CLAWBACK AND MALUS PROVISIONS IN INDIA: CONTRACTUAL VALIDITY, REGULATORY FRAMEWORKS, AND INTERNATIONAL COMPARISONS

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ABSTRACT

Disputes around executive pay being too high or unjustified have been a major issue and this has pushed companies to find ways to react even before shareholders express their dissatisfaction; clawback clauses are one such measure. Generally, these clauses permit a company to reclaim bonuses or other forms of payment based on incentives in the event where senior management is discovered to have been involved in misconduct, falsification of financial results, or violation of their fiduciary duties. In a number of jurisdictions, most notably in the U. S. and the U. K., clawback and malus provisions are no longer matters of private contract only but are supported by comprehensive statutory or regulatory frameworks. India's position, however, is rather scattered. Apart from the banking and NBFC sectors, where the Reserve Bank of India has issued specific guidelines on variable pay and malus provisions, the majority of Indian companies are dependent on voluntarily added clawback clauses in executive employment contracts. This situation gives rise to two interlinked questions: one is about the legal enforceability of such clauses under Indian contract and labor law and the other is related to whether they actually contribute to the prevention or discouragement of corporate misconduct. The present paper discusses these issues through an inquiry into the contractual rationale and regulatory handling of voluntary clawback clauses in India, with special reference to the Chanda Kochhar ICICI Bank case which reveals both the potential and the constraints of such measures.

Introduction

Corporate governance rests on a simple idea: those in charge of a business should act responsibly and in the best interests of its shareholders. Executives have considerable latitude in making choices for the company, and shareholders trust them to use this power carefully and honestly. But this relationship often faces tension. Agency theory suggests that managers might not always make choices that align with the long-term goals of the people they represent. Cases of fraud, inflated earnings, and misconduct from managers show how this misalignment can grow, hurting investor trust, damaging reputations, and causing lasting losses.

Clawback clauses have emerged as a way to address concerns about executive accountability. A clawback clause lets a company take back pay already given to an executive like bonuses or stock options if it turns out the pay was tied to misconduct or misrepresentation. These clauses aren't just about punishment; they aim to show that rewards should be linked to real, lasting performance, not just short-term gains achieved through unethical behavior. Clawbacks try to bring executive pay in line with the broader goals of corporate governance.

Some countries have moved beyond just letting companies decide on clawback policies themselves. In the U.S., the Dodd-Frank Act of 2010 makes companies recover incentive-based pay after financial restatements, even without proof of misconduct.[1] In the UK, regulators such as the Financial Conduct Authority require clawback provisions in pay policies, especially in the financial industry, as part of risk management.[2] India is different. The Reserve Bank of India has clawback requirements for banks regarding senior management pay, but the rest of the corporate sector mainly relies on voluntary clawback clauses in employment contracts. Their legal status and effectiveness aren't clear, particularly given Indian contract and labor law.

These issues came to light in the Chanda Kochhar–ICICI Bank case, where the bank tried to take back bonuses and stock options after allegations of conflict of interest.[3] The case raises questions about whether voluntary clawback clauses can be enforced under Indian law, whether they conflict with employee protections, and whether they can deter corporate misconduct. This

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 954, 124 Stat. 1376, 1904 (2010) (codified as amended at 15 U.S.C. § 78j-4 (2012)).

[2] Prudential Regulation Authority, Remuneration Part, Rule 15A.1 (2025), *available at* https://www.prarulebook.co.uk.

[3] *ICICI Bank Ltd. v. Chanda Deepak Kochhar, (2022) SCC OnLine Bom 3131 (India).*

article explores these questions by looking at the legal basis for clawback clauses in India and comparing India's voluntary approach with countries where clawbacks are more regulated. It aims to determine if voluntary clawback clauses can work as a governance tool in India, or if the lack of a clear legal framework limits them to being mostly symbolic.

