CORPORATE CRIMINAL LIABILITY AND SECURITIES OFFERINGS: RATIONALIZING THE IRIDIUM-MOTOROLA CASE

[IRIDIUM INDIA TELECOM LTD. v. MOTOROLA INCORPORATED & ORS]

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The authors here analyse the decision of the Indian Supreme Court in Iridium India Telecom v. Motorola Inc. with respect to the criminal liability of corporations. The authors examine the use of the rigid Tesco standard of attribution by the Indian Courts, and study the impact of this on criminal liability for misstatements in securities offerings in India.

I. SETTING THE CONTEXT ................................................................................................................................................. 109
II. IRIDIUM: FACTS AND DECISION ................................................................................................................................. 111
III. EVALUATING IRIDIUM ......................................................................................................................................................... 113
   A. Principles of Attribution ...................................................................................................................................................... 114
      1. Corporate Mens Rea .................................................................................................................................................. 115
      2. Evolution of Principles of Attribution – From Tesco to Meridian ................................................................. 119
      3. Supreme Court’s Analysis in Iridium ....................................................................................................................... 122
   B. Criminal Liability for Misstatements in Securities Offerings .................................................................................. 124
      1. The Offence of Cheating ........................................................................................................................................ 124
      2. Scope of Review Under S. 482, Cr.P.C. ................................................................................................................. 128
IV. CONCLUSION ........................................................................................................................................................................ 131

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I. SETTING THE CONTEXT

A company, or corporation, enjoys a separate existence from its owners and from those who manage its day-to-day affairs. Although the separate legal personality of a company has been a well-established concept, whether a company’s wrongdoing can be subject to the sanction of criminal law has been a vexed question. While it is trite law that the individuals managing a company may be liable under criminal law for wrongful acts carried out by them, the thornier issue pertains to whether the acts of such managers can be attributed to the company (through its separate legal existence) thereby making it liable to the consequences of an offence under criminal law.

More than a century ago, punishing a company was not considered possible: it was observed that a company was without a conscience as it had "no soul to be damned, and no body to be kicked."1 Gradually, however, the law began to recognize that legal persons such as companies could be liable under criminal law. This was not just for strict liability offences, but even for offences that require mens rea, where the relevant mental element of the appropriate individual (or group of individuals) within a company was attributable to the company itself. Although giant strides were taken during last century, particularly in England, to expand the scope of corporate criminal liability, the development of the law in India has been more nascent. It is only after the turn of this century that the Supreme Court welcomed the opportunity to clarify fundamental aspects of corporate criminal liability in the Indian context, and its judgment in Iridium India Telecom Ltd. v. Motorola Incorporated & Ors.2 is one such key step in solidifying the framework for criminal liability of companies.

Iridium is arguably one of the most significant judgments of the Supreme Court on corporate criminal liability since the verdict of a bench of five Judges in Standard Chartered v. Directorate of Enforcement.3 The Supreme Court in Standard Chartered had held by majority that a company can be prosecuted for offences which are

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1 This phrase has been attributed to a Lord Chancellor of England. See, John C. Coffee, Jr., "No Soul to Damn, No Body to Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 386 (1980).
2 AIR 2011 SC 20, [2010] 160 Comp Cas 147 (SC) (Supreme Court of India) [hereinafter "Iridium"]. The judgment was delivered on October 20, 2010 by a bench consisting of two judges.
3 AIR 2005 SC 2622, (2005) 4 SCC 530 (Supreme Court of India) [hereinafter "Standard Chartered"].
Corporate Criminal Liability and Securities Offerings: Rationalizing the Iridium-Motorola Case

punishable with mandatory imprisonment. In doing so, the Supreme Court overruled its previous decision in *Assistant Commissioner v. Velliappa Textiles Ltd.*, where it was held that a company cannot be prosecuted for an offence imposing mandatory imprisonment. In *Standard Chartered*, however, the Court left open the question of whether a company could be punished for crimes requiring *mens rea* (as opposed to statutory 'strict liability' offences). The significance of *Iridium* is that it finally clarifies the law on this aspect, and also represents the first indicative strides under Indian law towards assessing criminal liability for misstatements in relation to offerings of securities by companies.

**II. IRIDIUM: FACTS AND DECISION**

Iridium India Limited filed a criminal complaint against Motorola Inc. alleging offences under s. 420 (cheating) read with s. 120B (conspiracy) of the Indian Penal Code (IPC). The complaint alleged that Motorola Inc. had floated a private placement memorandum (PPM) to obtain funds/investments to finance the 'Iridium project'. The project was represented as being ‘... the world's first commercial system designed to provide global digital hand held telephone data ... and it was intended to be a wireless communication system through a constellation of 66 satellites in low orbit to provide digital service to mobile phones and other subscriber equipment locally.’ On the basis of the information contained in and representations made through the PPM, several financial institutions invested in the project. The criminal complaint alleged that the representations were false and that the project turned out to be commercially unviable resulting in significant loss to the investors.

Based on Iridium India’s complaint, a judicial magistrate in Pune commenced criminal proceedings against Motorola. Aggrieved by this, Motorola filed a petition before the Bombay High Court under Art. 227 of the Constitution and s. 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) to quash the proceedings against it. By way of an order dated August 8, 2003, the Bombay High Court quashed those proceedings. Against this order, Iridium India preferred an appeal to the Supreme Court.

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4 The relevant legislation in that case, the Foreign Exchange Regulation Act, 1973, provided a sentence of imprisonment and fine to persons (including companies) convicted of an offence.

5 (2003) 11 SCC 405 (Supreme Court of India).

6 See, e.g., *Standard Chartered*, supra, n. 3, at ¶ 9, where K.G. Balakrishnan J., referring to the issue of *mens rea*, observed: “we express no opinion on that issue.”

7 *Iridium*, supra, n. 2, at ¶ 4.

