THE INDEPENDENT DIRECTOR LIABILITY PARADOX: SECTION 149(12) AND THE GAP BETWEEN STATUTORY PROTECTION AND ENFORCEMENT PRACTICE IN INDIA

AI Disclosure Statement

The author used an AI-assisted tool during the preparation of this manuscript for research organisation, case-law identification, structural drafting, and language editing. All legal analysis, interpretation of case law, arguments, and conclusions presented in this manuscript reflect the author's own independent review and judgment, and have been verified against primary sources prior to submission.

Abstract

Section 149(12) of the *Companies Act, 2013* was enacted to shield independent directors from liability for corporate defaults occurring without their knowledge, consent, or connivance. This paper examines whether that statutory protection functions as intended once a corporate default is actually investigated. Using doctrinal analysis of key precedents including the *Satyam* scandal, the National Company Law Tribunal's intervention in *Infrastructure Leasing & Financial Services Ltd. (IL&FS)*, the Madras High Court's ruling in *V. Selvaraj v. Reserve Bank of India*, and the National Company Law Appellate Tribunal's decision in *Union of India v. Gitanjali Gems Ltd.* The paper traces how the "knowledge, consent or connivance" standard has been interpreted at different stages of proceedings. It argues that a structural gap exists between the interim stage, at which independent directors are frequently named and restrained based on formal directorship alone, and the final stage, at which liability is rarely established absent specific evidence.

The Insolvency and Bankruptcy Code compounds this gap*, with 2016*'s more exacting monitoring obligations, which narrow the practical scope of Section 149(12)'s protection. The paper contends that this enforcement pattern risks discouraging qualified professionals from accepting independent directorships. It proposes a threshold "knowledge pleading" requirement, informed by the Tribunal's own reasoning in *Gitanjali Gems*, to better align enforcement practice with statutory intent.

Keywords: Independent Directors; Section 149(12); Companies Act 2013; Corporate Governance; Director Liability; Insolvency and Bankruptcy Code 2016

I. Introduction

The independent director is an odd creature of Indian company law: not an employee, not a promoter, and not meant to owe her seat to either. The whole point of the role is that she can look at a board decision from the outside and say no if it needs saying. The *Companies Act, 2013*[1] leaned into this harder than the old 1956 Act ever did, mandating independent directors on listed and other prescribed boards and holding them, under Section 166, to duties of care, skill, diligence, and independent judgment.

Parliament also recognized that this asked a lot of someone with very little day-to-day control, so Section 149(12) built in a shield: an independent director can be held liable only for acts committed with her knowledge, knowledge attributable through actual board processes, and with her consent or connivance, or where she simply failed to act diligently. The point was to make independent directorship a viable career, not a trapdoor. The provision is, almost word for word, what the J.J. Irani Committee[2] had recommended to Parliament in 2005: a director who does nothing on learning of a wrong should be held liable, but that knowledge itself "should flow from the processes of the Board," with any dissent recorded in the board minutes.

This paper is not about whether that shield is badly worded. Read plainly, Section 149(12) is sensible, and Indian courts have generally applied it correctly once a case is fully argued. The trouble lies earlier. By the time a matter reaches a considered hearing, an independent director may already have been named as a respondent, had her assets frozen, and spent years and real money defending herself, regardless of the eventual outcome. If being named and being found liable are, in practice, two very different things, and the gap between them is wide, the statute's protection does far less work than its text promises. That gap, and what to do about it, is what this paper is about. Part II reviews how the existing literature has framed this problem. Part III lays out the statutory terrain **who counts as an independent director,**

[1] Companies Act, 2013, No. 18 of 2013 (India).
[2] *Report of the Expert Committee on Company Law*, Ministry of Corporate Affairs, Gov't of India (J.J. Irani Committee, 2005)

What Section 149(12) requires, and how it sits next to SEBI's securities-enforcement track and the *Insolvency and Bankruptcy Code, 2016*. Part 4 works through four cases *Satyam*, *IL&FS*, *V. Selvaraj*, and *Gitanjali Gems* to show the gap in action. Part V checks whether the UK, the US, and Singapore have the same problem. Part VI sketches how the gap could be measured, and what it likely costs in practice. Part VII proposes a fix.

II. Review of Existing Literature

The regulatory and academic literature on independent directors in India has developed largely in two overlapping waves, each responding to a specific governance failure. The first wave followed the *Satyam* scandal and produced the recommendations that fed into the *Companies Act, 2013* itself most directly, the Irani Committee's own proposed liability standard for non-executive and independent directors, which Parliament carried into Section 149(12) in substantially the same words. This literature was primarily concerned with the adequacy of independent directors' formal powers and information access, on the premise that *Satyam*'s independent directors had lacked the tools to detect a sophisticated, concealed fraud. The second wave, following *IL&FS*, shifted focus from information access to enforcement design, asking why a governance framework built around independent oversight had failed to prevent a systemic collapse in India's shadow-banking sector, and what accountability mechanisms should follow. This literature tends to treat *IL&FS* as a case study in board failure generally, without disaggregating the specific procedural posture **interim restraint versus final liability** that this paper argues is the more precise locus of the problem.

A related strand of empirical scholarship has approached the question from the inside rather than through case studies, **asking independent directors themselves, through structured interviews, how they understand their own oversight role in controlled Indian firms.**[3] **That work is valuable for what it reveals about how independent directors perceive their information constraints in practice, but it does not extend to how those perceptions square with subsequent enforcement outcomes,** precisely the connection this paper draws.

What is largely absent across both waves is a sustained examination of enforcement data distinguishing independent directors who are named in proceedings from those ultimately found liable. Existing commentary tends to treat regulatory action against independent directors as a single, undifferentiated category, either citing enforcement statistics as evidence that the protective regime is failing, or citing final liability outcomes as evidence that it is working, without reconciling the two. This paper's contribution is

[3] *Vikramaditya Khanna & Shaun J. Mathew, The Role of Independent Directors in Controlled Firms in India: Preliminary Interview Evidence, 22 Nat'l L. Sch. India Rev. 35 (2010).*

to make that distinction explicit, using the Irani Committee's own drafting record and four subsequent cases, to identify the specific procedural stage at which the statutory protection in Section 149(12) is, in practice, at its weakest.