Concept and Purpose of Clawback Clauses

Clawback clauses have gradually emerged as an important instrument in corporate governance and executive compensation. They are contractual provisions that allow a company to reclaim compensation already awarded to executives under certain circumstances, such as fraud, misconduct, regulatory violations, or financial restatements. The concept recognizes the potential for misalignment between the interests of company management and those of shareholders. When managers pursue short-term personal gains at the cost of long-term corporate health, clawbacks act as a mechanism to restore fairness, discourage opportunism, and protect investor confidence.

The purpose of clawback clauses goes beyond mere financial recovery. They perform three interrelated functions in corporate governance:

1. *Deterrence* – By creating the risk of forfeiture or repayment, clawbacks discourage unethical or short-term behavior.

2. *Accountability* – They ensure that executives bear the consequences of decisions that harm the company or violate regulatory obligations.

3. *Investor Protection* – By aligning rewards with sustainable performance, clawbacks safeguard shareholders from losses caused by misconduct or misrepresentation.

Voluntary Clawback Provisions and Enforceability under Indian Law

Clawback clauses let a firm reclaim pay which is already awarded to management, such as bonuses, if certain conditions are met. In India, these clauses are relatively recent outside the finance sector. Their enforceability relies mainly on company rules and government guidance, not standard contract law. The Companies Act of 2013 provides some direction on executive pay, especially Section 199, which provides for recovery of remuneration.[4] It also states that

[4] Companies Act, 2013, s 199, No. 18, Acts of Parliament, 2013 (India).

the board and shareholders must agree to pay that exceeds certain amounts and that all compensation details must be public in the annual report. Section 199 allows firms to change or reclaim pay from directors if they make mistakes, provide false information, or fail to fulfill their duties. Voluntary clawbacks can be broader, but Section 199 sets a baseline that pay isn't automatically protected and can be reclaimed under certain conditions.

Beyond Section 199, voluntary clawback clauses extend responsibility to senior leaders who aren't directors. These clauses define the conditions under which pay can be reclaimed, such as fraud or ethical issues. Courts likely uphold these clauses if they are clearly stated in job agreements, triggered by specific misconduct, and reasonable relative to the harm done. Voluntary clawbacks should align with Section 199's remuneration limits and reporting rules to avoid company law problems.

The Chanda Kochhar–ICICI Bank case[5] illustrates how voluntary clawbacks function in India. Following conflict of interest claims, ICICI Bank tried to reclaim bonuses from its former CEO. This case shows the issues of mixing contract terms, leadership rules, and legal structures. Indian courts must balance accountability and investor protection with legal limits on manager pay. Because the enforceability of voluntary clawbacks is unclear outside regulated areas, careful drafting and alignment with company law are essential.

In finance, the Reserve Bank of India (RBI) has issued the 2021–22 Master Direction on Compensation (RBI/2021-22/112)[6] and the April 29, 2022, NBFC Compensation Guidelines.[7] These circulars state that banks must mandatorily include malus and clawback clauses in their top management contracts. These guidelines link pay to long-term performance, discourage excessive risk-taking, and increase leadership accountability. By connecting pay reclamation to performance, the RBI gives a legal foundation that strengthens enforcement in the regulated sector.

Even with these development, India still does not have a single, complete clawback system for

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[5] *ICICI Bank Ltd. v. Chanda Deepak Kochhar, (2022) SCC OnLine Bom 3131 (India).*

[6] Reserve Bank of India, Scale Based Regulation (SBR): A Revised Regulatory Framework for NBFCs, RBI/2021-22/112 DOR.CRE.REC.No.60/03.10.001/2021-22 (Oct. 22, 2021). Available at https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12179&Mode=0

[7] Reserve Bank of India, Guidelines on Compensation of Key Managerial Personnel (KMP) and Senior Management in NBFCs, RBI/2022-23/36 DOR.GOV.REC.No.29/18.10.002/2022-23 (Apr. 29, 2022). Available at https://fidcindia.org.in/wp-content/uploads/2022/05/RBI-COMPENSATION-FOR-NBFC-PERSONNEL-29-04-22.pdf

all companies on the stock market. Unlike countries like the U.S. and the U.K., the Securities and Exchange Board of India has not made rules for listed companies to have mandatory clawback policies for executive pay. Because of this, statutory clawbacks in India are not unified. They work through a mix of specific laws and rules for certain industries, instead of a well-organized corporate governance plan.

