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A STUDY OF LEGAL AND REGULATORY FRAMEWORK OF CORPORATE ADVISORY FIRMS WITH REFERENCE TO THE MODERN BUSINESS ENVIRONMENT – ASEEM SRIVASTAVA & Dr. JUHI SAXENA

ABSTRACT

The research paper is a critical analysis of the changing legal and regulatory environment in regard to corporate advisory firms under the modern circumstances of the business environment. Historically viewed as non-portable, hard-copy repositories, which are protected by basic non-disclosure and fiduciary obligations, advisory firms have been rapidly turned into dynamic, decentralised digital repositories sitting in third-party cloud structures. This paper conducts research using the doctrinal and analytical methodology to examine how new disruptors namely artificial intelligence, stringent data privacy frameworks (like the GDPR and the DPDA Act in India) and the imposition of Environmental, Social, and Governance (ESG) mandatory reporting fundamentally changed the compliance environment. The study outlined ontological lapse between the traditional corporate jurisprudence and the modern digital reality. It raises significant areas of legal weakness, such as

the flimsiness of digital "Chinese Walls," the administrative cost of running Structured Digital Databases (SDDs) which are unalterable, and the growing liability of fiduciaries as arising of algorithmic negligence. There is a conclusion, based on the inadequacy of the contemporary, disjointed regulatory policy in the era of high-speed global transactions, and actionable reforms are suggested in the paper. The most appropriate solutions among them are the unification of multi-sectoral compliance standards, creation of tech-legal safe harbours, and the introduction of the so-called Zero Trust digital architecture to balance the new professional liability and also preserve the integrity of the market conditions.

INTRODUCTION

The practise of corporate advisory is both the strategic and intellectual heart of the contemporary corporate arena, which assists business organisations in undertaking intricate financial and business deals such as mergers and acquisitions (M&A), financial structuring, capital financing, and legal compliance.[1] The core of this profession is a database of collected sensitive business intelligence, strategic blueprints, compliance audit, information that is unpublished and price-sensitive (UPSI), a legal opinion. Conventionally, legal and regulatory structures surrounding these firms dwell on the generational notions of corporate law and greatly emphasised on fiduciary, client-advisor and contract confidentiality enshrined by various standard statutes such as the Companies Act, 2013 and the

[1] JOHN ARMOUR ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (3d ed. 2017).

Indian Evidence Act, 1872, which have long been in place.[2]

This traditional paradigm has, however, been shaken by the modern business environment. The accelerated digitalization of company business practises, the implementation of cloud computing infrastructure and the use of Artificial Intelligence (AI), in the due diligence, have made the advisory firm no more a physical and locked-up dossier, but a dynamic and decentralised digital object.[3] This development has brought new legal complications never experienced before. The processes of preparing, maintaining, and transferring advisory firms are no longer a question of non-disclosure agreements (NDAs) and simple loyalty to the company, today is heavily dominated with strict data protection laws, including the European Union General Data Protection Regulation (GDPR)

[2] The Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India); The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872 (India).
[3] Jane K. Winn, The Securitization of Corporate Data and Privacy Regimes, 60 STAN. L. REV. 135 (2020).

and the Digital Personal Data Protection (DPDP) Act, 2023 in India.[4]

Additionally, the intensity of the observation of corporate intermediaries has increased due to regulatory agencies such as the Securities and Exchange Board of India (SEBI).[5] Due to the contemporary market focus on insider trading prevention, management of complex conflicts of interest, and environmental, social, and governance (ESG) compliance, the regulatory load of the advisory firm has increased numerous folds. The advisors are also legally required to keep detailed time-stamped electronic documentation to ensure active compliance and protect themselves against serious professional liability. Therefore, one should critically scrutinise the legal and regulatory framework that governs the corporate advisory firms to be in a position to appreciate how the nature of the traditional laws is changing, or not changing, to meet the complex nature of

[4] Regulation (EU) 2016/679 (General Data Protection Regulation), 2016 O.J. (L 119) 1; The Digital Personal Data Protection Act, 2023, No. 22, Acts of Parliament, 2023 (India).
[5] Umakanth Varottil, The Evolution of Corporate Governance in India, 2 J. INDIAN L. & SOC'Y 1 (2021).

carrying out business in the modern international business arena, which is dominated by technology and highly regulated.

Conceptual and Regulatory Framework of Corporate Advisory

The Concept and Scope of Corporate Advisory

Corporate advisory is highly technical and multispecialized field which advises corporate body using strategic, financial, and legal advice defined to assist intricate business goals.[6] Advisory services are normally used in contrast to normal corporate management which is normally practised to facilitate transactions of high-stakes and structure or financial change of the companies. The range of corporate advice is extremely wide and includes Mergers and Acquisitions (M&A), corporate restructuring (including demergers and capital reductions), initial public offerings (IPOs), syndicating private

[6] Ronald J. Gilson, Value Creation by Business Lawyers: Legal Skills and Asset Pricing, 94 YALE L.J. 239 (1984).

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equity and debt restructuring, and mapping regulatory compliance.[7] In the recent years, it has gone further and incorporated forensic auditing, risk mitigation and corporate governance consulting.[8]

The basis of this grand professional service is the "corporate advisory firm". The conceptual representation indicates the advisory firm is not just a passive folder of documents; it is that it holds the active repository of the entire advisory lifecycle. It harbours the initial term sheets, unrelenting due diligence reports, valuation models, strategic memorandum, risk matrices, and draught transaction arrangements. It is also bare of extremely sensitive trade secrets, intellectual property designs, and future financial forecasts.