III. The Rules on Paper: Section 149(12) and Its Neighbours

This Part moves from the ground up **who actually qualifies as an independent director, what Section 149(12) requires, and how it sits alongside two other bodies of law SEBI's securities-enforcement track and the *Insolvency and Bankruptcy Code, 2016*** that also reach independent directors.

A. Who Counts as Independent, and Why That Matters

Before turning to the liability standard itself, it is worth recalling why Indian law defines independent directors as narrowly as it does. Section 149(6)[4] sets out disqualifying relationships in some detail: an independent director must have no material pecuniary relationship with the company, its holding, subsidiary, or associate companies; must not be, or have been, a promoter of the company or any of its group entities; must not be related to promoters or directors; and must not hold, or have held, a position as key managerial personnel or employee in the two immediately preceding financial years. These exclusions are the institutional foundation for the protection in Section 149(12) the statute grants a liability shield specifically to directors whom it has structurally positioned outside the company's ordinary chain of information and control, precisely because it expects them to know less, by design, than an executive director or promoter would.

For listed companies, this framework is reinforced by SEBI's Listing Obligations and Disclosure Requirements Regulations **the *SEBI (LODR) Regulations, 2015***[5], which mandate minimum proportions of independent directors on the board and on the audit committee, and impose additional disclosure obligations, including the requirement that a listed company disclose detailed reasons where an independent director resigns before the end of her term[6] This disclosure requirement is, incidentally, one of the few sources of systematic, publicly available data bearing on independent director attrition, and is drawn on in Part VI below.

B. What Section 149(12) Actually Requires

Section 149(12) provides that an independent director and a non-executive director not being a promoter or

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[4] Companies Act, 2013, sec 149(12), No. 18 of 2013 (India).

[5] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Notification No. SEBI/LAD-NRO/GN/2015-16/013 (Sept. 2, 2015).

[6] *Id. at reg. 30, read with Part A of Schedule III.*

key managerial personnel shall be held liable only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through board processes, and with his consent or connivance or where he had not acted diligently.[7] Three elements are embedded in this formulation, and their conjunctive character is significant. First, there must be knowledge not constructive or presumed knowledge, but knowledge attributable specifically through the processes of the board, such as circulated minutes, agenda notes, or committee reports. Second, there must be consent or connivance mere presence or passive acquiescence is, on a plain reading, insufficient; the provision contemplates active or knowing participation. Third, and disjunctively, liability may also attach where the director failed to act diligently, which imports an independent standard of reasonable care distinct from the knowledge requirement.

This sits alongside the general duties in Section 166, which requires every director to act in good faith, exercise independent judgment, and exercise the duties of care, skill, and diligence that a reasonably prudent person would exercise.[8] Read together, Sections 149(12) and 166 create a layered standard for independent directors specifically: they are judged by the same general duty of care as any director, but are additionally shielded from liability for matters outside their actual knowledge and board-attributable participation.

C. The Officer-in-Default Mechanism

India's approach to corporate criminal and civil liability differs structurally from jurisdictions that rely primarily on a business judgment rule to insulate directors from second-guessing by courts. Instead, the Companies Act attributes liability through the concept of the 'officer in default,' a specific statutory category encompassing whole-time directors, key managerial personnel, and, in their absence, any director specified by the board as responsible for compliance, or, failing that, all directors.[9] This is an attribution mechanism rather than a standard of culpability: it identifies who may be proceeded against, leaving the separate question of what must be proved against them to provisions like Section 149(12) and Sections 339-341. Sections 339 through 341 govern liability for fraudulent conduct of business, empowering the Tribunal to declare any person who was knowingly a party to the carrying on of business with intent to defraud creditors personally responsible, without limitation, for the company's debts.[10] These provisions extend liability to directors, managers, and officers, and, under Section 341, to partners or directors of connected firms and companies. Critically, as discussed in Part III, the standard under these sections requires proof of fraudulent

[7]Companies Act, 2013, § 149(12), No. 18 of 2013 (India)

[8]Companies Act, 2013, § 166, No. 18 of 2013 (India) (setting out the general duties of directors, including the duty to act in good faith, exercise reasonable care, skill and diligence, and exercise independent judgment).

[9] *Companies Act, 2013, § 2(60), No. 18 of 2013 (India) (defining "officer who is in default" to include whole-time directors, key managerial personnel, and, in their absence, a director specified by the Board with his written consent, or, failing such specification, all directors).*

[10]*Companies Act, 2013, §§ 339–341, No. 18 of 2013 (India).*

intent or knowing participation, a considerably higher threshold than mere directorship.

D. Where SEBI Fits In

A further layer of the enforcement landscape relevant to independent directors operates outside the Companies Act altogether, under the securities law jurisdiction of the Securities and Exchange Board of India. Where a listed company is alleged to have violated disclosure norms, related-party transaction requirements, or insider trading regulations, SEBI's Adjudicating Officers may initiate proceedings against the company and, in appropriate cases, against individual directors, including independent directors who sat on the relevant board or committee at the time of the alleged violation. Unlike the Companies Act's oppression-and-mismanagement route, SEBI adjudication proceedings generally require a specific show-cause notice identifying the individual respondent's alleged role, which in principle should operate as a filtering mechanism comparable to the knowledge-pleading requirement this paper later proposes for NCLT proceedings.

In practice, however, SEBI's show-cause notices in large, multi-respondent securities matters have sometimes named the entire board, including independent directors, on the basis of collective board approval of a disclosure or transaction later found to be defective, without always distinguishing the independent directors' more limited practical role from that of executive management and promoters. Appeals to the Securities Appellate Tribunal have, in at least some instances, drawn this distinction explicitly. In *Pritha Bag v. SEBI*, the Tribunal held that a non-executive/independent director could not be penalized absent a specific finding that she had been entrusted with the relevant statutory function or shown to be an "officer in default" reasoning that echoes the same named-versus-liable gap this paper traces through the NCLT context.[11] This is consistent with, though on the present record narrower than, the broader pattern the NCLT cases illustrate: it is one identifiable example rather than proof of a systematic tendency, and a fuller claim about how frequently SAT distinguishes independent directors from the rest of the board would require the kind of systematic review of adjudication and appellate orders that Part VI identifies as a needed next step.

