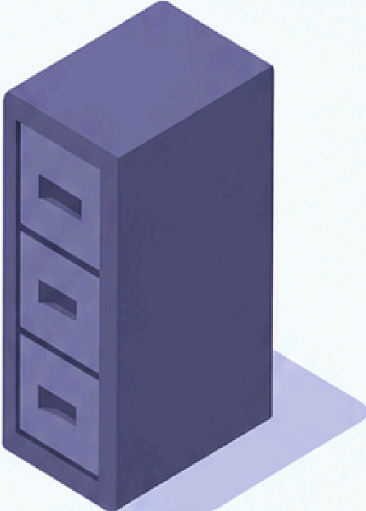
In this case, while the suit was pending, arbitration proceedings were initiated and culminated in the passing of an arbitral award, without the leave of the court. Based on this award, the trial court dismissed the suit. This was upheld by the Madhya Pradesh HC, leading to the present appeal before the SC.

Setting aside the concurrent findings of the HC and the trial court, the SC held that once a civil suit is pending and the parties have knowledge of such pendency, arbitration proceedings cannot be initiated or continued without complying with Section 21 of the 1940 Act. Any arbitral award passed without obtaining such leave of the trial court is not made in compliance with the Act and is, therefore, non-est in the eyes of law.

The Court further held that the requirements of Section 47 of the 1940 Act were not satisfied. Under that provision, an arbitral award can be treated as a compromise or settlement in a pending civil suit only if all parties consent to accept the award. Since the plaintiffs had given no such consent, the award could not be treated as having settled or adjusted their rights with respect to the suit property.

The judgment reaffirms that procedural safeguards under the 1940 Act are not mere technicalities but substantive conditions relating to the validity and enforceability of an award. An award passed in breach of these conditions cannot be used to extinguish the rights of a party who never consented to it.

MISCELLANEOUS



The Ministry of Finance makes amendments to the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 for Insurance Sector Foreign Direct Investment ("FDI"). [Link]

The Ministry of Finance has issued the Foreign Exchange Management (Non-debt Instruments) (Second Amendment) Rules, 2026, amending the Foreign Exchange Management (Non-debt Instruments) Rules, 2019, to implement the revised FDI policy in respect of the insurance sector under FEMA.

Under the earlier policy, foreign investment in Indian insurance companies could not exceed 74%, whereas investment in insurance intermediaries was subject to the applicable sector-specific foreign investment policy restrictions. Through the amendments, the Government now permits up to 100% FDI in an automatic route in insurance companies and insurance intermediaries. Foreign investment in Life Insurance Corporation of India ("**LIC**"), however, is still restricted to 20%.

Under the amended framework, foreign investment up to 100% is permitted in Indian insurance companies and insurance intermediaries, subject to compliance with the Insurance Act, 1938, FEMA pricing guidelines, and applicable regulations prescribed by the Insurance Regulatory and Development Authority of India ("**IRDAI**"). The Amendment Rules also retain governance safeguards, including the requirement that at least one among the Chairperson, Managing Director, Chief Executive Officer, or other specified key managerial personnel be a resident Indian citizen.

The amendment is expected to attract greater foreign investment into the insurance sector, enhance insurance penetration, support long-term capital inflows, and improve ease of doing business while ensuring continued regulatory oversight by the IRDAI.

The Reserve Bank of India ("RBI") discontinues Investment Fluctuation Reserve ("IFR") requirement for commercial banks. [Link]

The RBI has issued the Reserve Bank of India (Commercial Banks Classification, Valuation, and Operation of Investment Portfolio) Second Amendment Directions, 2026 ("**2026 Directions**"), amending the RBI (Commercial Banks – Classification, Valuation, and Operation of Investment Portfolio) Directions, 2025 ("**2025 Directions**"). The amendment, inter alia, discontinues the requirement for commercial banks to maintain an IFR, prescribes the transfer of existing IFR balances to specified reserve accounts, and removes the provisions governing the IFR framework from the 2025 Directions.

Earlier, commercial banks were required to maintain an IFR as a prudential buffer against potential losses arising from fluctuations in the value of their investment portfolios. The framework governing the creation, maintenance, and utilisation of the IFR was prescribed under paragraphs 105 to 108 of the 2025 Directions.

Under the 2026 Directions, the RBI has discontinued the requirement to maintain an IFR with effect from May 18, 2026. Banks have been directed to transfer the existing IFR balance, as on May 17, 2026, to the Statutory Reserve, General Reserve, or Balance of Profit and Loss Account. In the case of foreign banks operating in India through the branch mode, the IFR balance is required to be transferred to statutory reserves maintained in Indian books or to non- repatriable retained surplus. The 2026 Directions also deletes the provisions relating to the IFR framework from the 2025 Directions.

The 2026 Directions have been introduced in light of developments in the prudential framework governing market risk and investment portfolios of commercial banks. They are expected to simplify regulatory requirements, rationalise capital management practices, and provide banks with greater flexibility in the utilisation of reserves while maintaining prudential safeguards under the revised regulatory framework.

The Ministry of Corporate Affairs ("MCA") notifies the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2026, allowing Corporate Social Responsibility ("CSR") funding through social stock exchange instruments. [Link]

The MCA has issued the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2026, which amend the Companies (Corporate Social Responsibility Policy) Rules, 2014, allowing corporations to fund their CSR programs through instruments listed at the Social Stock Exchange and upgrading the CSR implementation process.

Before the amendment, companies could undertake CSR activities only through the modes prescribed under the Companies (Corporate Social Responsibility Policy) Rules, 2014, such as implementing projects directly, through eligible implementing agencies, or in collaboration with other companies. However, there was no provision permitting companies to utilise CSR funds through financial instruments listed on the Social Stock Exchange.

Pursuant to the amendment, companies may now fulfil a portion of their CSR obligations by investing in Zero Coupon Zero Principal ("**ZCZP**") instruments issued by eligible Not-for-Profit Organisations ("**NPOs**") and listed on the Social Stock Exchange, subject to a limit of 10% of their total CSR expenditure for the relevant financial year.

The amendment further introduces definitions of "Not-for-Profit Organisation" and "Zero Coupon Zero Principal Instrument" by aligning them with the regulatory framework prescribed by SEBI. It also specifies that investments made through ZCZP instruments shall not be subject to the impact assessment requirements under the CSR framework. Further, eligible NPOs issuing such instruments are required to complete the funded projects within three financial years and transfer any surplus arising from such projects to funds specified under Schedule VII of the Companies Act, 2013.

Further, the amendment also makes amendments to Schedule VII of the Companies Act, 2013 that now specifically allows the subscription to ZCZP Instruments on the Social Stock Exchange to be classified as a permissible CSR activity.

This amendment will lead to the creation of additional means of making CSR expenditures, better access to funds by social organizations and not-for-profits, and an effective contribution by the Social Stock Exchange in directing company money to socially beneficial activities.

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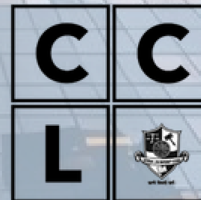
Aditya Danturty Amritanshu Rath Anindita Saha Gauri Dudeja Paavanta Arya Pradhyumn Singh Khangarot Reyansh Thakur Saumya Joshi Shivam Gupta Shreya Tiwari Shubham Singh Sohini Chakraborty Soumya Dubey Surbhi Goyal	

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