The advisory firm has two objectives. First, it serves as the working blue-print to carry out the corporate transaction with all the strategic and

[7] PAUL DAVIES & SARAH WORTHINGTON, GOWER'S PRINCIPLES OF MODERN COMPANY LAW (11th ed. 2021).
[8] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (Harvard Univ. Press 1996).

legal grounds being taken care of. Second and more important, it is like armour plated defence to both the advisor and the client. Whenever regulatory investigations or actions by the shareholders occur, the advisory firm serves as the major record art of evidence to show that the transaction was made in the required fiduciary care, sufficient due diligence, and in full compliance with the existing legal provisions. Consequently, legal framework of such firms must be comprehended by noting that these firms are dynamic assets which have colossal commercial worth and legal liability.[9]

Key Statutory and Regulatory Bodies

The regulatory framework of corporate advisory and regulation of related firms in the Indian context is largely regulated by a basket of statutory bodies with the Ministry of Corporate Affairs (MCA) and the Securities and Exchange

[9] AVTAR SINGH, COMPANY LAW (17th ed. 2022).

Board of India (SEBI) being the most prominent ones.[10]

The Ministry of Corporate Affairs (MCA)

The MCA, which is mainly governed by Companies Act, 2013, is in place at the minimum level of governance to all incorporated entities.[11] Although the Act directly controls the companies, it controls the advisory firms and indirectly through controlling the statutory requirements of actions of companies. As an example, advisory firms in the context of mergers should also be harmonized with the procedural requirements of the sections 230-232 of the Act that cover the compromises, arrangements and amalgamations.[12] The firms shall have the required valuation reports by registered valuers, fairness opinions and disclosures necessary to National Company Law Tribunal (NCLT) approvals. The MCA provides the legality basis of the advice contained in the firm.

[10] Umakanth Varottil, The Evolution of Corporate Governance in India, 2 J. INDIAN L. & SOC'Y 1, 15 (2021).
[11] The Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).
[12] Id. at §§ 230-232.

Securities and Exchange Board of India (SEBI)

In the case of listed entities and transactions in the public markets, the supreme regulator is SEBI. The control over the firms handling of the corporate intermediaries (investment bankers, merchant bankers, and legal advisors) is very invasive as controlled by SEBI. SEBI controls the process of advice in a variety of ways, including the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, and the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018.[13] The advisors are required to have rigorous documentation of their due diligence procedures, pricing equation and disclosure to guarantee integrity in the market.

In addition, other regulatory authorities also influence the advisory firms periodically based on the nature of the transaction. The Foreign Exchange Management Act (FEMA), 1999 regulates firms related to cross-border

[13] Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

transactions and foreign direct investment (FDI).[14] Equally, Competition Commission of India (CCI) requires that there are stringent economic and legal scrutiny in advisory firms regarding M&A to meet anti-trust laws. As a result, a corporate advisory firm remains a heterogenous document in law, which is required to comply with a set of varied regulatory bodies, each of which requires certain levels of record-keeping and disclosure.

Legal Nature of Advisory Firms: Privilege, Confidentiality, and Fiduciary Duty

Legal status of a corporate advisory firm is challenging and based on the three legality of a legal privilege, contractual confidentiality and fair fiduciary relationship.[15] One of the most important issues is to differentiate the legal protection of various kinds of advisors.

Client-Advisor Privilege vs. General Confidentiality

[14] The Foreign Exchange Management Act, 1999, No. 42, Acts of Parliament, 1999 (India).
[15] A. RAMAIYA, GUIDE TO THE COMPANIES ACT (19th ed. 2020).

In India, legal professional privilege is a privilege that is enshrined in the Indian Evidence Act in Section 126-129.[16] This highly guards communications of an attorney and his or her client, and prevents their revelation in the court. Thus, the advisory firms that the external legal counsels keep are securely provided by statutes. But the contemporary corporate advisory ecosystem is dependent on non-legal practitioners: investment bankers, management consultants and financial auditors. The firms kept by these professionals do not have any statutory legal privilege under the Indian law.

Rather, Non-Legal advisory firms are virtually left to the safeguarding of Non-Disclosure Agreements (NDAs) under contract and the law of breach of confidence. An NDA commits the advisor not to disclose the firms to anyone, and only to the authorized transaction. In case an advisory firm violates this contract, it will face harsh civil penalties and unliquidated damages claims.

[16] The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872, §§ 126-129 (India).

Fiduciary Duties and the Constructive Trust

In addition to contracts, the law perceives the association between a corporate client and an advisor as being fiduciary in nature. The advisor is put into a place of advantage, where he or she has unequal access to the most vulnerable information of the client. As such, a constructive trust is commonly considered a constructive trust by equity.[17] The advisor does not keep the information because it is his or her advantage, but that of the client. This duty of honesty and concern requires that the advisor should take up every effort to ensure that the firm is not accidentally leaked, lost or abused to serve personal interests.