8 Motorola Inc. v. Union of India, 2004 Cri. L.J. 1576 (Bom) (Bombay High Court).
The Supreme Court began by considering whether it was appropriate for the High Court to quash the proceedings under s. 482 of the Cr.P.C. It noted that the High Court “should normally refrain from giving a prima facie decision in a case where all the facts are incomplete and hazy”, and where the requisite evidence has not yet been produced. The court made references to previous case law defining the scope of interference of the High Court under s. 482 of the Cr.P.C.

As for substantive matters, the Supreme Court was concerned with the broad question of corporate criminal liability. It concluded that there was no doubt companies can be held criminally liable, as they could no longer claim immunity from prosecution. In that sense, a company can be treated in the same manner as an individual for being convicted of an offence, including one that requires mens rea. Relying upon its decision in Standard Chartered, the Supreme Court found that a company cannot escape liability simply because the offence requires mandatory imprisonment.

As to the specifics of an offence of cheating as defined in s. 415 of the IPC, the Supreme Court ruled that a complainant needs to prove that an inducement of the victim was caused by deception exercised by the accused. Moreover, “non-disclosure of relevant information would also be treated as a mis-representation of facts leading to deception”. On the facts of the case, the Supreme Court found that the High Court had exceeded its brief by examining the PPM and other documents in detail in exercise of jurisdiction under S. 482 of the Cr.P.C. In doing so, the Supreme Court paid scant regard to the existence of risk factors and disclaimer language in the PPM that may have cautioned investors regarding risks of the investment and thereby dilute the allegation of deception. It therefore allowed the appeal and set aside the judgment of the Bombay High Court.

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9 Iridium, supra, n. 2, at ¶ 32.
10 Id.
11 Iridium, supra, n. 2, at ¶ 35 (noting that “the companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary mens rea for the commission of criminal offences. The legal position in England and the United States has now crystallized to leave no manner of doubt that a corporation would be liable for crimes of intent.”).
12 Iridium, supra, n. 2, at ¶ 38.
13 Iridium, supra, n. 2, at ¶ 40.
14 Iridium, supra, n. 2, at ¶ 42.
15 Id.
III. Evaluating Iridium

The factual backdrop of Iridium as well as Supreme Court’s observations therein provide an ideal opportunity to analyze Indian law on two questions: (i) attribution of mens rea to companies for the purposes of criminal liability, and (ii) criminal liability for misstatements in the context of securities offerings made to specific investors on a private basis. This note briefly explores both these issues in the context of the ruling in Iridium.

At the outset, however, it would be pertinent to note that the Supreme Court did not conclusively deal with the issue pertaining to securities offerings by companies on a private basis and possible criminal liability for misstatements thereon. This is understandable given the nature of proceedings before the Court. In a petition involving quashing of criminal proceedings under s. 482 of the Cr.P.C., courts are required to only consider whether a prima facie case is made out in the complaint. They must consider whether the facts as disclosed in the complaint are sufficient to result in conviction, without examining questions of how those facts would be proved. Thus, while courts considering a petition under section 482 would examine questions of law (in the sense of deciding whether, assuming the facts as stated in the complaint are correct, an offence is not made out), the standard of their review on questions of fact or on mixed questions of fact and law tends to be significantly less stringent.

On this basis, the first question of whether a corporation is capable of possessing mens rea is a purely legal question, which the Court was able to considerably elaborate on. As to the other question of criminal liability in cases of securities offerings, the Court’s review had to necessarily proceed on the basis that the facts as alleged in the complaint were true; and the Court was not able to consider possible defenses which might be available at the stage of the trial. Consequently, while we primarily focus in this note on the question of attribution of mens rea to a corporation, we seek to undertake a broad discussion on the key issues that arise in the use of the criminal offence of cheating in response to an allegation of misstatement in a document which is used to offer securities.

16 State of Haryana v. Bhajan Lal, AIR 1992 SC 604 (Supreme Court of India) [hereinafter “Bhajan Lal”].
17 Id.
18 Bhajan Lal, supra, n. 16.
A. Principles of Attribution

As a general matter, principles of attribution are invoked to ascertain the identity of individuals within a company whose mental element will be attributed to that of the company for the purpose of foisting criminal liability. In *Iridium*, the Supreme Court held:

The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons.

The Court thus rules on two aspects. First, it affirms that a corporation is capable of possessing mens rea. Second, it lays down a somewhat rigid test – affirming the judgment of the House of Lords in *Tesco Supermarkets Ltd. v. Nattrass*, that the person whose mens rea is to be attributed to the corporation must be the directing mind. The Supreme Court appears to have accepted the rigid ‘directing mind and will’ test of *Tesco* and, in doing so, has failed to refer to a subsequent significant judgment of the Privy Council in *Meridian Global Funds Management Asia Ltd. v. Securities Commission* that leaves scope for a more flexible analysis for

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20 *Iridium*, supra, n. 2, at ¶ 38 [emphasis supplied].
21 [1972] AC 153 (HL) (House of Lords) [hereinafter “Tesco”].
22 *Id.*. Tesco was prosecuted under Section 11 of the (UK) Trade Descriptions Act, 1968. One of Tesco’s supermarkets had advertised that it was selling certain packets of goods at the reduced price but a customer was told to pay the normal price. This was because the shop manager was negligent in failing to notice that the shop had run out of the low-price packets. Section 24(1) of the Act provided a defence for a shop owner, if he could prove that the commission of the offence was caused by “another person”, and that he had taken all reasonable precautions and had exercised all due diligence so as “to avoid the commission of such an offence by himself or any person under his control.” Tesco was able to prove that its board had instituted systems of supervision and training which amounted to taking reasonable precautions. The issue which arose was whether it was the precautions of the board which counted, or whether the conduct of the shop manager also had to be taken into account as being the conduct of the company. The House of Lords held that the precautions taken by the board were sufficient, and the manager’s negligence was held to be not attributable to the company.
23 [1995] 2 AC 500 (PC) (Privy Council) [hereinafter “Meridian”].
Corporate Criminal Liability and Securities Offerings: Rationalizing the Iridium-Motorola Case

Some further comment on both the aspects of this holding in *Iridium* is apposite.