IV. The Insolvency and Bankruptcy Code Overlay

A second, more demanding layer of potential liability arises where a company enters insolvency proceedings. The Insolvency and Bankruptcy Code, 2016 imposes obligations on directors, including independent directors, to act with a degree of proactive vigilance that the Companies Act, 2013 does not require in ordinary circumstances. Provisions addressing fraudulent and wrongful trading, and the avoidance of preferential, undervalued, and fraudulent transactions,

[11] *Pritha Bag v. Securities and Exchange Board of India, Appeal No. 291 of 2017 (Securities Appellate Tribunal, Mumbai) (decision dated Feb. 14, 2019) (India).*

place a premium on directors having monitored the company's financial position and having taken steps to prevent value erosion once insolvency became reasonably foreseeable.[12]

This creates a doctrinal tension that is central to this paper's argument. Section 149(12) is calibrated to protect independent directors who lack actual knowledge of wrongdoing occurring outside the board process. The IBC's monitoring obligations, by contrast, ask what an independent director ought to have known or done once financial distress became apparent a standard that sits closer to constructive knowledge than the Companies Act's actual-knowledge threshold. An independent director who successfully invokes Section 149(12) in relation to a specific fraudulent transaction may nonetheless face separate exposure under the IBC for having failed to flag the company's deteriorating financial position during the same period. The two regimes are not formally in conflict, but they pull independent directors in different directions, and neither the Companies Act nor the IBC clearly delineates where one liability standard ends and the other begins.

V. Four Cases, Two Standards

A. Satyam: The Origin of the Debate

The Satyam Computer Services scandal of 2009 remains the reference point for almost all subsequent Indian scholarship and regulatory reform on independent director accountability. On 7 January 2009, B. Ramalinga Raju admitted, in a letter to the company's board, to a fabrication of the company's accounts amounting to several thousand crores of rupees.[13]

Public attention quickly turned to Satyam's independent directors, several of whom were prominent academics and businesspersons. Their conduct in the months before the fraud came to light was not uniform: the board, including all five independent directors then serving, approved the founder's proposal in December 2008 to acquire the Maytas companies a related-party transaction reversed within hours after investor backlash yet at least one non-executive director later stated he had not been present at the specific meeting where that proposal was discussed

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[12] *Insolvency and Bankruptcy Code, 2016, § 66, No. 31 of 2016 (India) (fraudulent trading/wrongful trading provisions); id. §§ 43, 45, 49 (preferential, undervalued, and fraudulent transaction avoidance provisions, respectively).*

[13] *Letter from B. Ramalinga Raju, Chairman, Satyam Computer Services Ltd., to the Board of Directors (Jan. 7, 2009) (India) (admitting to the fabrication of the company's financial statements); Securities and Exchange Board of India, Order in the Matter of Satyam Computer Services Ltd. (July 15, 2014) (India) (WTM order under §§ 11(1), 11(4), 11B, 11(4A) of the SEBI Act, 1992, detailing the scale of the fraud and directing disgorgement against Satyam's founder and former executives).*

and was, under Indian company law, ineligible to vote on it[14] This unevenness is itself instructive: even within a single board, on a single transaction, individual directors' actual involvement varied in ways that a blanket description of "the independent directors" obscures precisely the kind of granularity this paper argues gets lost at the naming and interim-restraint stage of enforcement.

The subsequent criminal proceedings, including the trial before the Special Court for CBI Cases in Hyderabad, focused primarily on the promoter-executives directly responsible for the fabrication rather than on the independent directors, reflecting an implicit acceptance that attendance at meetings where fabricated figures were presented did not, without more, establish the knowledge or connivance required for liability.[15] Satyam is therefore best read not as a case that expanded independent director liability, but as the event that exposed how limited an independent director's practical ability to detect concealed fraud can be and, consequently, why a knowledge-based liability standard makes normative sense even as it creates the enforcement difficulties this paper examines.

A related, if narrower, piece of Satyam-era litigation is worth a brief mention, with an important caveat attached. The appellant in *Chintalapati Srinivasa Raju v. Securities and Exchange Board of India*[16] was a former executive director and promoter of Satyam who had resigned from the company entirely in August 2000, nearly a decade before the fraud came to light in January 2009, not, as sometimes loosely characterised, a director who merely moved from an executive to a non-executive role. SEBI nonetheless treated him as a "connected person" and "insider" under the 1992 Prevention of Insider Trading Regulations by virtue of his continuing family relationship to B. Ramalinga Raju. The Supreme Court held he had no role in the accounting fraud and set aside the findings against him. It should be stated plainly what this case is and is not: it is a SEBI insider-trading matter turning on the definition of a "connected person" and "insider" under the 1992 Prevention of Insider Trading Regulations, not a Section 149(12) case, and it should not be cited as if it interprets that provision directly. What it does offer, at a more general level, is a second, independently arising illustration of the same underlying fact pattern as Satyam and Selvaraj: a

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[14]*Madan Lal Bhasin, Corporate Accounting Fraud: A Case Study of Satyam Computers Limited, 2 J. Bus. Case Stud. 25, 26 (2013); Scandal at Satyam: Truth, Lies and Corporate Governance, Knowledge@Wharton (Jan. 9, 2009), https://knowledge.wharton.upenn.edu/article/scandal-at-satyam-truth-lies-and-corporate-governance/ (last visited Aug. 22, 2026) (on file with author) (reporting Krishna Palepu's statement regarding his absence from the board meeting discussing the Maytas proposals).*

[15]*Central Bureau of Investigation v. B. Ramalinga Raju, Spl. C.C. No. 3 of 2010 (Special Court for CBI Cases, Hyderabad) (decision dated Apr. 9, 2015) (India).*

[16]*Chintalapati Srinivasa Raju v. SEBI, (2018) 7 SCC 443.*

director once close to a company's operations, but structurally cut off from its books by the time the wrongdoing occurred, spending years establishing that distance in litigation. light in January 2009, not, as sometimes loosely characterised, a director who merely moved from an executive to a non-executive role.