Unpublished Price Sensitive Information (UPSI)

This is perhaps the most serious legal feature of a contemporary advisory firm, that it is often a repository of UPSI. The SEBI (Prohibition of Insider Trading) Regulations, 2015 provide that any

[17] JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 45 (Oxford Univ. Press 2006).

information contained in the firm that may have a material impact on the stock price of a company in the event of publicity leads to legal transformation of the nature of the firm.[18] Only certain people are allowed to access this firm, and advisors need to establish so-called Chinese Walls in their companies to ensure that such confidential information is not cross-pollinated with any other employee of the trading or research department.

Core Legal Compliances and Documentation Requirements

The regulatory framework sets strict compliance and documentation standards on the way corporate advisory firms are prepared, kept and finally destroyed or archived. These compliances will ensure that there is accountability, prevention of money laundering and conducting of regulatory audits.

Record-Keeping and Data Continuity

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[18] Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015.

Most statutes have the effect of obligating corporate intermediaries to keep transaction records over a period of time. Indicatively, merchant bankers and stockbrokers under different regulations of SEBI are legally obliged to keep their books of accounts, records and other advisory documents at minimum of five years. [19]Equally, in accordance with the Prevention of Money Laundering Act (PMLA), 2002, reporting entities (which frequently comprise financial advisory firms) are required to keep a record of all transactions and client KYC (Know Your Customer) forms within a period of five years to help in the investigation of financial crimes by law enforcers.

The Structured Digital Database (SDD)

SEBI made amendments to the Insider Trading regulations that brought about monumental changes in the regulatory compliance of the advisory firms. Fiduciaries (advisors) and

[19] Securities and Exchange Board of India (Intermediaries) Regulations, 2008.

companies now have a legal obligation to investigate Structured Digital Database (SDD).[20] The SDD is simply a static digital database in which the names of all individuals (who are internal employees and external advisors) who are provided with UPSI are listed as well as their Permanent Account Numbers (PAN). The advisory firm is thus no longer a free-standing document, but its existence and circulation have to be monitored, time-stamped and placed in a database that is inaccessible to anyone.

Defensive Documentation and the "Fit and Proper" Criteria

Lastly is the general compliance standard of the corporate advisors to ensure that they are maintaining their fit and proper status that is provided by SEBI. In order to defend this position, advisory firms would have to establish strict codes of conduct internally. This compliance should be supported by the advisory firm. It should provide

[20] Mihir Naniwadekar, Insider Trading and the Structured Digital Database: A Compliance Nightmare?, 28 NAT'L L. SCH. INDIA REV. 112 (2022).

written evidence, an audit trail that gives evidence that the advisor has done independent verification of the claims of the client, identified possible regulatory obstacles and was not just a rubber stamp on corporate fraud. The new regulatory system demands the firm of advice to be robust enough to be a defence on its own in the face of any case of professional negligence or corporate malpractice conspiracy.

To conclude, the classical conceptual and regulatory system considers the corporate advisory firm an extremely sensitive, heavily regulated asset under the jurisdiction of overlapping statutory and fiduciary duty alike, as well as the market conduct rules. Nontheless, as will be seen in the following chapters, this historic structure is now being challenged and fundamentally distorted as a result of the digital transformation being hastened and the new realities of business becoming increasingly complex.

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Impact of the Modern Business Environment

The legal and regulatory system for the corporate advisory which is discussed in the last chapter was primarily tailored towards an analogue age. It worked based on the fact that an advisory firm was a tangible dossier, locked safely and tightly within the precincts of a law firm or an investment bank, guarded by the geographical frontiers of a particular territory, and by the normal non-disclosure contracts.[21] Nonetheless, this paradigm has been deeply replaced by the nature of the modern business environment that cannot be undone. The modern business environment can be defined by hostile digitalization, strict data privacy laws, international cross-border operations, and a tough regulatory attitude to sustainability. It has therefore transformed the advisory firm to become a hyperconnected, digital and multi-jurisdictional asset. This chapter will look at the way these contemporary forces have transformed the legal

[21] Jane K. Winn, The Securitization of Corporate Data and Privacy Regimes, 60 STAN. L. REV. 135, 140 (2020).

requirements, the vulnerabilities as well as compliance overhead of corporate advisory firms.

Digital Transformation and Tech-Driven Advisory

The first effect which can be noted about the contemporary business setting on corporate advisory is the full computerization of the advisory firm. Virtual Data Rooms (VDRs) and cloud collaborative tools have completely substituted the physical data rooms of the old, which were heavily used during the M&A due diligence. Although this online revolution has made corporate dealings multiples faster and more efficient, it has also created a list of new legal challenges with data sovereignty, overreliance on third parties, and Artificial Intelligence (AI).[22]

The Shift to Virtual Data Rooms and Cloud Infrastructure:

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[22] Nidhi Srivastava, Artificial Intelligence in M&A Due Diligence: Legal and Ethical Implications, 14 INDIAN J. L. & TECH. 88 (2024).

The legal chain of custody is lost when an advisory firm is being hosted on a cloud server or a VDR. The advisor has ceased to be the sole custodian of the firm, however, we put a third-party technology provider (the cloud service provider) into the matrix. This brings complicated contractual and regulatory issues. The distribution of legal liability is highly controversial in the situation when a VDR has been cyber attacked and the Unpublished Price Sensitive Information (UPSI) is leaked.[23] In the customary agency law, a fiduciary component requires the advisor to safeguard the firm to the client. Nonetheless, in the current technologically-enabled advisory, it stems down to shredding through the incomprehensible Service Level Agreements (SLAs) and indemnification to unravel whether the breach should fall on the shoulders of the advisory or the cloud service provider.