1. Corporate Mens Rea

As we noted earlier, the question of whether a corporation is capable of having *mens rea* is one which—until *Iridium*—was unsettled under Indian law. The fact that Indian courts have displayed ambivalence in holding a corporation guilty of acts involving *mens rea* raises an element of surprise given the robust developments in English law on the subject-matter, which have been extensive relied upon by Indian courts.

Under principles of corporate law, in certain situations the acts or mental state of certain individuals can be attributed directly to the company, where the company carries the primary or direct liability. In such situations, there is no requirement to invoke doctrines of either agency or vicarious liability. The so

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24 In *Meridian, id.*, a case concerning the attribution of knowledge and not the attribution of actions, the Privy Council had to decide whether the knowledge of an investment manager employed by the company would be attributed to the company, so that the company would have the knowledge that it was a “substantial security holder” under the New Zealand Securities Amendment Act 1988. It was argued that the board of Meridian did not have knowledge that it had become a substantial holder; and consequently, the company could not be attributed with that knowledge. Lord Hoffman held (¶ 22):

The policy of section 20 of the Securities Amendment Act, 1988 is to compel, in fast-moving markets, the immediate disclosure of the identity of persons who become substantial security holders in public issuers. Notice must be given as soon as that person knows that he has become a substantial security holder. In the case of a corporate security holder, what rule should be implied as to the person whose knowledge for this purpose is to count as the knowledge of the company? Surely the person who, with the authority of the company, acquired the relevant interest. Otherwise the policy of the Act would be defeated ...

He however also clarified (¶ 23), “... their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company. It is a question of construction in each case ...”

25 In the case of agency or vicarious liability, the company carries secondary or indirect liability. For the difference between primary liability and secondary liability, see, Jason Harris, Anil Hargovin & Michael Adams, *Australian Corporate Law* 220 (2009). Where the company carries primarily liability, law treats the company and its directing mind or will as one and the same; where the company carries secondary liability, law recognizes the company as separate from its employee or agent whereby the company becomes vicariously liable for the acts of the employee or agent.
called “alter-ego” theory, which is premised on the company’s primary liability, was initially propounded by Viscount Haldane as a basis of attribution distinct from agency or vicarious liability.26

The Supreme Court of India had earlier considered this theory in JK Industries v. Chief Inspector of Factories and Boilers.27 The Court specifically approved of Lennard’s, but then it proceeded nevertheless to state that the doctrine of vicarious liability comes into play. This deployment of the phrase ‘vicarious liability’ in that case was unfortunate. Although the court was dealing with a statutory strict liability case (where the mental element is immaterial or even unnecessary) and the issue turned on wordings of the relevant statute, the thesis under Indian law that the ‘directing mind and will’ doctrine relates to vicarious liability can perhaps be traced to this dicta of the Supreme Court. Subsequently, in 2005, the Supreme Court held that Tesco dealt simply with vicarious liability.28 Again, this statement was dicta and the Court was engaged in interpreting a strict liability offence.29

In India, several statutes impose vicarious responsibility (for strict liability offences) on officers who are in charge of and responsible to the company for the management of its affairs. The Supreme Court in JK Industries and PC Agarwala were both relying on Lennard’s and Tesco in order to determine the identity of persons would be “in charge of and responsible” for the purpose of the statute in question, which only imposed strict liability. The Court had to engage in this exercise as it was concerned with determining the criminal liability of directors or officers of the company. Under statute, a “person in charge of and responsible” is deemed to be an offender, and the Court was only expressing that the specific statutory formulation in that case made an exception from the general criminal law rule that there is no vicarious liability in criminal law. The Court was merely clarifying that under specific strict liability statutes, a person in charge of and responsible would be vicariously liable for the acts of the company. The principle of attribution in Tesco and Lennard’s, however, was the reverse, namely whether the company will be held liable for acts of certain individuals.

26 Lennard’s Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd., [1915] AC 705, 713-14 (HL) (House of Lords) [hereinafter “Lennard’s”] (holding that “the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself”).
27 (1996) 6 SCC 665 (Supreme Court of India).
28 P.C. Agarwala v. Payment of Wages Inspector, M.P., (2005) 8 SCC 104 (Supreme Court of India) [hereinafter “P.C. Agarwala”].
29 Id.
Unfortunately, the Supreme Court was not explicit on this point. In that background, perhaps this curious amalgamation of statutory strict liability with the Tesco rules of attribution had the unfortunate consequence of lower courts becoming cautious and therefore refraining from using these doctrines for holding that a company can have mens rea for it is a settled proposition of Indian criminal law that there can be no general vicarious liability and mens rea cannot be vicariously imputed. In effect, nothing in either JK Industries or PC Agarwala suggests the Court sought to hold that mens rea cannot be imputed to corporations. As stated above, Tesco was being discussed only in a limited context; not in the context of attribution as such.

Of course, even prior to JK Industries, the position in India was far from clear. As long ago as the late 1940s, issues of this nature arose before the Calcutta High Court. The view in Calcutta – from the 1940s to the 1990s – appeared to be that it was impossible for a legal (as opposed to a natural) person to have any mens rea. Judgments of the Calcutta High Court on the point proceeded on a rather simplistic reasoning – effectively, that the ability to have ‘intention’ was the exclusive prerogative (or curse) of natural persons, and it was impossible for a legal person like a company to have intention. The Bombay High Court, however, had taken a more convincing view, noting developments under English law until Tesco. It is worthy of note that in Esso Standard Inc. v. Udharam Bhagwandas Jainwalla, arguments were advanced before the Bombay High Court not just on whether a company can have mens rea, but also on how the process of attribution would in fact operate, with the precise question being whose mens rea would be attributed to the company. Interestingly, arguments proceeded on the basis of whether, for the purposes of criminal liability, a strict test of mens rea was required (a la Tesco), or whether a contextual flexibility (such as that subsequently adopted in Meridian) would be apposite. The Bombay High Court accepted the Tesco approach, rejecting the application of a flexible rule. The court was called upon, on the authority of Moore v. I. Bresler Ltd., to decide whose mens rea is to be attributed to the company.