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B. IL&FS: A Tightening at the Interim Stage

The collapse of Infrastructure Leasing & Financial Services Ltd. (IL&FS) in 2018, precipitated by a series of loan defaults that threatened wider contagion in India's non-banking financial sector, produced the most consequential intervention by the National Company Law Tribunal in this area to date. On an application by the Union of India, the NCLT Mumbai Bench suspended the existing board and vested management in a set of government-nominated directors, and separately pursued asset-freeze and remuneration-recovery proceedings against several former directors.[17]

This paper does not have a verified, paragraph-level record of how the Tribunal treated individual independent directors in IL&FS, and it would be a mistake to assert specific findings that cannot be checked against the primary order. What is well documented, and is enough to make the point, is the scale and speed of the interim action itself: the entire incumbent board of independent directors included was displaced in a single order, before any individualised inquiry into who knew what. That is a useful illustration of this paper's broader argument precisely because it asks so little of the specific facts: whatever the eventual, director-by-

[17] *Union of India v. Infrastructure Leasing & Financial Services Ltd., C.P. No. 3638/§§ 241–242/NCLT/MB/2018 (National Company Law Tribunal, Mumbai Bench) (interim order dated Oct. 1, 2018) (India) [hereinafter IL&FS].*

director findings turn out to be, and IL&FS's proceedings are still unfolding across multiple fora years later, the interim mechanism itself did not, and structurally could not, distinguish a director with real knowledge of the group's distress from one without it.

The scale of the group itself compounds the point. IL&FS operated through a large, multi-layered structure of subsidiaries and joint ventures accumulated over roughly three decades.[18] A structure large enough that even a careful regulator would struggle to distinguish, at the speed an interim order demands, between a director with genuine oversight failures at a specific subsidiary and one whose formal association with the group was comparatively peripheral. The subsequent appellate proceedings before the NCLAT, concerning board reconstitution and the resolution process that followed, were necessarily focused on stabilising a systemically important financial group rather than on adjudicating any individual director's knowledge[19] a defensible regulatory priority given the stakes, but one that illustrates why the interim stage of a proceeding on this scale is a poor proxy for the individualised liability determination Section 149(12) actually contemplates.

It is also worth noting that both the IL&FS and Gitanjali Gems proceedings were brought under Sections 241 and 242 of the Companies Act, the oppression-and-mismanagement provisions, rather than under a bespoke director-liability procedure. These sections were designed principally to provide a remedy to shareholders and creditors against mismanagement, and confer broad interim powers on the Tribunal to protect a company's assets pending final relief. That structural choice using a company-protective remedy as the procedural vehicle for what functions, for individual respondents, as a liability proceeding helps explain why the interim threshold for including a director as a respondent is set so much lower than the final threshold for holding that director liable: the two thresholds were not designed with the same question in mind.

C. V. Selvaraj: Judicial Reaffirmation of the Knowledge Standard

If IL&FS shows enforcement at its most aggressive, *V. Selvaraj v. Reserve Bank of India* shows what happens when a director actually gets a full hearing on the merits. The petitioner, a retired IAS officer, joined the board of First Leasing Company of India Ltd. as a non-executive independent director in August 2012 and served barely seven months of eleven years, from 2002 to 2013, that

[18]*Serious Fraud Investigation Office, Ministry of Corporate Affairs, Gov't of India, Investigation Report into the Affairs of IL&FS Financial Services Ltd. and Other Group Companies (May 28, 2019), cited in Text of Charge sheet Filed by SFIO against IL&FS, TaxGuru (June 4, 2019), https://taxguru.in/company-law/charge-sheet-filed-sfio-ilfs.html (last visited Aug. 22, 2026) (on file with author).*

[19]*Union of India v. Infrastructure Leasing & Financial Services Ltd., Company Appeal (AT) No. 346 of 2018, National Company Law Appellate Tribunal, New Delhi (proceedings concerning board reconstitution and the subsequent resolution process) (India).*

regulators later scrutinised for accounting fraud engineered by the company's founder-managing director. On the strength of nothing more than his board membership, the State Bank of Mysore (and, after a merger, the State Bank of India) listed him as a wilful defaulter under the RBI's Master Circular, a classification the Madras High Court itself described as carrying "serious consequences" and "social stigma."[20]

The Court's actual holding tracks Section 149(12) closely: an independent director "shall be held responsible only in respect of such acts of commission or omission... which occurred with his knowledge, consent or connivance," and on the facts, "no materials" connected the petitioner to the fraud.[21] Two things about the judgment are worth pulling out. First, the RBI's own Master Circular already builds in something close to the Section 149(12) standard it bars banks from tagging a non-whole-time director as a wilful defaulter unless it is "conclusively established" that he knew of the default through board minutes and failed to object, or that it occurred with his consent or connivance so the Court was not importing a company-law standard into an unrelated banking context; the regulator's own circular already required it. Second, the Court added a general point about how the standard should be applied: "penal provisions require strict proof, and it cannot be permitted to be exercised casually." That line captures precisely what this paper argues is missing at the interim stage of most enforcement proceedings.

What makes Selvaraj useful for this paper's argument is not the eventual outcome the petitioner won, unremarkably, because the statute and the RBI's own circular required that result, but the road to it. Separately from the litigation, the State Bank of India's own internal Wilful Defaulter Identification Committee reviewed the same file and declined to list the petitioner roughly three years before the Court ruled, evidence that even the bank's own process, once it looked closely, could not sustain the initial classification. Getting there took roughly three years: the petitioner was first threatened with the wilful-defaulter tag in 2014, sued in 2016, and only obtained relief in 2019. A retired civil servant with seven months' tenure and four board meetings to his name spent three years defending a classification that both the bank's own committee and the High Court ultimately found unsupported by any evidence at all.