The fact that there are both voluntary clawbacks in contracts and limited statutory recovery methods brings up a key structural question. Section 199 shows that the law accepts the clawback idea, but its limited reach means that most recovery work still relies on clauses arranged voluntarily. This leads to inconsistent accountability standards across different industries and companies, and it leaves big holes in supervising executives outside of controlled financial groups. Section 199 is a starting point, but whether it's enforced for non-director leaders depends on board approval and court interpretation. This contrasts with places like the U.S. and the U.K., where recovery plans are legally required. Giving clawback clauses a mandatory character in India, would significantly strengthen their enforceability and bring much-needed uniformity to executive accountability.

Comparative Clawback and Malus Regimes: United States and United Kingdom

A comparative examination of clawback regimes in the United States and the United Kingdom offers valuable insight into how mandatory recovery mechanisms operate when embedded within statutory and regulatory frameworks rather than left to private contracting. Both jurisdictions treat clawbacks not merely as contractual safeguards but as integral components of corporate governance and financial regulation. Making the inclusion of a clawback clause mandatory for the executives of a company.

United States

In the U.S., clawback clauses are enforced by the Dodd-Frank Act, 2010.[8] The Act articulates that companies that are listed must have rules in place to take back incentive pay from current or former executives if the company has to restate its finances because it didn't follow reporting rules closely enough. It's worth noting that the company doesn't have to prove that the executive

[8] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 954, 124 Stat. 1376, 1904 (2010) (codified as amended at 15 U.S.C. § 78j-4 (2012)).

did anything wrong to take the money back; the restatement itself is enough.

This method shows a clear decision by lawmakers. By not making it necessary to prove fault, the U.S. system puts importance on correct financial reporting and supports the idea that executive pay should be tied to results that can be checked. Incentive pay that's based on wrong financial statements is seen as unfair, no matter if the executive knew about the errors or not. This makes the rules much easier to enforce, since companies don't have to spend a lot of time in court arguing about who was at fault before they start the process of getting the money back.

The Securities and Exchange Commission (SEC) makes clawbacks even more standard by requiring companies to share their recovery rules and any times they've been used.[9] This openness adds damage to reputation to the financial recovery, which makes executives even more responsible. Because of this, clawbacks in the U.S. act as a normal part of how companies are run, instead of something that's optional or that can be discussed when someone is hired.

United Kingdom

In the UK, especially in finance, regulators take the lead. The Financial Conduct Authority (FCA)[10] and the Prudential Regulation Authority (PRA)[11] require banks and some investment companies to add malus and clawback clauses to executive pay plans. These requirements apply to Material Risk Takers (MRTs) and Senior Managers, aimed at adjusting variable remuneration downward (malus) or recovering paid amounts (clawback) in cases of misconduct, material error, or financial failure. Malus lets firms cut or cancel unpaid pay, and clawback lets them recover pay that was already given out.

Unlike the US, where clawbacks mainly happen when financials are restated, the UK uses them for more reasons like misconduct, poor risk handling, drops in finances, or regulatory punishments.[12] Clawbacks can be used for years after pay is given, showing a long-term focus on executive duty and risk balance.

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[9] Listing Standards for Recovery of Erroneously Awarded Compensation, 87 Fed. Reg. 73,076 (Nov. 28, 2022) (to be codified at 17 C.F.R. pts. 229, 240, 249).

[10] FCA Handbook, Systems and Controls sourcebook, SYSC 19D.3.51A R (specifically within the Remuneration Code for dual-regulated firms).

[11] PRA Rulebook, Remuneration Part, Rules 15.19 to 15.25 (specifying clawback requirements) and Rule 15.15 (specifying malus requirements).