Artificial Intelligence and Professional Liability:

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[23] Id. at 95.

Additionally, AI technology in document reviews and due diligence has also completely changed the development of the advisory firm. Today, there are Natural Language Processing (NLP) algorithms routinely use by modern advisors to scan thousands of contracts in search of clauses or liabilities that are concealed under the change of control. Although this is efficient, it poses essential issues of professional liability and explainability of algorithms. When an AI instrument overturns a red flag that is important, and an incorrect legal/financial opinion is consequently added to the advisory firm, who is criminally responsible?[24] The concept of an algorithmic negligence is currently an issue that the regulatory framework wrestles with. The law continues to make the human advisor professionally liable, that is, the advisor should keep documented evidence in the firm that the output provided by the AI was checked by a human professional in a somewhat independent manner, in this way avoiding the

[24] Vikramaditya Khanna, Corporate Criminal Liability in India, 5 AM. J. COMP. L. 43 (2019).

advisor delegating their fiduciary obligation into a machine.[25]

Data Privacy and Cybersecurity Laws

In the past, advice firm confidentiality was more of a contract law issue that was dictated by Non-Disclosure Agreements (NDAs). Nowadays, though, the advisory firm is extremely controlled by statutory information privacy laws. The introduction of broad privacy laws, above all the General Data Protection Regulation (GDPR) in Europe and the Digital Personal Data Protection (DPDP) Act, 2023 in India have imposed an additional compliance model on corporate advisory services.[26]

From Corporate Secrecy to Statutory Privacy:

Personal Identifiable Information (PII) is also often crammed in corporate advisory firms especially in the area of M&A, restructuring, and human resources consulting. A typical due diligence firm

[25] JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 60 (Oxford Univ. Press 2006).
[26] The Digital Personal Data Protection Act, 2023, No. 22, Acts of Parliament, 2023 (India).

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can include the personal salary of the employees, executive health firms, customer database, and a vendors firm that contains the details of the vendors at a granular level. Modern privacy practises no longer treat the corporate advisor as a consultant, but he/she is technically a Data Processor (or in some situations a Joint Data Fiduciary) under modern laws of privacy. This categorization imposes on the advisor legal duties which are way beyond standard NDAs.[27]

Purpose Limitation vs. Comprehensive Due Diligence:

One of the main legal tensions presented by the contemporary privacy legislation is the concept of the so-called data minimization and purpose limitation. Privacy laws stipulate that organisations must gather and process the absolute minimum of personal information needed by a particular and declared reason, and once the designated reason is achieved, they should destroy

[27] Graham Greenleaf, Global Data Privacy Laws and Corporate Compliance, 14 DATA PROT. L.J. 45 (2023).

all the information.[28] This naturally clashes with the natural instinct of corporate advisors which is to cram as much information as they can to perform due diligence and to cushion themselves against future liability actions. Where a given advisory firm still contains outdated PII after the transaction, the advisor is exposed to serious statutory fines.

Cybersecurity Mandates and Breach Notification:

Moreover, the current cybersecurity regulations establish proactive responsibilities to those who hold guard of advisory firms. In India, the Computer Emergency Response Team (CERT-In) issues recommendations requiring that serious cybersecurity incidents have to be reported within a very abridged timeframe (in many cases within half a day).[29] Premade incident response plans must be included in the advisory firm now as well as evidence of advanced encryption standards. The

[28] Regulation (EU) 2016/679 (General Data Protection Regulation), 2016 O.J. (L 119) 1, art. 5(1)(b).

[29] The Information Technology Act, 2000, No. 21, Acts of Parliament, 2000, § 70B (India).

inability to obtain the digital advisory firm does not merely lead to the breach of the contract with the client anymore, but it leads to the immediate, punitive regulatory intervention on state blacklist.

Cross-Border Transactions and Jurisdictional Complexities

The capital globalisation has guaranteed that the contemporary corporate advice is hardly limited to the territories of a particular country state. The fact that cross-border M&As, international joint ventures, and international debt syndication imply that the same advisory firm is in many jurisdictions of often overlapping, and even conflicting, legal jurisdictions of a number of sovereign states.[30]

Conflict of Laws and Extraterritoriality:

The dossier of advisory is a field of jurisdictional dispute when an Indian advisory bank helps a US multinational firm to take over a European target

[30] Afra Afsharipour, Corporate Governance and the Indian Private Equity Model, 27 NAT'L L. SCH. INDIA REV. 18 (2015).

firm. It must at the same time be in accordance with the regulations of the Foreign Exchange Management Act in India (FEMA), regulatory disclosures of the US Securities and Exchange Commission (SEC), and the hard requirements of the EU, GDPR.[31] The modern business world is a particular characteristic of manoeuvring around this conflict of laws. Regulators are pushing the limits of their extraterritorial jurisdiction; their authority extends to foreign advisors; e.g. the FCPA of the US Foreign Corrupt Practises Act and the UK Bribery Act are capable of punishing foreign advisors on the basis of complicity in practises involving corruption which bear even a nominal nexus to their respective jurisdictions.[32]

Data Localization and Sovereign Borders:

Another important contemporary regulatory challenge is the emergence of the so-called data localization laws. The regulators are curbing the

[31] Regulation (EU) 2016/679 (General Data Protection Regulation), 2016 O.J. (L 119) 1.
[32] Vikramaditya Khanna, Corporate Criminal Liability in India, 5 AM. J. COMP. L. 43, 50 (2019).

cross-border transfer of sensitive data across nations as the countries are becoming increasingly aware of data as a sovereign resource. Sectoral regulators, i.e. the reserve bank of India (RBI) with regard to the information of payment systems, require that some of their important data be stored in domestic servers only.[33] This implies that corporate advisors will not always be able to share their advisory firm across their global offices seamlessly. They are required to split the firm legally along the borders and such that localised information does not go beyond the restricted boundaries heavily complicating logistical and legal process of global advisory firms.