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[20] *V. Selvaraj v. Reserve Bank of India, W.P. No. 43433 of 2016, 2019 SCC OnLine Mad 39151 (Madras H.C. Aug. 29, 2019) (India) [hereinafter Selvaraj].*

[21] *Selvaraj, supra note 19, ¶¶ 15, 17–18 (quoting §§ 149(6)–(12) of the Companies Act, 2013 and cls. 2.5, 3(d) of the Reserve Bank of India Master Circular on Wilful Defaulters, dated July 1, 2015).*

D. Gitanjali Gems: Naming, Vacating, and the Tribunal's Own Acknowledgement of the Gap

The clearest illustration of the named-versus-liable distinction this paper advances comes from the National Company Law Appellate Tribunal's decision in *Union of India, Ministry of Corporate Affairs v. Gitanjali Gems Ltd. & Ors.*, arising out of the Punjab National Bank letter-of-undertaking fraud.[22] The Ministry's petition before the NCLT Mumbai Bench impleaded well over a hundred respondent companies, partnership firms, trusts, and individual directors and key managerial personnel across the corporate web associated with the principal wrongdoers seeking interim orders restraining the disposal of assets pending investigation by the Serious Fraud Investigation Office.[23]

Among the respondents challenging their inclusion was a director of one group company who submitted that he had resigned from the board as early as 2009, nine years before the fraud came to light and had no subsequent association with the company, and that the Union of India had incorrectly listed him as a key managerial person at the relevant time. The Appellate Tribunal accepted this submission and vacated the restraint order against him, holding that he had been wrongly arrayed as a respondent.[24]

More significant for this paper's broader argument is the Tribunal's articulation of the applicable standard at the interim stage. The Tribunal held, in terms, that for the purpose of passing an interim order it could not fix the personal liability of delinquent directors, managers, officers, or other employees in the absence of specific evidence, notwithstanding that an investigation and an application under Sections 241 and 242[25] remained pending. This is, in effect, a judicial acknowledgement of precisely the gap this paper identifies: an interim order restraining a director's assets may issue on the strength of formal association alone, while the Tribunal itself recognises that it cannot yet determine, and does not purport to determine, actual liability. Final

[22] *Union of India v. Gitanjali Gems Ltd., Company Appeal (AT) No. 103 of 2018 (NCLAT July 12, 2018) (India), arising out of C.P. No. 277/241-242/NCLT/MB/MAH/2018 (NCLT Mumbai Bench Apr. 2, 2018*

[23] *Id.* at ¶ 2.

[24] *Id. at ¶¶ 14, 42-43 (vacating the interim freeze orders against independent non-executive directors who established that they had severed formal board ties prior to the execution of the fraud).*

[25] *Companies Act, 2013, §§ 241-242, No. 18 of 2013 (India).*

effect, a judicial acknowledgement of precisely the gap this paper identifies: an interim order restraining a director's assets may issue on the strength of formal association alone, while the Tribunal itself recognises that it cannot yet determine, and does not purport to determine, actual liability. Final liability, the Tribunal noted, remains governed by the fraudulent-conduct provisions in Sections 339 through 341,[26] which require proof of knowing participation in the fraud, a standard considerably closer to Section 149(12)'s[27] conjunctive test than the threshold applied when the interim restraint order was first issued.

E. Synthesis: A Two-Stage Standard the Statute Does Not Name

It is worth pausing to state precisely what the four episodes surveyed above do, and do not, show. They do not show that Indian courts and tribunals apply an incorrect legal standard when they engage substantively with Section 149(12). *Selvaraj*[28] and the final-liability discussion in *Gitanjali Gems*[29] apply essentially the same conjunctive knowledge-and-connivance test that a careful reading of the statute would produce. What they show instead is that Indian enforcement practice operates, in effect, on two different standards depending on the procedural stage reached: a lower, largely status-based standard for naming and interim restraint, and a higher, evidence-based standard for final liability.

Furthermore, the statute itself makes no provision for, or acknowledgement of, this bifurcation. Section 149(12) speaks in the language of ultimate liability it says nothing about what a regulator or applicant must show before a director may be named or restrained in the first place. That silence has been filled, in practice, by ordinary civil and tribunal procedure governing interim relief generally, which asks only whether there is a prima facie case for protecting the company's assets, a threshold designed for a different question than the one Section 149(12) was drafted to answer.[30]

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[26]*Companies Act, 2013, §§ 339-341, No. 18 of 2013 (India).*
[27]*Gitanjali Gems, supra note 21; see also National Company Law Tribunal Rules, 2016, r. 11, r. 37, Gazette of India, pt. II sec. 3(i) (July 21, 2016); Code of Civil Procedure, 1908, Order XXXIX, rr. 1–2, No. 5, Acts of Imperial Legislative Council, 1908 (India).Act, 2013, § 149(12), No. 18 of 2013 (India).*
[28]Selvaraj, supra note 19..
[29]*Gitanjali Gems, supra note 21; see also National Company Law Tribunal Rules, 2016, r. 11, r. 37, Gazette of India, pt. II sec. 3(i) (July 21, 2016); Code of Civil Procedure, 1908, Order XXXIX, rr. 1–2, No. 5, Acts of Imperial Legislative Council, 1908 (India).*
[30]*See Companies Act, 2013, No. 18 of 2013, section 242(4) (India); see also Code of Civil Procedure, 1908, Order XXXIX, rr. 1–2, No. 5, Acts of Imperial Legislative Council, 1908 (India).*

Read together, these four episodes suggest a consistent pattern rather than a set of unrelated incidents. Where Indian courts and tribunals reach a considered final determination, as seen in *Selvaraj* and the Tribunal's own final-liability standard as articulated in *Gitanjali Gems,* the knowledge-based protection in Section 149(12) is applied with real effect. But the interim stage, at which independent directors are named, restrained, and exposed to years of litigation and reputational cost, operates on a materially lower threshold than the final standard does not require and that the statute's text does not obviously contemplate. The gap is not a matter of courts misapplying the law; it is a structural feature of how Indian enforcement proceeds, which the law as currently drafted does little to close.

VI. Comparative Analysis: United Kingdom, United States (Delaware) and Singapore

Comparative analysis serves a specific, limited purpose in this paper: not to suggest that India should import a foreign liability standard wholesale, but to test whether the enforcement-stage gap identified in Part IV is a general feature of independent-director liability regimes or a distinctly Indian procedural artefact. If comparable jurisdictions exhibit the same pattern aggressive naming followed by narrow final liability the case for reform would rest more on efficiency and fairness grounds than on any claim that India's practice is anomalous. If, however, other jurisdictions filter more effectively at the point of naming, that strengthens the case that India's gap is a product of specific, identifiable procedural choices, and is therefore a tractable target for reform. India's approach can usefully be situated against two comparators.