[12] The UK Corporate Governance Code, Provision 37 (Jan. 2024), Available at https://www.frc.org.uk/library/standards-codes-policy/corporate-governance/uk-corporate-governance-code/

A key thing about the UK system is that these rules are mandatory.[13] Firms must prove they're following the rules as part of their governance and risk management. Not having good clawback rules can lead to supervisory actions. This puts clawbacks into the regulatory system, making them less reliant on job talks or executive approval.

Comparative Observations

Both the U.S. and UK regimes demonstrate how mandatory clawback frameworks can achieve consistency, predictability, and enforceability. By mandating clawback clauses, these systems minimize disparities in executive accountability across firms and reduce the scope for resistance at the drafting stage. They also shift the focus from punishment to correction, treating recovery as a natural consequence of inaccurate performance assessment rather than as a personal sanction.

For India, these comparative models highlight the limitations of relying predominantly on voluntary contractual clauses. While Indian law recognizes the principle of remuneration recovery in specific contexts, particularly under Section 199 of the Companies Act and RBI regulations, the absence of a general mandatory framework results in uneven application. The experiences of the United States and the United Kingdom suggest that codification and regulatory backing play a crucial role in transforming clawbacks from symbolic provisions into effective governance tools.

India lacks a broad, required system for clawback clauses across all businesses. Except for a few statutes, like Section 199 of the Companies Act, 2013, and some rules from the Reserve Bank of India for Banking and NBFC industries, getting back executive pay depends mainly on voluntary contract terms. This creates inconsistent standards for accountability, where punishments for wrongdoing change based on whether a clause was agreed to in an executive's contract, not on the type of misconduct.

The absence of required clawback rules weakens how well they work. First, voluntary clawbacks are naturally open to unfair bargaining. Top executives, especially in big public companies, often have a lot of negotiating power when they are hired. This lets them weaken, narrowly write, or even remove clawback terms. Because of this, clawbacks are used inconsistently, which lowers their ability to discourage unfair practices and makes them less

[13] Prudential Regulation Authority, *PRA Rulebook: Remuneration* r. 15.23 (U.K.).

reliable as a tool for governance.

Second, depending on voluntary clawback clauses may deter companies from enforcing the clause in case misconduct occurs. If there is a clawback clause, boards might be hesitant to use it because they worry about lawsuits, damage to their image, or claims of unfair labor practices. Presence, of a mandatory law or regulation, gives institutional support, allowing repayments to be seen as following a legal duty, not as an optional or hostile action. This greatly strengthens their enforceability and makes things clearer for both firms and executives.

Clawback clauses work best when they are standard rules, not just optional protections. Required clawbacks help connect executive pay to long-term results by making sure that rewards based on wrong or misleading results can be fixed later. They also improve investor trust by showing that business governance systems can truly respond to misconduct, instead of just admitting it happened. It's important to remember that clawbacks are meant to fix things, not to punish. They aim to restore the balance between work and pay, instead of adding penalties.

The current Indian laws already show some acceptance of these ideas. Section 199 of the Companies Act provides that it is permissible to recover additional incentives linked to wrong financial numbers. Also, RBI rules show how mandatory clawbacks should be added to remuneration plans to reduce high risk-taking. But, because these rules are limited and specific to certain industries, clawbacks can't reach their full potential for governance. Without broader legal or regulatory backing, clawbacks remain reactive, uncertain in enforcement, and uneven in their application.

Adding a mandatory clawback system to Indian business governance would fix these issues by creating a basic standard of accountability. This system would not get rid of the chance for contract changes, but it would make sure that the main recovery ideas are used evenly across all public companies. By doing this, clawbacks would become more than just symbolic clauses and would turn into a dependable way to support ethical behavior, financial honesty, and long-term shareholder value in Indian corporate realm.