Integration of ESG (Environmental, Social, and Governance)

The inclusion of the Environmental, Social, and Governance (ESG) requirements in the mainstream of the contemporary corporate advisory firm is perhaps the most radical substantive change to

[33] Graham Greenleaf, Global Data Privacy Laws and Corporate Compliance, 14 DATA PROT. L.J. 45, 52 (2023).

the contents. ESG has evolved to no longer be perceived as a voluntary and soft law concept that has been used as a marketing tactic of corporations to sever positive ties with their environment into being a hard law and obligatory requirement that will determine the capital placement and desirability of a transaction.[34]

The Expanding Scope of Due Diligence:

In the past, advisory firms concerned virtually only the financial measure, tax payments, and normal legal compliance. In the modern world, non-financial disclosure in the form of detailed information is required by the regulatory bodies. Regulations like the SEBI Business Responsibility and sustainability report framework in India, or the address in the Corporate Sustainability Reporting Directive (CSRD) in the EU have basic widened the content of an advisory firm.[35] The absence of a vigorous ESG due diligence report

[34] Sarah Haan, Corporate Governance and the ESG Framework, 130 YALE L.J. F. 251 (2021).
[35] Int'l Org. of Sec. Comm'ns (IOSCO), Environmental, Social and Governance (ESG) Ratings and Data Products Providers (2021).

makes an M&A advisory firm legally incomplete. Advisors are to record the carbon footprint of the target company, evaluate risks, both physical and transition related to climate change, audit human rights abuse in supply chains, and measure the board diversity indices.

Legal Liability for Greenwashing:

The availability of advisor firms that include ESG information has presented a new source of professional liability the danger of carrying out greenwashing. Since investors strongly base their decisions on the sustainability of a specific firm, the regulatory authorities have been in full attack on organisations that are falslying information about their compliance with the rules of sustainable operations. Corporate advisors have been put under increasing pressure to be liable in cases where they build either a transaction or a prospectus off exaggerated or unproven ESG assertions. The advisory firm, therefore, now has to serve as an evidentiary fortress, full of detailed

methodologies, independent environmental audits, and confirmed sustainability metrics, in which the advisor showed due diligence in certifying the ESG position of the client.

Overall, the contemporary business world has permanently changed the corporate advisory firm DNA. It is no longer a document that is defined as being somewhat static with legally described protection practises within a contract that becomes an active digital asset encumbered with statutory privacy requirements, cybersecurity regulations, extraterritorial jurisdictional issues, and broad based ESG practises. Since the regulatory environment keeps evolving in reaction to new technological and global changes, the legal system of these firms has to forcefully advance in order to make sure that advisors are free to do their business without bearing debilitating professional liabilities.

Critical Analysis and Contemporary Challenges

The above chapters created the background of the legal business context of the corporate advisory firms and represented how the digital revolution, data privacy policies, and ESG requirements have radically changed the contemporary business landscape. But acceptance of these changes does not start with this. This is shown in the critical review of the existing legal and regulatory framework that creates notable jurisprudential gaps, friction in operations and introductions of liabilities. With the corporate advisory firms transforming into multi-discipline global conglomerates and becoming incredibly large, the conventional laws that regulate its firms are becoming mercilessly stretched.[36] The chapter critically reflects on the modern day dilemma of dealing with conflicts of interest, the paradigm shift of professional liability, the growing mismatch between old law and new reality of technology and

[36] JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE (Oxford Univ. Press 2006).

practical inferences manifested in the recent regulatory practises.

Managing Conflicts of Interest and Insider Trading

The conflict of interest, which has been escalated by the consolidation of advisory services, is one of the most significant challenges of the day and in the field of corporate advisory. In the modern world, simultaneous auditing, M&A advisory, tax consulting, and ESG compliance services are how the Big Four accounting companies and leading investment banks regularly provide them.[37] Multi-disciplinary nature of this model implies that advisory firms of one corporate entity can contain conflicting strategic interests of an entity or an incompatible data set of the same client or target company.

The Fragility of the "Chinese Wall"

[37] Afra Afsharipour, Corporate Governance and the Indian Private Equity Model, 27 NAT'L L. SCH. INDIA REV. 18, 25 (2015).