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31 Champa Agency v. R. Choudhury, 1974 CHN 400 (Calcutta High Court); Sunil Banerjee v. Krishna Nath, AIR 1949 Cal 689 (Calcutta High Court); AK Khosla v. Venkatesan, 1992 (98) CrLJ 1448 (Cal) (Calcutta High Court).

32 [1975] 45 Comp Cas 16 (Bom) (Bombay High Court) [hereinafter “Esso”].

33 [1944] 2 All ER 515 (King’s Bench Division) [hereinafter “Moore”]. In this case, a company was convicted of an offence requiring proof of an intention to deceive where those responsible were its secretary and branch manager; and not the absolute ‘directing minds.’
Counsel suggested before the court that a flexible test which allowed actions of branch-managers to be attributed to a company went too far and negated the element of certainty which ought to be inherent in criminal law. Support for the proposition that Moore was wrongly decided was drawn from academic writings in leading English journals. The Court accepted this line of argument, expressly approving Lord Diplock’s speech in Tesco, including the following passages:

In my view, therefore, the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.

The Bombay High Court then disapproved of an earlier passage of Paranjape, J. in State of Maharashtra v Syndicate Transport (P) Ltd. Justice Paranjape had stated:

[The question whether a corporate body should or should not be liable for criminal action resulting from the acts of some individual must depend on the nature of the offence disclosed by the allegations in the complaint or in the charge-sheet, the relative position of the officer or agent, vis-a-vis, the corporate body and the other relevant facts and circumstances which could show that the corporate body, as such, meant or intended to commit that act ...]

In Esso, this was disapproved, based on Lord Diplock’s speech in Tesco.

These two judgments of the Bombay High Court are creditable in as much as they prophesied the debate which intensified in England after Meridian – over 25 years after the judgment in Esso: is a flexible, case-by-case, approach suitable to the criminal law? Unfortunately, these Bombay judgments do not appear to have had the required influence on the development of the Indian principles in this regard. Part of the reason might have been that in intervening years, until the Supreme Court decision in Standard Chartered, this debate about

34 For instance, R.S. Welsh, The Criminal Liability of Corporations, 62 L.Q.R. 345 (1946), which was cited before the Court by counsel.
35 Esso, supra, n. 32, at ¶ 29.
36 AIR 1964 Bom 195 (Bombay High Court).
mens rea did not really garner the requisite attention Indian law: the other issue of whether a company can be prosecuted for offences which carry a mandatory punishment of imprisonment operated as a distraction to absorb judicial attention in the interim. Be that as it may, by 2010, the Bombay High Court accepted the view that a corporation cannot have mens rea. This latest Bombay judgment was again based on the simplistic reasoning of the early cases of the Calcutta High Court. Most surprisingly, Esso was not cited at all by the court.

In the backdrop of that prevailing confusion, the holding in Iridium has finally clarified beyond doubt that a corporation is capable of having mens rea. The Supreme Court has specifically approved of the decision in Tesco. However, rather surprisingly, Meridian does not even find a mention in the Supreme Court's judgment. The significance of this comment depends on how one understands Meridian. To what extent did Meridian depart from Tesco? If it did indeed depart substantially from Tesco, was the Supreme Court justified in refusing to take the same path as of Meridian? We now turn our attention towards unravelling the jurisprudence on attribution as it has evolved more recently in England, with Meridian being a leading light.

2. Evolution of Principles of Attribution – From Tesco to Meridian

At the outset, it will be useful to keep in mind that there are specific observations in case law stating the directing mind theory applies with equal force in civil law and in criminal law. Thus, Lord Justice Nourse in El Ajou v. Dollar Land Holdings plc stated that the theory has been applied in civil and criminal cases alike, “with no divergence of approach.” El Ajou itself is in some ways the genesis of a more flexible approach, and the Court of Appeal formulated the

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37 Id., at ¶ 17.
38 Arvind Mafatlal, supra, n. 30.
39 Supra, n. 31.
40 The most recent scholarly overview of the principles in Meridian is found in Ellis Ferran, Corporate Attribution and the Directing Mind and Will 127 L.Q.R. 239 (2011).
41 [1994] 2 All ER 685 (CA) [Court of Appeal (Civil Division)] [hereinafter “El Ajou”].
42 Id. at 695.
43 See, Lebon v Aqua Salt Co Ltd. [2009] UKPC 2 (Privy Council) [hereinafter “Lebon”], at ¶ 25, where El-Ajou is explained as an earlier example of the application of the principles later laid down specifically in Meridian.
idea of there being different directing minds in respect of different activities. It is also far too easy to fall into the trap of assuming Meridian to be a drastic change in the position of law. In the recent decision in Stone & Rolls Ltd. (in liquidation) v. Moore Stephens (a firm), Lord Walker specifically stated that leading academic commentators had “overstated” the effect of Meridian.

In Meridian, the Privy Council considered a case involving disclosure obligations under securities regulations in New Zealand. On the facts of the case, it was held that the knowledge of employees who acquired the shares for the company counted as the knowledge of the company. The Privy Council applied a contextual and purposive interpretation, and no emphasis was placed on whether the relevant employees were the “directing mind and will” of the company. Meridian was immediately preceded by two cases - Re Supply of Ready Mixed Concrete (No 2), and Regina v. British Steel plc which had distinguished Tesco as turning on the specific statutory language. Thus, at first sight, these three cases indicated that flexibility was the general rule, and the anthropomorphic approach of Tesco turned on the statutory language in Tesco.

There are, it seems to me, two points implicit, if not explicit, in each of these passages. First, the directors of a company are, prima facie, likely to be regarded as its directing mind and will whereas particular circumstances may confer that status on non-directors. Secondly, a company’s directing mind and will may be found in different persons for different activities of the company...