Towards a Mandatory Clawback Regime in India

Any proposal to bring in required clawback rules in India needs to be based on how companies are currently run and what regulators can do. The aim shouldn't be to punish too harshly, but to build a fair and clear system. Such a framework should ensure that executive remuneration remains closely aligned with lawful conduct and accurate financial reporting. India's company law already has pieces of this system, which can be made more effectual with specific legal and regulatory actions.

This required clawback system should mainly apply to companies that are listed on the stock exchange. It should cover all Key managerial personnel (KMP's) like managing directors, full-time directors, CEOs, and other high-level executives who get paid mostly based on how well the company does. By confining clawbacks to those who control corporate decision-making, the framework avoids overreach into ordinary employment relationships.

The situations that cause a required clawback to be used should be clearly stated and easy to prove. These could be things like having to fix financial statements because of big mistakes, regulators finding violations, or clear cases of bad behavior that hurt the company's finances or reputation. If these triggers are used along with current ways of reporting and enforcing rules, it would be less confusing and prevent unfair use. Section 199 of the Companies Act already shows that the law accepts taking back pay when financial reports are wrong, which gives us a good starting point.

The Securities and Exchange Board of India (SEBI) is in the best place to put this system in place for listed companies. SEBI could say that companies have to follow standard clawback policies as part of their rules for how the company is run and how they pay executives. This is similar to how SEBI already watches over how executive pay is set up. The boards of these companies would still be in charge of making sure the rules are followed, but with SEBI's support to take back pay instead of making decisions without a clear system. Making companies report their clawback policies and when they take back pay would also make things more open and give investors more confidence.

It's also important to have rules that make sure required clawbacks are not used unfairly or too harshly. Taking back pay should only affect pay that changes based on performance. The amount taken back should be reasonable compared to the damage done or the benefit wrongly received. Executives should be treated fairly in the process, including getting notice and a chance to explain their side. These protections are needed to keep the system legitimate and make sure clawbacks are seen as ways to fix problems in how the company is run, not just as punishments.

A well-thought-out mandatory clawback system wouldn't replace contracts that are already in place. Instead, it would set a minimum level of responsibility that all companies must meet. Companies could still have their own voluntary clawback clauses that are stricter or more specific than what the law requires. By doing this, required clawbacks would create consistency while still allowing flexibility. This would complete the move from scattered, reactive ways of taking back pay to a clear system of executive responsibility within Indian corporate governance.

Conclusion

Clawback clauses have emerged as an important tool for linking executive rewards to responsible corporate conduct and accurate financial reporting. In India, these clauses are largely voluntary, which makes the system uneven. Whether these rules are enforced depends on the specifics of each executive's contract and if the board is willing to take action. This causes doubt, weakens the ability to prevent unethical or even illegal conduct, and makes investors lose confidence in the way companies are managed.

Looking at the United States and the United Kingdom, it can be observed that having mandatory clawback statutes leads to more consistency, easier enforcement, and openness. In these jurisdictions, clawbacks are part of the laws and regulations. This makes sure that executives are held responsible for wrongdoings or false financial statements, regardless of what their individual contracts say. These mechanisms ensure that executives are motivated to prioritize sustainable performance and ethical decision-making. In addition, they offer a way to fix problems without needing to prove that an executive was personally at fault.

India lacks a complete set of required clawback rules. This is a problem but also a chance to improve things. Provided that India adopts a mandatory mechanism similar to the U.K. or the U.S.A, it would create clear standards for responsibility, reduce uncertainty about putting these rules into action, and strengthen the integrity of how executives are paid. By focusing on top decision-makers and linking recovery of pay to clear events like financial restatements or misconduct, India could have a system that is fair to executives and protects the interests of shareholders.

In conclusion, mandatory clawbacks could change how executive responsibility works from a reactive and inconsistent practice into a predictable, reliable, and governance-focused mechanism. Incorporating lessons from international frameworks while adapting them to India's corporate law landscape can strengthen investor trust, promote ethical corporate behavior, and ensure that remuneration is truly aligned with performance and lawful conduct.

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