Traditionally, the application of Chinese Walls information barriers that separate the M&A advisory wing and either equity research or trading desks has been the juridical shield against a conflict of interest and the leakage of the Unpublished Price Sensitive Information (UPSI).[38] Nevertheless, examining the example of the contemporary digital infrastructure critically shows how frail this idea is. With a cloud-based and hyper-connected workspace when the enterprise resource planning (ERP) systems and document management platforms are centralised, the "Chinese Wall" can oftentimes be narrowed down to simple access-permissions in the form of software.[39] Regulators are becoming less convinced by the fact that these digital fences actually stop the cross-pollination of sensitive data. When an advisory firm with UPSI of an impending merger is hacked because an internal digital access protocol on digital access was malfunctioning, the

[38] Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015.
[39] Jane K. Winn, The Securitization of Corporate Data and Privacy Regimes, 60 STAN. L. REV. 135, 150 (2020).

presumption of insider trading in court law becomes literally hard to disprove.[40]

The Burden of the Structured Digital Database (SDD)

In response, financial authorities such as the Structured Digital Database (SDD) required by the regulators such as the Securities and Exchange Board of India (SEBI).[41] Ideally, it is a sound concept but the problem of the practical application of the SDD is a huge challenge in the present times. It is an enormous administrative responsibility that the advisory firm is time-stamped and each internal and external individual must be recorded in the firm. In high-paced, multi-jurisdictional M&A deals, where multi-fluid teams of lawyers, bankers, and consultants work in real-time, it is virtually impossible to have an error-free, unadoptable history of information

[40] Mihir Naniwadekar, Insider Trading and the Structured Digital Database: A Compliance Nightmare?, 28 NAT'L L. SCH. INDIA REV. 112 (2022).
[41] Sec. & Exch. Bd. of India, Master Circular for Intermediaries, SEBI/HO/MIRSD/MIRSD-PoD-1/P/CIR/2024/01 (Jan. 15, 2024).

exchange.[42] The most critical issue in this situation is the unequal legal punishment that is placed on minor administrative violations in the SDD; the fact that a technical failure to enter a record can be brought down to legal interpretation by regulating bodies as the intentional act to promote insider trading, and the entire burden of proof is placed upon the advisor.[43]

Accountability and Professional Liability: The Shift to "Gatekeeper" Status

Historically, corporate advisors had a veil of limited liability through which they argued that their firms only had opinions or rather advice on information presented by the corporate management. The caveat emptor (let buyer beware) legal doctrine and general disclaimers tended to shield advisors against the aftermath of company fraud, so long as they did not conspire with the doers.[44]

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[42] Id.
[43] Mihir Naniwadekar, supra note 45, at 115.
[44] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (Harvard Univ. Press 1996).

The Imposition of Gatekeeper Liability

This is a passive position that has been repulsed by the contemporary regulatory jurisprudence. The regulators have come to consider corporate advisors, especially the merchant bankers, statutory auditors and legal counsels to be a market integrity gatekeeper. [45]This change of paradigm implies that active fraud is not the only source of triggering professional liability, but it is the professional negligence and failure to use reasonable professional scepticism. [46]In the event that a corporate scandal breaks out, the regulatory authorities undertake instant subpoena of the corporate advisory firm to determine the level of due diligence done.

Constructive Knowledge and Evidentiary Burdens

The legal notion of constructive knowledge is the critical problem of modern advisors. According to

[45] JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 80 (Oxford Univ. Press 2006).

[46] Ministry of Corporate Affairs, Report of the Company Law Committee (2022), https://www.mca.gov.in.

the argument of regulators, in case there was a red flag in the raw data which had been passed on to the advisor, the advisor would be said under the law to have known there was an anomaly in the data although they did not necessarily know it.[47] This, however, has rendered the advisory firm to be exhaustively defensive. It should include written proof that the advisor had personally checked the claims of the client, stole financial data and actively investigated dubious deals. The inability of the advisory firm to show such a proactive scepticism places advisory firm at the risk of incurring drastic penalties in the form of disgorgement of fees, capital markets debarment as well as immense reputations damages.[48] The legal system has succeeded in converting the advisory firm into a strategic business tool into a compulsory regulatory self-defence instrument.[49]

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[47] A. RAMAIYA, GUIDE TO THE COMPANIES ACT (19th ed. 2020).
[48] Vikramaditya Khanna, Corporate Criminal Liability in India, 5 AM. J. COMP. L. 43, 60 (2019).
[49] Umakanth Varottil, The Evolution of Corporate Governance in India, 2 J. INDIAN L. & SOC'Y 1, 20 (2021).

The Gap Between Traditional Law and Modern Complexities

An analytical approach to the framework of regulations creates a growing gap between the pace at which modern corporation deals are being conducted and the inflexible, frequently outdated form of traditional corporate law.[50] This friction is realised in a number of its operation areas.

Evidentiary Challenges of Digital and AI-Generated Firms

Although, laws such as the Information technology act are familiar with digital signatures and electronic records, the rules of evidence in most cases experience difficulty with the dynamic nature of the current advisory firms.[51] In cases where advisory firm is created dynamically by Artificial Intelligence (e.g., by automated contract analysis or through AI-based financial modelling), conventional legal systems have no way of

[50] JOHN ARMOUR ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (3d ed. 2017).
[51] The Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).

attributing the authorship and responsibility. In case a transaction is formed as a result of an error in an AI-generated valuation model, which was present in the firm, the traditional tort law and a contract law do not have the necessary language with the help of which to isolate a responsible party, i.e., the software developer, administrative agency, or corporate client.[52] The law, however, also requires a human author of the firm which establishes a fiction of the law that does not correspond to the reality of tech-driven advisory.