El Ajou, supra, n. 41, at 699 (per Rose LJ).

[2009] UKHL 139, at ¶ 134 (House of Lords) [hereinafter “Moore Stephens”].

Id., at ¶ 134.

[1995] 1 WLR 1356 (CA) [Court of Appeal (Criminal Division)].

The expression “anthropomorphic” literally means “relating to or characterized by anthropomorphism”, and “anthropomorphism” is defined as “the attribution of human characteristics or behaviour to a god, animal, or object” – CONCISE OXFORD ENGLISH DICTIONARY 56 (11th ed., 2006). The use of “anthropomorphic” in this context refers to the treatment of a corporate body as being similar to a human being, with the actions/intention of the “brain” of the corporation being treated as the actions/intention of the body of the corporation. By contrast, a flexible rule would not have any such predetermined anthropomorphism, such that the person whose intention is attributed to the company, may well be situated at different levels in the corporate hierarchy. The classic “anthropomorphism” in this context may perhaps be Lord Denning’s statement in H.L. Bolton (Engg.) Co. Ltd. v. T.J. Graham and Sons, [1957] 1 Q.B. 169 [hereinafter “Bolton”], when the learned judge stated (at p. 172) that a company “has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre”. The anthropomorphic approach is thus a one-size-fits-all approach; where the ‘brain’ is to be identified, and the intention of the ‘brain’ is to be imputed to the company. A flexible approach on the other hand would leave open contextual enquiries of attribution, without an a priori determination that only the actions/intention of the ‘brain’ will be attributed to the company.
Meridian was greeted enthusiastically in scholarly writing as a welcome departure from the strictness of Tesco. Professor Sealy thus claimed that it brought “a welcome degree of flexibility into a difficult area of the law”, while Professor Grantham considered Lord Hoffmann’s flexible approach praiseworthy. It was also felt that Meridian was more attuned to the realities of corporate organisational hierarchies. Lord Cooke was far more circumspect: “The value of the Privy Council’s refinement of the concept of identification may well be considerable but remains to be demonstrated by future cases ... a kind of anthropomorphism would be very hard to eradicate from this branch of the law”. Lord Cooke’s circumspection is borne out from subsequent decisions as well. Recent case-law from the United Kingdom best illustrates this. For example, in Attorney General’s Reference (No. 2 of 1999), the identification principle was once again narrowly identified to refer only to top management of the offending company. The House of Lords in Moore Stephens in obiter remarks also clarified that Meridian cannot be understood as having changed the position far too much.

Under civil law, Meridian appears to be a more favoured tool with judges, and has been applied in several spheres. The flexible rule has been used to impute knowledge to companies, to impute contractual obligations of disclosure, and several other cases. Yet, there has been caution even in the civil law sphere. Lord Justice Buxton, for example, in a dissenting judgment refused to categorise Meridian as anything more than an instance of statutory construction. Professor Peter Watts has also championed a reading of similar cases as turning on statutory interpretation. This reading has also found favour with a recent bench of the

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54 [2000] Q.B. 796 (CA) [Court of Appeal (Criminal Division)].
55 Moore Stephens, supra, n. 45, at ¶ 134.
56 Lebon, supra, n. 43.
57 Jafari-Fini v Skillglass Ltd, [2007] EWCA Civ 261 [Court of Appeal (Civil Division)].
58 Ferguson v British Gas Trading Ltd, [2009] EWCA Civ 46 [Court of Appeal (Civil Division)]. See generally, for a more elaborate discussion, Ferran, supra, n. 40.
59 Odyssey Re (London) Ltd v OIC Run-off Ltd, [2001] Lloyd’s Rep I.R. 1, CA at 96 [Court of Appeal (Civil Division)].
Court of Appeal – where the Court pointed out: “one cannot just jump from one Act to another and say the rule for one is the rule for the other.”

The reason why judges have favoured applying the flexible rule of Meridian more in civil cases, perhaps, is that certainty in result is much more desirable in imposing criminal penalties than in imposing civil penalties. Ultimately, once the matter is treated as one of construction, a flexible construction is much more suitable for civil law than criminal law. In sum, it would appear that what Meridian does is to provide judges with the choice of rules – the strict enquiry continues as the default rule, but special circumstances may justify courts adopting a flexible analysis. What these special circumstances are would depend on the underlying legal rule, its language and policy. In the law of crimes, these considerations are likely to lead to a strict approach a la Tesco. However, it is of course possible that on a fair construction of even a criminal statute, the policy underlying a rule may require a flexible approach. To that extent, it is arguable that Meridian is not a sea-change from Tesco, at least in its application to the law of crimes.

3. The Supreme Court’s Analysis in Iridium

These developments in English law raise the question – was the Supreme Court in Iridium justified in invoking only Tesco and not Meridian? First, it is noteworthy that the Meridian approach could yet have been brought implicitly into Indian law. The court seems to have rejected this. However, on the facts of the case, given the nature of proceedings (based on the premise inherent in proceedings under s. 482 of the Cr.P.C. that the allegations in the complaint were true), the Court was not required to express an opinion conclusively as to the test for attribution. What was in issue was the ‘whether’ question; not the ‘how’ question: whether a corporation can have mens rea – not how can mens rea be proved. Thus, these remarks are obiter; and though obiter of the Supreme Court is

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61 Fergusson v. British Gas Trading, [2009] EWCA Civ 46 [Court of Appeal (Civil Division)].
62 See generally: Ferran, supra, n. 40. Professor Ferran writes: Judicial caution in this sphere may also reflect the importance that is attached to preserving the certainty and predictability of the criminal law. These are features of the law that would be undermined by the rather ad hoc approach that could be the product of over-enthusiastic reliance on the concept of context-specific rules of attribution ... Id., at 248.
63 KR v. Royal & Sun, [2006] EWCA Civ 1454 [Court of Appeal (Civil Division)].
64 Iridium, supra, n. 2, at ¶ 38, see, extract accompanying supra, n. 20.
considered binding on High Courts, what will be binding is that at the stage of proceedings under S. 482, when the requisite allegations have been made, the mode of proving *mens rea* should not be taken into account as a relevant factor. Nonetheless, it is unlikely that Courts will feel free to reject a *Tesco* approach; particularly considering that *Meridian* finds no mention whatsoever in the Supreme Court judgment. Instead, the Supreme Court has preferred to rely on cases such as *Bolton*,