Jurisdiction	Primary Substantive Standard	Procedural Filter (Before Naming)	System Performance
India	**Section 149(12), Companies Act, 2013** (Conjunctive knowledge, consent, or connivance)	**Weak:** Mere status/directorship is often sufficient for interim asset-restraint orders.	Aggressive interim naming; narrow final liability.

United Kingdom	**Section 174 & 1157, Companies Act 2006** (Duty of care balanced by judicial discretion to excuse).	**Moderate to Strong:** Claimants/FCA must plead specific process failures or knowledge.	Process-driven filtering; rare routine board-wide naming.
United States (Delaware)	**Business Judgment Rule & DGCL § 102(b)(7)** (Presumption of good faith & exculpatory charters)	**Strong:** Plaintiffs must plead particularised facts of bad faith to survive dismissal.	High threshold to name; rapid early-stage dismissal.
Singapore	**Section 157, Companies Act 1967** (Honesty and reasonable administrative diligence).	**Strong:** CAD and ACRA focus initial investigation strictly on operational/signing roles.	Targeted enforcement; protection via regulatory practice.

A. United Kingdom

In the United Kingdom, Section 174 of the Companies Act 2006[31] imposes a duty of reasonable care, skill, and diligence on all directors, assessed by both an objective standard like what may reasonably be expected of a person carrying out the relevant functions and a subjective standard the particular director's own knowledge, skill, and experience. While this does not create a bespoke independent-director carve-out equivalent to Section 149(12),[32] UK law supplies a different kind of safety valve at a later stage: Section 1157 of the same Act[33] allows a court to relieve a director from liability, wholly or in part, where it finds that she acted honestly and reasonably and ought

[31]Companies Act 2006, c. 46, § 174 (UK).
[32]*See Companies Act, 2013, § 149(12), No. 18 of 2013 (India)*
[33]Companies Act 2006, c. 46, § 1157 (UK).

fairly to be excused, given all the circumstances of the case expected of a person carrying out the relevant functions) and a subjective standard (the particular director's own knowledge, skill, and experience). While this does not create a bespoke independent-director carve-out equivalent to Section 149(12),[34] UK law supplies a different kind of safety valve at a later stage: Section 1157 of the same Act[35] allows a court to relieve a director from liability, wholly or in part, where it finds that she acted honestly and reasonably and ought fairly to be excused, given all the circumstances of the case.

That is a materially different design choice from Section 149(12), which India front-loads its protection into the definition of liability itself, while the UK grants courts a broad, later-stage discretion to excuse a director regardless of how liability is defined but the practical effect is similar: a well-intentioned outside director who acted reasonably has a real prospect of being excused before the matter runs its full course. UK enforcement practice, including derivative claims under the 2006 Act and regulatory action by the Financial Conduct Authority, has also generally required a claimant to plead specific knowledge or a specific failure of process before a non-executive director is named, rather than naming all directors as a matter of investigative routine.

B. United States (Delaware)

In the United States, the business judgment rule, most influentially articulated in Delaware jurisprudence, creates a strong presumption that directors, including outside directors, acted on an informed basis and in good faith, placing the burden on a plaintiff to rebut that presumption before liability can even be considered. The practical effect, reinforced by exculpatory charter provisions permitted under Delaware law under DGCL § 102(b)(7),[36] is that outside directors are rarely named in the first instance without a specific, particularised allegation of bad faith or a knowing breach of duty.

C. Singapore

Directors in Singapore[37] owe a general statutory duty under Section 157 of the Companies Act 1967 to act honestly and use reasonable diligence, and the Singapore Exchange's Listing rules impose

[34] *See Companies Act, 2013, § 149(12), No. 18 of 2013 (India)*
[35] Companies Act 2006, c. 46, § 1157 (UK).
[36] *DEL. CODE ANN. tit. 8, § 102(b)(7) (2024).*
[37] *Singapore offers a further, geographically proximate comparator with particular relevance given the volume of Indian-origin corporate groups with Singapore holding structures. See Companies Act 1967, 2020 Rev. Ed., § 157 (Sgp.).*

independent-director eligibility and disclosure requirements broadly analogous to SEBI's. Singapore does not have a direct equivalent to Section 149(12)'s conjunctive knowledge test; instead, its Commercial Affairs Department and the Accounting and Corporate Regulatory Authority have tended, in practice, to concentrate initial investigative attention on directors with an operational or signing role in the specific transactions under scrutiny, rather than naming an entire board or group of affiliated-company directors as a matter of course.

The comparison is instructive rather than dispositive: it is not that Indian law's substantive standard under Section 149(12) is more permissive of liability than its UK, US, or Singaporean counterparts; on the contrary, the conjunctive knowledge-and-connivance test is, if anything, more protective on paper. The divergence lies at the procedural stage. All three comparators tend to require some particularised basis before a non-executive or independent director is formally proceeded against at all, whereas Indian enforcement practice, as illustrated by ***IL&FS*** and ***Gitanjali Gems***, permits directors to be named and restrained based on formal position, with the knowledge-based standard applied only later, if the matter is contested to a final hearing. India's problem, in other words, is not an overly generous substantive standard; it is the absence of a comparable procedural filter at the point of naming.

VII. Toward an Empirical Test: Methodology and Enforcement Pattern

Parts I and IV established the doctrinal architecture and traced how it has operated across four illustrative episodes. This Part turns from doctrine to pattern: it sets out how the named-versus-liable distinction introduced in Part I could be tested systematically, and then draws out, based on the available evidence, what that pattern appears to be and why it matters.