The Friction Between Speed and Compliance

Moreover, the contemporary business setting requires an unprecedented pace. Whereas deals or acquisitions took months of physical due diligence to resolve, today Virtual Data Rooms (VDRs) suggest that such a deal can be resolved in weeks. Nevertheless, there have been unprecedented high increases in the legal and regulatory compliances, which include the required anti-trust filings, ESG

[52] Nidhi Srivastava, Artificial Intelligence in M&A Due Diligence: Legal and Ethical Implications, 14 INDIAN J. L. & TECH. 88, 102 (2024).

audits, and cross-border data privacy auditors.[53] The classical legal structure lacks the existence of safe havens or faster tracks of transactions across high levels of digitization. The nature is frictionary, as advisors find themselves continually at crossroads between a commercial necessity to operate fast and a legal necessity to create time consuming and exhaustive documentation in the advisory firm. Such a gap results in imposed compliance, with advisory firms being filled by boilerplate and generic legal disclaimers instead of a real, transaction specific analysis.

Case Study and Recent Regulatory Trends

Recent enforcement patterns of market regulators provide the most effective way of seeing the theoretical weaknesses of the contemporary advisory structure. As can be seen in a critical review of the SEBI adjudicative orders which have been issued recently on major merchant bankers and rating agencies, there is a clear hardening of

[53] Graham Greenleaf, Global Data Privacy Laws and Corporate Compliance, 14 DATA PROT. L.J. 45, 60 (2023).

the regulatory approach as far as the maintenance and integrity of advisory firms are concerned.[54]

Regulatory Scrutiny in Capital Market Transactions

Regulatory surveillance of the fiduciaries was applied in the wake of large corporate debt crises ((the IL&FS crisis in India)). In some of the recent irregularities in the Initial Public Offering (IPO), SEBI has not punished the lead managers and merchant bankers because they committed the fraud, but because they were lax in their due diligence filings. Regulators pointed specifically in these orders that the promoters that the advisory firms did not independently verify the claims they made and had conflicting financial measures and had not documented the benefit of accepting the representations of the management at face value.

The Legal Precedent Set by Enforcement Actions

[54] Sec. & Exch. Bd. of India, Master Circular for Intermediaries, SEBI/HO/MIRSD/MIRSD-PoD-1/P/CIR/2024/01 (Jan. 15, 2024).

These enforcement measures create a strict legal precedent: failure to have the documentation in the advisory firm, is considered in the eyes of the law, the same as failure to have the advisory act itself. When an advisor purports to have made a site visit or checked existence of a debt obligation, but corroborating digital evidence in the form of time-stamps is present in the advisory firm, the regulator will assume that the due diligence was not carried out. In addition, regulating bodies are imposing more fines on the advisory firms due to the negligence in securing their digital firms citing the violation of SEBI Intermediaries Regulations that require the maintenance of the integrity of the market and data confidentiality.[55]

These tendencies of the cases highlight the main idea of this critical analysis regarding the modern corporate advisory firm it is a very unstable legal resource. The modern-day issues of dealing with digital conflicts of interest, managing the gatekeeper liability, and closing the divide between

[55] Securities and Exchange Board of India (Intermediaries) Regulations, 2008.

slow moving laws and hyper-fast technologies necessitate the revision of the legal organisation, maintenance, and defence of advisory professional casework thoroughly.

Conclusion and Suggestions

Summary of Findings

In this study, the author has attempted to transfer the jurisprudential doctrines to the modern world of business through systematic analysis of legal and regulatory frameworks of corporate advisory firms. The inquiry was initiated to determine the conceptual concept of the advisory firm. In the past, it has been considered as a fixed, physical, body of corporate strategy, unpublished price-sensitive information (UPSI), and due diligence, which was kept highly confidential by common Non-Disclosure Agreements (NDAs), client-advisor privilege, and fair provisions of fiduciary duty. Regulation, which is by bodies such as the Ministry of Corporate Affairs (MCA), and the Securities and Exchange board of India (SEBI) was based on the premise of being in unified control of these physical presentations.

But the results in Chapter 3 were the crucial change of paradigm. The digital transformation of

the corporate world has taken place with a rabid pace and has transformed the advisory firm into a multi-jurisdictional and multi-faceted digital object that is stored on third-party cloud wiring and on Virtual Data Rooms (VDRs). This has effectively replaced the century-long use of contract law with strict, cross-sectoral legislative requirements, above all, full data privacy frameworks such as the GDPR and India Digital Personal Data Protection (DPDP) Act, 2023. Moreover, the current requirement of Environmental, Social, and Governance (ESG) is a radical change in the content of the advisory firm, since it obligates advisors to record the non-financial indicators to avoid the possibility of greenwashing liability.

Lastly, the critical analysis of Chapter 4 revealed deep tensions of the existing framework. The development of Artificial Intelligence (AI) as a part of due diligence has left a vacuum of jurisprudence on the issues of algorithmic negligence and professional responsibility. Regulators have emphatically thrown the responsibility of market

integrity on corporate advisors, as they are termed as gatekeepers and use the advisory firm as a regulatory self-defence. Administrative burdens of maintaining unchangeable logs, like Structured Digital Database (SDD) by SEBI complex, and the fragility of digital Chinese Walls in operation, have subjected advisory firms to gross disproportionate liability on technological errors. The study concludes that the old legal structure is having a hard time in managing the hyper-networks, high-speed realities of new-fangled corporate advisory.