In sum, the Indian enquiry appears to be more anthropomorphic than flexible. The discussion above will indicate that this is perhaps true even in England with the flexibility, if any, introduced only through the principles of statutory interpretation. One other factor which indicates that a rigid approach is perhaps more suitable in Indian law is the enormous framework of legislative interventions in several types of offences. Where the legislature has found it fit to relax *mens rea* requirements, it has categorically done so through specific “offences by companies” and by implementing strict liability offences. The enthusiasm of the legislature in such exercises is perhaps an additional reason for circumspection by the judiciary. Conversely, *Iridium* itself need not be read as an ultimate rule – *Iridium* was decided in the context of the requirements of the IPC; and need not be applied to cases where the policy underlying statutory legislation, as understood in accordance with the principles of interpretation, leaves open a more flexible window.

What is also important is to note that the Supreme Court has left open issues of when a directing mind’s acts will not be attributed to the company. That issue was not at all before the Court; and thus, a rigid approach based on the *Iridium* judgment will not be suitable when – say – a directing mind is playing a fraud on the company itself and third parties are incidentally affected by such a fraud. In such a case, it appears unfair to nonetheless hold the company criminally liable. But can this unfairness be reconciled with legal principles? According to us, it can. Cases such as the Canadian Supreme Court’s decision in *R v. Canadian Dredge & Dock Co.*

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65 Supra, n. 49.
66 [1985] 1 S.C.R. 662 (Supreme Court of Canada).
67 This will, of course, apply only when the company has more than one directing mind.
Supreme Court could not possibly have dealt with this situation. Consequently, we argue that while there may have been reasons for the Court to adopt an apparently rigid approach in *Iridium*, caution must be exercised to ensure that the Court's decision is not treated as the final word on all aspects relating to attribution under Indian law. *Iridium* should be seen as the first step on the road to rationalizing Indian law on the point – not as the final destination in and of itself.

**B. Criminal Liability for Misstatements in Securities Offerings**

We now deal with the second principal issue at hand in *Iridium*, namely the criminal liability of companies for misstatements in the context of securities offerings. At the outset, it is necessary to note that the scope of the Supreme Court's pronouncement in *Iridium* was limited only to issues that have a bearing at the relatively premature stage of deciding on an application for quashing proceedings under s. 482 of the Cr.P.C. Nevertheless, since the court was compelled (while making its determination on the case) to comment on legal issues arising out of the specific facts, we consider it essential to dwell upon some of those issues of substance.

1. The Offence of Cheating

The Supreme Court was concerned with the precise requirements for showing a charge of cheating in cases involving an issue of securities by a company on a private basis using an offering document such as a PPM. In this regard, the facts of *Iridium* present a somewhat peculiar situation. Liability (whether criminal or civil) for misstatements in a prospectus are governed by specific provisions in corporate and securities laws, which in India are represented primarily by the Companies Act, 1956, and the Securities and Exchange Board of India Act, 1992.

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68 Courts will not usually consider defences in proceedings under S. 482 of the Cr.P.C. See, e.g., *Aptech v. State of Gujarat*, (2003) 1 Guj. L.R. 56 (Gujarat High Court). The Supreme Court in *Harshendra Kumar v. Rebatilata Koley*, (2011) 3 SCC 351 (Supreme Court of India) [hereinafter “Harshendra Kumar”] affirmed that non-consideration of defences is the rule in S. 482 petitions, but also clarified that the rule is not an absolute one.

69 We subsequently return to the appropriate scope of review under S. 482 of the Cr.P.C. See, *infra* sub-part 2.

70 The provisions pertaining to issues of prospectus are administered by the Securities and Exchange Board of India (SEBI), *Companies Act*, 1956, § 55A. For criminal liability for misstatements, see, S. 63 *Companies Act*, 1956.

71 By way of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, SEBI has stipulated the detailed requirements regarding disclosures in a prospectus.
However, these specific provisions apply only to a public offering of securities that are to be listed on one or more stock exchanges. Since the issue of securities in Iridium involved a private placement rather than a public offering, the transaction was essentially within the domain of private contract law and these specific provisions in corporate and securities laws were inapplicable, thereby requiring the complainant to resort to general principles of criminal law under the IPC. In that sense, Iridium represents a relatively less trodden path involving the use of the wider offence of "cheating" to a more specific situation that is otherwise within the purview of corporate and securities laws.

Cheating is defined under s. 415 of the IPC as follows:

Cheating.- Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation- A dishonest concealment of facts is a deception within the meaning of the section."

Essential to the offence of cheating is fraudulent or dishonest inducement or deception (defined to include a dishonest concealment of facts). It has been held that bona fide mistakes in a prospectus do not amount to cheating – this is obvious; when something is established to be bona fide, no question of dishonesty or deception would arise. More interestingly, and rather less obvious, is a holding that even a “scheme (in a prospectus) which was speculative in the highest degree” is not a dishonest statement. Furthermore, the Supreme Court has held: “It is for the legislature to intervene if it wants to protect people who participate in these schemes knowing that sooner or later the scheme must fail.” In Basit Ali, the Supreme Court appears to have accepted

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72 For factors that differentiate a public offering of securities from a private placement, see, COMPANIES ACT, 1956, § 67.
74 Radha Ballav Pal v. Emperor AIR 1939 Cal 327 (Calcutta High Court); Kamal Chopra v State of UP 1999 (105) CrLJ 2345 (All) (Allahabad High Court).
a ‘put on inquiry’ type defence,\textsuperscript{76} when it uses the phraseology of “knowing that sooner or later the scheme must fail” but the decision itself is not clear in that respect. To that extent, then, Iridium was an excursion in virgin territory for the Supreme Court.