A. How the Gap Could Be Measured

The doctrinal analysis in Part IV suggests a testable empirical proposition: that a significant proportion of independent directors named in SEBI adjudication proceedings, SFIO investigations, and NCLT/NCLAT applications since the Companies (Amendment) Act, 2020[38] are not ultimately found liable, and that the interval between naming and final resolution is, on average, substantial. Testing this proposition rigorously would require compiling a dataset from three sources: SEBI's publicly available adjudication and enforcement orders; NCLT and

[38] *Companies (Amendment) Act, 2020, No. 29 of 2020 (India).*

NCLAT case records accessible through their respective registries and through case-law aggregators; and, where obtainable, SFIO investigation outcomes, which are less systematically published and may require the Right to Information Act, 2005[39] to access in usable form.

Each record in such a dataset would need to be coded along at least four dimensions:

i. whether the respondent was formally an independent director, as opposed to an executive director, promoter, or key managerial personnel, at the relevant time;

ii. the date and nature of the initial action, whether a show-cause notice, an interim restraint order, or a formal charge;

iii. the date and outcome of the final determination, distinguishing between exoneration, a negotiated settlement, and a substantive finding of liability; and

iv. the elapsed time between the two. A dataset coded in this manner would allow a researcher to calculate, for a defined period, the proportion of named independent directors who were ultimately held liable, and the average duration of proceedings against those eventually exonerated the two figures that most directly bear on the deterrence question this paper raises.

This paper does not itself present a completed dataset of this kind, both because a comprehensive compilation was beyond its scope and because, as noted above, enforcement records are not centrally indexed in a form that permits efficient systematic coding without significant independent data-collection effort. What the case studies in Part IV offer instead is a set of illustrative data points, *Gitanjali Gems*[40] in particular, that are consistent with the proposed empirical pattern and that identify, with some precision, the procedural mechanism through which the pattern arises. A natural extension of this paper, and one the author would encourage future researchers to pursue, would be to build the dataset described here across a five-year window and test the proposition formally.

[39] *Right to Information Act, 2005, No. 22 of 2005 (India).*

[40] *Union of India v. Gitanjali Gems Ltd., Company Appeal (AT) No. 103 of 2018, National Company Law Appellate Tribunal, New Delhi (decision dated July 12, 2018) (India).*

B. What the Pattern Likely Costs

Even without a completed dataset, the pattern traced through Parts III and IV has two related consequences worth drawing out explicitly. The first is doctrinal: it reveals that the practical content of Section 149(12) depends heavily on the procedural stage at which it is invoked, a dependency the statute's text does not itself register. A provision that operates robustly at final hearing but weakly at the interim stage offers materially less protection than its wording suggests, because for most named respondents the interim stage is where the practical cost frozen assets, reputational damage, years of legal expense is actually incurred, regardless of the eventual outcome. This is not a hypothetical cost: legal representation before the NCLT and NCLAT in a multi-respondent matter of the scale seen in *IL&FS* or *Gitanjali Gems* routinely runs into significant, sustained expenditure over several years, an amount that is rarely, if ever, recovered by a respondent who is ultimately exonerated, since Indian civil and tribunal practice does not generally award costs on a scale that would compensate for it.

The second consequence is behavioural, and here the evidence is necessarily more circumstantial than the doctrinal analysis above, since enforcement data on independent director outcomes is not centrally or uniformly published by SEBI, the SFIO, or the NCLT registries. What can be observed is that regulatory and governance commentary in India has, since *IL&FS*, repeatedly flagged rising resignation rates among independent directors of listed companies, and SEBI's own listing regulations require companies to disclose the reasons for such resignations. While resignation data alone cannot establish that enforcement risk is the dominant cause, career considerations, time commitments, and remuneration levels are also plainly relevant; the correlation is consistent with the concern this paper raises: that a regime combining low-threshold naming with high-threshold eventual liability creates exactly the kind of asymmetric risk that a rational, qualified professional would price into her decision to accept, or continue in, an independent directorship.

It is also worth noting the Ministry of Corporate Affairs' own recognition, through its March 2020 circular,[41] clarifying the applicability of Section 149(12), that confusion about the scope of independent director liability had become significant enough to warrant administrative clarification. That circular addressed interpretive uncertainty about the provision's scope, but did

[41] *Ministry of Corporate Affairs, Gov't of India, General Circular No. 05/2020, Clarification on Prosecutions Filed or Internal Adjudication Proceedings Initiated Against Independent Directors, Non-Promoters and Non-KMP Non-Executive Directors (Mar. 2, 2020).*

not, and could not by itself, address the procedural gap this paper identifies, since the circular speaks to substantive liability standards rather than to the threshold for naming a director in the first place.

C. Closing the Gap

1. Threshold Knowledge-Pleading Requirement

The central claim of this paper is not that Section 149(12) is poorly conceived or that Indian courts have misapplied it, but that the statute's protection is procedurally hollow at precisely the stage where it matters most to the individuals it is meant to protect. Addressing this requires an intervention aimed at the naming stage itself, rather than a further refinement of the final liability standard, which the case law discussed above shows is already being applied sensibly.

This paper proposes a threshold "knowledge pleading" requirement, modelled on the reasoning the Appellate Tribunal itself employed in *Gitanjali Gems* when it vacated the restraint order against a director with no continuing association with the company. Before an independent director is named as a respondent in an application under Sections 241–242, or subjected to an interim restraint order, the applicant whether the Ministry of Corporate Affairs, SEBI, or another regulator should be required to plead, with reasonable particularity, a basis for believing that the director had knowledge attributable through board processes and consented to or connived in the relevant conduct, or specific facts suggesting a failure to act diligently. This need not be a high evidentiary bar; it would not require proof at the pleading stage of what must ultimately be proved at a final hearing. It would, however, require something more than formal directorship status on the company's register, which is currently sufficient to trigger inclusion in enforcement proceedings and, often, an accompanying restraint order. Stated as a rule rather than a principle, the proposed amendment to the National Company Law Tribunal Rules, 2016[42] would read along the following lines:

> *No application under Section 241, Section 242, or Section 339 seeking the impleadment of, or interim relief against the personal assets of, an independent director appointed under Section 149(6) shall be admitted unless accompanied by a statement identifying, with reasonable particularity, the board process, communication, or other material through which knowledge of the alleged default is attributed to that director, and the facts relied upon to show consent, connivance, or a failure to act diligently. Formal directorship status*

[42]National Company Law Tribunal Rules, 2016, r. 11, Gazette of India, pt. II sec. 3(i) (July 21, 2016).

alone shall not constitute a sufficient basis for such impleadment or relief.