Conclusion

The primary argument that this work has is that the existing legal and regulatory system of corporate advisory firms is facing an ontological lag. Legislators and regulators are still drafting the law using an old conceptualization of the firm as a in and of itself document upon which the advisor has absolute and unilateral control. As a matter of fact, the current corporate advisory firm is a moving dynamic dataline to be optimised by third party algorithms, archived across jurisdictions,

and caught in the competing cross demands of the various regulatory systems.

This study finds that the conventional means of protection and control over advisory firms, in this case, the standard NDAs, the barrier of physical information and reactive post-factum audit is grossly outdated to the current business. The existing system of regulation is excessively punitive and piecemeal. Regulators can also subject companies to tiring and granular compliance tasks (like the inflexible SDD parameters) without subsequent legal safe harbours regarding the reasonable technological failures or the restrictive nature of AI-powered due diligence.

Also, absolute gatekeeper liability against corporate advisors will compel a defensive response which naturally will be contrary to the business imperative of speed and mobility in international dealings. This regulatory framework has resulted in an impossible paradox when an

advisor is placed in a situation where by law he or she has to hoard data to the point of futility to provide protection in the case of future regulatory scruting, and that he or she has to only store the necessary data to ensure the faithfulness to a contemporary privacy law. Finally, unless the legal architecture is completely and technology-savvy updated, the corporate of the advisory firm will be no more a service of strategic corporate facilitation and will rather become an unmanageable source of disastrous professional liability.

Suggestions for Regulatory Reforms

In order to deal with the jurisprudential gaps and functional friction that have been observed in this study, the following regulatory reforms can be proposed:

- Harmonisation of Multi-Sectoral Compliance: At present, the advisory firms of corporate entails are lacked in a scattered attention by SEBI, MCA, sectoral controllers (such as the RBI), or the novel data protection boards.

There is an urgent need to have a single, inter-regulatory standard concerning compliance on the digital corporate records. A unified Corp DHC should be created to balance the inconsistent needs of financial disclosure, data reduction, and cross borders information exchanged and thus minimise the unnecessary compliance costs imposed on advisory fiduciaries.

- Introduction of Tech-Legal Safe Harbours: Regulatory authorities need to recognise the application of AI and machine learning to the corporate due diligence process. The legislation ought to initiate certain safe harbours that would safeguard corporate advisors against strict liability of algorithmic negligence as long as the advisory firm shows that the AI tools were obtained through certified vendors, audited on regular basis, and that the advisor had utilised reasonable human control. It is necessary to develop legal

frameworks that will provide the clear limits of collaborative human-AI liability.

- Structured Digital Database (SDD) Rationalisation: As much as the prevention of insider trading is essential, the existing requirement to have a comprehensive, manually monitored SDD on all micro-movement of an advisory firm is grammatically crippling. The regulators need to change a granular and prescriptive approach to a principle driven approach. Advisors are to be allowed using automated blockchain-based access logs built into their enterprise software, and inadvertent technical lapses in the SDD should not lead to automatic assumptions of market manipulation in the absence of substantive evidence of intent.
- Leveraging ESG Documentation Metrics Standardisation: To ensure that advisors are not advertising against subjective accusations of greenwashing, regulators should offer direct, standardised taxonomies of ESG

reporting on advisor firms. The law can eliminate the arbitrary enforcement of regulations, which enlightens the law, and permit advisors to freely prepare sustainability data without fear of being penalised retrospectively because of the fluctuating regulatory sights due to the law.

Recommendations for Advisory Professionals

In the meantime that structural regulatory changes take place, corporate advisory firms should actively overhaul their own internal legal and operating structures to ensure their own survival in the new business world:

- Introduction of "Zero Trust" Digital Architectures: Advisory firms need to drop the outdated method of depending on basic software permissions to establish a shaky structure of digital Chinese Walls. Companies need to adopt transformative architectures in their cybersecurity frameworks of all advisory firms as Zero Trust. Under this structure,

there are threats both within and beyond the network, one that must be constantly through multi-factor cryptographic authentication of any user who wants to access, modify, or share a particular group of firms in a Virtual Data Room, which will help to ensure seamless automation of SDD compliance.

- Reposition to Defensive, Purpose-Limited Documentation: Advisory experts need to change their culture towards a mentality of data hoarding to data minimization. The due diligence procedures should be reassessed, to be within the DPDP Act and the GDPR. Advisory firms can only retain the exact information needed to make the transaction and firms need to have automated data-purging standards to destroy the obsolete Personal Identifiable Information (PII) as soon as the transaction is completed to ensure the statutory privacy liability is reduced.
- Development of Engagement Letters and Non-Disclosure Agreements: Standard boilerplate

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NDAs are not sufficient. It is the duty of the advisory firms to revamp their client engagement letters in a wholesome manner to actively seek to capture contemporary complexities. The device should be very clear in terms of liability on breach of the clouds provider on the ground, concrete on use of AI to process advisory firm, ensure that the corporate client indemnifies the device on the factuality of the raw ESG data presented to conduct due diligence.

- <u>Integrating Unceasing Tech-Legal Audits:</u> Lastly, it is no longer the prerogative of lawyers and bankers to go to the advisory firm and ensure that it remains untouched; it needs technologists. Continuous tech-legal auditing should become part of the normal practise of advisory companies. This includes consistent penetration examinations of VDRs, test testing of AI with due diligence software, and unremitting training so that every financial and strategic advisor knows the

tremendous legal consequences of being obese about how to handle digital advisory resources.