In Iridium, the Bombay High Court had placed weight on the “Risk Factors” and the cautionary statement contained in the PPM.\textsuperscript{77} In the view of the High Court, a dishonest intention could not be made out and the case was essentially in the nature of a civil dispute between the parties. Before we discuss the Supreme Court’s decision, it would be important to note the context in which the phraseology of “civil dispute” arises.

Under the IPC, several cases have discussed whether a breach of contract is a case of cheating. Often, complainants have initiated criminal proceedings in contractual disputes, alleging that a breach by the counter party had resulted in the offence of cheating. In this context, the Supreme Court has stipulated that it is important to determine whether an essentially civil dispute is being given the color of a crime.\textsuperscript{78} A mere breach of contract is not cheating – what needs to be established is a dishonest intention at the time of entering into the contract.\textsuperscript{79} Unless such a pre-existing dishonest intention is established, the dispute should be treated as civil in nature; and no criminal case would be made out.\textsuperscript{80} In Iridium, the High Court drew on such reasoning – which is fairly settled in Indian law – and applied the same to the somewhat different facts of a securities offering. In the High Court’s

\textsuperscript{76} A “put on inquiry” defence essentially involves a stance that the plaintiff/complainant was given enough facts such that his suspicion ought to have been aroused; and if he then yet to proceed with the transaction, the defendant/accused cannot be blamed for any connected risks or liabilities. The “put on inquiry” defence has been used in the commercial law in several cases, notably in negating claims of ostensible authority under the law of agency. See, Underwood v. Bank of Liverpool, [1924] 1 K.B. 775.

\textsuperscript{77} The relevant clause in the PPM reads:
An investment in Iridium involves certain risks, many of which relate to the factors and developments listed above, prospective investors should carefully consider the disclosures set forth elsewhere in this memorandum, including those under the caption ‘risk factors’ (1992 PPM Pg. 5) Iridium, supra, n. 2, at ¶ 43.

\textsuperscript{78} For example, in G. Sagar Suri v. State of Uttar Pradesh, AIR 2000 SC 754 (Supreme Court of India), the Supreme Court observed (at ¶7): “It is to be seen if a matter, which is essentially of a civil nature, has been given the cloak of a criminal offence”.

\textsuperscript{79} Hriday Ranjan Verma v. State of Bihar, JT 2000 (3) SC 604; 2000 Cri. L.J. 2983 (Supreme Court of India).

\textsuperscript{80} Id.
Corporate Criminal Liability and Securities Offerings: Rationalizing the Iridium-motorola Case

view, no intention to deceive was evident at the time of issuing the PPM. The High Court placed substantial reliance on the fact that the PPM contained elaborate "Risk Factors".

In reversing the High Court's holding on this ground, the Supreme Court relied on the judgment of the House of Lords in *The Directors & Co., of the Central Railway Company of Venezuela v Joseph Kisch*, 81 which was a case involving the issue of a prospectus in a public offering (and presumably carrying higher disclosure requirements than a PPM issued to sophisticated investors). 82 The Court then cited a passage from *New Brunswick and Canada Railway Company v Muggeridge*: 83

... [T]hose who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take share ...

The Supreme Court held on this basis that the complaint showed a prima facie case of cheating, as there had not been a full disclosure of facts. However, what deserves more scrutiny is the fact that the High Court seems to have relied on the Risk Factors section of the PPM not only for showing that there was full disclosure, but also for showing that at the stage of issuing the PPM no 'dishonest' concealment was evident. While the Supreme Court's hesitation on allowing the mere mention of certain Risk Factors as being sufficient for quashing is understandable, the Court could perhaps have explained in greater detail as to why it found that the Risk Factors do not nullify any dishonesty from the inception. The Court's reliance on the above decisions indicates that it viewed the Risk Factors as nothing but a 'put on inquiry' statement; but "it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry." 84

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82 Interestingly, the idea of 'sophisticated investors' in India is still not well-entrenched; for instance, to distinguish between a public offer and a private placement, Indian law uses a quantitative test of number of investors and not a qualitative enquiry as to sophistication. See, *COMPANIES ACT, 1956*, § 67.
83 [(1860) 1 Dr. & Sm. 381] (Court of Exchequer), cited in, *Iridium, supra*, n. 2, at ¶ 44.
84 Id.
However, the Supreme Court judgment cannot be said to have completely discounted the role of Risk Factors as mitigating elements. Once again, the nature of proceedings meant that the enquiry was only *prima facie*. As the Court explained:

[T]he Appellants were entitled to establish that they have been deliberately induced into making huge investments on the basis of representations made by [Motorola] and its representatives, which representations subsequently turned out to be completely false and fraudulent. The appellants were entitled to an opportunity to establish that [Motorola] and its representatives were aware of the falsity of the representations at the time when they were made ...

Essentially, the matter is one of trial; and a petition for quashing was not to be entertained merely on the basis of the risk factors. But is such an approach completely justifiable? Should Courts consider “Risk Factors” in petitions under s. 482 of the Cr.P.C.?

2. Scope of Review Under s. 482, Cr.P.C.

To answer the questions raised above, it is essential to understand the rationale behind the exercise of powers under s. 482 of the Cr.P.C. The plain text of s. 482 does not indicate that it is concerned mainly with petitions for quashing criminal proceedings. Indeed, s. 482 is only a provision saving the inherent powers of the High Courts. The text states:

> Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice ...

Thus, in substance, the High Court can quash proceedings before lower courts when those proceedings amount to an abuse of process. The Supreme Court has elaborated the guidelines to be kept in mind while exercising the power of quashing under s. 482. The leading case on the point is the Supreme Court’s judgment in *Bhajan Lal*.

Hence, the High Court would exercise powers of quashing...

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85 *Iridium*, supra, n. 2, at ¶ 44.