This is offered as an illustration of the proposal's operative content, not as drafted legislative text; the precise wording would properly be a matter for the Tribunal's own rulemaking process or, if pursued as a statutory amendment, for Parliament.

2. Institutional Vehicle for Implementation

A proposal of this kind requires an institutional vehicle to become operative, and two are readily available within the existing framework. The first is procedural: the National Company Law Tribunal Rules, 2016 could be amended, or a practice direction issued by the Tribunal's leadership, to require that any application under Sections 241-242 seeking to implead an independent director as a respondent, or to seek interim relief against her personally, include a specific paragraph identifying the factual basis for believing she had knowledge attributable through board processes and consented to or connived in the relevant conduct. This is the more direct route, since it operates at the level of the very proceedings in which the gap identified in this paper arises.

The second is legislative: Parliament could amend Section 149(12) itself to make explicit that its knowledge-and-connivance standard governs not only final liability but also the threshold for impleading an independent director as a respondent in the first place, closing the interpretive silence identified in the Synthesis section through statutory text rather than procedural rule. Either route would achieve the substance of this paper's proposal; the procedural route is likely to be faster to implement, given that it does not require the legislative process, and could plausibly be piloted by the Tribunal on its own administrative authority.[43]

3. Reconciling the Insolvency and Companies Act Monitoring Standard

A second, narrower recommendation addresses the tension identified in Part 3 between Section 149(12) and the Insolvency and Bankruptcy Code, 2016.[44] Because the IBC's fraudulent- and wrongful-trading provisions ask what a director ought reasonably to have known once insolvency became foreseeable, while Section 149(12) asks what the director actually knew, an independent

[43] *For an example of the Tribunal exercising its administrative authority to govern filings, see National Company Law Tribunal Rules, 2016, r. 11 & r. 14.*

[44] *Insolvency and Bankruptcy Code, 2016, No. 31 of 2016 (India).*

director can, in principle, satisfy the Companies Act standard while failing the IBC standard for the same underlying conduct.

Regulators and resolution professionals invoking IBC provisions against independent directors should be encouraged, through Insolvency and Bankruptcy Board of India (IBBI) guidance, to draw an explicit distinction between an independent director's general oversight role and the more exacting monitoring expected of directors with financial or executive responsibilities, so that the constructive-knowledge standard under the IBC does not become a *de facto* route around the actual-knowledge standard Parliament chose for ordinary corporate liability under Section 149(12).[45]

4. Anticipating Objections

Two objections to the knowledge-pleading proposal deserve brief consideration. The first is that a pleading threshold could allow genuinely complicit directors to evade timely restraint, allowing them to dissipate assets before liability is established. This risk is real but manageable: the proposal does not remove the Tribunal's existing interim powers, including the power to order asset preservation on an *ex parte* or urgent basis where the applicant can show a *prima facie* basis for believing dissipation is likely; it simply requires that the applicant articulate, even briefly, why a particular independent director as opposed to the company and its executive management is an appropriate target of that power.[46]

The second objection is that regulators, operating under time pressure in the early stages of a suspected large-scale fraud, may not yet have the information needed to distinguish complicit from peripheral independent directors, and that a pleading requirement would simply shift investigative work forward in time without reducing it. This is a fair practical concern, and the answer is not to insist on a high threshold, but a low and workable one: board minutes, committee membership records, and signing authorities are typically available to investigators at a very early stage, often before a formal petition is filed, and a requirement to reference this readily available material rather than to conduct a full merits investigation should not meaningfully slow enforcement against

[45] *See Insolvency and Bankruptcy Code, 2016, § 66(2) (setting out the "due diligence" and "ought to have known" thresholds that trigger personal liability for wrongful trading during the twilight zone preceding insolvency).*

[46] *See* National Company Law Tribunal Rules, 2016, r. 37 & r. 111 (governing the procedure for filing urgent motions and the service of notice, which can be bypassed or abridged under the inherent powers of the Bench).

companies or against directors who are genuinely implicated.

5. Implications for the Broader Governance Debate

The argument advanced here also bears on a wider, ongoing debate about the direction of Indian corporate governance reform. Much recent legislative and regulatory attention has focused on **the Companies (Amendment) Act, 2025**[47] Amendments to Delaware-style safe-harbour provisions notwithstanding being a foreign example, and closer to home, the continuing refinement of *SEBI*'s related-party transaction and board-composition norms has focused on giving boards clearer rules and more certainty about when their conduct will be protected from second-guessing.

The knowledge-pleading proposal advanced in this paper is best understood as belonging to that same reform tradition, applied to a specific procedural gap: it does not ask for a new substantive right for independent directors, but for the existing substantive right in Section 149(12) to be given practical effect at the stage where it is currently least effective. A governance framework that grants independent directors a liability shield in principle, while allowing enforcement practice to erode it in practice, ultimately sends a confused signal to the market for governance talent, precisely the audience the 2013 reforms were designed to reassure.

VIII. Conclusion

India's independent director regime rests on a simple premise: that professionals who are neither promoters nor employees can supply a genuinely independent check on corporate management only if they are not themselves exposed to open-ended liability for decisions outside their knowledge and control. Section 149(12) gives that premise legislative form. The case law surveyed in this paper shows that Indian courts and tribunals have, on the whole, respected the letter of that protection once a matter is fully contested. The persistent gap lies earlier in the process in the ease with which independent directors are named and restrained before any assessment of their actual knowledge or connivance takes place. Closing that gap **not by diluting the substantive standard, but by disciplining the point at which enforcement begins** would bring Indian practice closer to the legislative intent behind Section 149(12), and would remove a source of risk that appears,

[47] *Companies (Amendment) Bill, 2025, Bill No. XXXII of 2025 (introduced in Lok Sabha, Dec. 5, 2025) (India).*

on the available evidence, to be shaping who is willing to take on the role the 2013 reforms were designed to strengthen.[48]

[48] *See Companies Act, 2013, § 149(12), No. 18 of 2013 (India).*