86 In a passage which has been cited frequently in subsequent judgments, the court observed:

> In the ... exercise of the extra-ordinary power under Article 226 or the inherent powers under s. 482 of the Code of Criminal Procedure, ... the following categories of cases [are given] by way of illustration wherein such power could be
when the allegations against the accused do not qualify as an offence under law, even when the allegations are assumed to be factually true. Such tests have meant that courts do not usually consider defences of an accused — the logic is that if a case is such that a *prima facie* charge is made out, allowing matters to finally be decided at trial cannot be an abuse of process.\(^7\)

It is arguable, however, that an absolute refusal to consider the effect of Risk Factors in an offer document (such as the PPM in *Iridium*) is not justified on such a basis. The Risk Factors are after all part and parcel of the very representation which is relied on by the complainant itself; the Risk Factors are inseparable

exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice...

1. where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

2. where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

3. where the uncontroverted allegations made in the FIR or ‘complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4. where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

5. where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

*Bhajan Lal*, supra, n. 16, at ¶ 105.

\(^{87}\) See, e.g., the judgment of the Supreme Court in *Bharat Parikh v. CBI*, (2008) 10 SCC 109 (Supreme Court of India), as applied by the Kerala High Court in *P. Sulaiman v. State*, Crl. MC. 1246/2010 (judgment dated 20 April 2010) (Kerala High Court).
Any representation must be looked at in its entirety before determining whether a prima facie case exists for continuation of proceedings.⁸⁸

Since the Supreme Court in Iridium was only dealing with an appeal from an order under s. 482 of the Cr.P.C., its ruling in respect of Risk Factors is at best a preliminary determination without a detailed examination of countervailing arguments of the parties. We therefore caution against treating Iridium as the final word of the highest court of the land on the effect of Risk Factors in a securities offering document. More generally, the significance of Risk Factors cannot be undermined, as we note below.

Companies that issue securities are not expected to guarantee future prospects and results to prospective investors. Hence, they tend to include cautionary language in offering documents that moderates investor expectations. It is in this background that securities regulations governing public offerings of securities require issuers to include detailed Risk Factors. Even the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 provide detailed guidelines on the types of Risk Factors to be included in a prospectus. These regulations in fact encourage rather than restrict the inclusion of Risk Factors.⁹⁰

Surely, it cannot be intended that these Risk Factors would become immobilized

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⁸⁸ Recently, in Harshendra Kumar, supra, n. 68, the Supreme Court has clarified that in appropriate cases, a defence emerging ex facie from uncontroverted documents can be considered even in the exercise of jurisdiction under s. 482 – to not do so could amount to a “travesty”. So too, “[i]t is one thing to say that the Court at this juncture would not consider the defence of the accused but it is another thing to say that for exercising the inherent jurisdiction of this Court, it is impermissible also to look to the admitted documents...” All Cargo Movers v. Dhansh Jain, (2007) 12 SCALE 39 (Supreme Court of India). An analogous principle can well be applied insofar as the question of the relevance of risk factors is concerned.

⁹⁰ Of course, we do not claim that the mere inclusion of risk factors may be sufficient to avoid all criminal liability at the stage of s. 482 proceedings. Our point is narrower – which is that risk factors are at least relevant in s. 482 proceedings, while assessing the ‘representations’ made by the issuer. At the stage of trial, the risk factors would have greater weight – a point which the Supreme Court in Iridium does not seem to have disregarded.

⁹¹ A useful parallel is contained in the U.S. context where the “bespeaks caution” doctrine provides protection to issuers of securities from liability that arises from forward looking statements as long as they are tempered by cautionary language. The doctrine has largely been used in civil claims for securities frauds and has also received statutory recognition in the Private Securities Litigation Reform Act of 1995. See, Palmer T. Heenan, Jessica L. Klarfeld, Michael Angelo Roussis and Jessica K. Wash, Securities Fraud, 47 AM. CRIM. L. REV. 1015, 1064-66 (2010).
once criminal proceedings are initiated against the issuer company for misstatements in the prospectus. That would make Risks Factors rather redundant, a position that would operate against the goals of full disclosure to prospective investors. An extreme approach of disregarding Risk Factors would not only disincentivize full and fair disclosure of future prospects by issuers that would enable investors to gauge their investment appetite, but it could chill securities offerings by imposing too onerous a cost on issuers.

Finally, the Supreme Court in *Iridium* pays scant regard, if at all, to the sophistication of the investors while determining whether they were subjected to ‘deception’ so as to constitute an offence of cheating. In that case, the securities offering was made to institutional investors on a private placement basis and not to individual investors or the public in general. Institutional investors generally possess levels of sophistication that enable them to make investment decisions without advice from the issuer company. Moreover, Risk Factors and disclaimers of the nature contained in the PPM in *Iridium* seek to pass on risks of uncertainty to the investors. Where Risk Factors form an important mitigating feature for public offerings of securities to even unsophisticated investors, as we have seen earlier, there seems to be no reason to grant better levels of protection to sophisticated investors who have the information, expertise and wherewithal to absorb greater risks. Any reading of *Iridium* that suggests complete disregard of Risk Factors in a private offering of securities would place sophisticated institutional investors on an even higher pedestal than unsophisticated public investors; a matter surely not intended by the scheme of regulation of securities offerings.

**IV. CONCLUSION**

The Supreme Court’s decision in *Iridium* is momentous as it clarifies the previously ambiguous position under Indian law that a legal person such as a company is capable of having *mens rea*. It is an important step in promoting the use of criminal sanctions to regulate corporate behavior. At the same time, it is crucial to note that the Supreme Court stops short of ruling convincingly on the methods by which *mens rea* of a company can be proved. It places reliance on the anthropomorphic approach of the English courts in *Tesco* without in any way considering the subsequent crucial development in the form of the more flexible approach in *Meridian*. Similarly, the Supreme Court does not conclusively deal with the effect of Risk Factors in determining the existence of ‘deception’ as an ingredient of an offence of cheating due to misrepresentation in a private placement.