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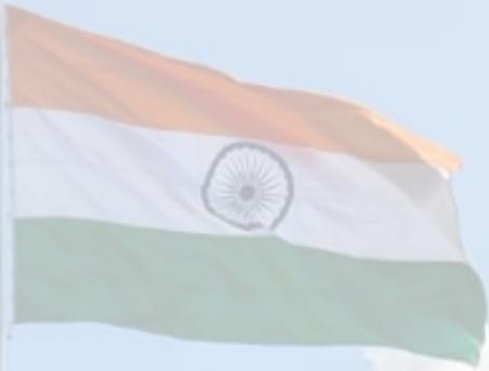

AU COURANT

A Monthly Newsletter by RFMLR

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NEWS UPDATES

Arbitration Law

- **English Test for Anti-Suit Injunction:** UK Supreme Court in its recent decision, in the case of ***Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb"*** laid down the two-step English Test for granting an anti-suit injunction in Arbitration. The Apex Court held that the courts before granting an anti-suit injunction must firstly, examine whether there is a breach of arbitration agreement, and secondly, whether there are strong reasons not to grant the relief. Read More
- **Emergency Arbitration for Amazon-Future Dispute:** In an emergency arbitration proceeding initiated by Amazon in SIAC, an injunction was granted to stay the deal between Reliance and Future group. The dispute arose out of an agreement between Amazon and Future group. Amazon objected to the act Future group's action of selling the company to Reliance Limited for Rs. 24,713 crores. As per the agreement, Reliance group was one of the listed companies with which the transactions were prohibited.
- **Novation of Contract will end the arbitration clause:** Delhi High Court in the case of ***Sanjiv Prakash v. Seema Kukreja*** held that novation of contract terminates the arbitration clause as well. The court held that as soon as the parties agree to supersede the contract or the contract has been put to an end entirely, the arbitration clause, being a part of the earlier contract, falls with it. Read More
- **Mere Submission to Exclusive Jurisdiction:** Delhi High Court in the case of ***Big Charter Pvt. Ltd. v. Ezen Aviation Pty. Ltd.*** held that 'mere submission to the exclusive jurisdiction' of a foreign court in an arbitration does not take away the jurisdiction of Indian courts u/s. 9 to be read with s. 2(2) of the Arbitration and Conciliation Act 1996. Read More

Aviation and Defence Law

- **Air fare cap limits to remain in place for another three months:** Civil Aviation Minister Hardeep Singh Puri announced that the upper and lower limits on domestic airfares will remain in place for three months post-November 24. The ministry had on May 21 placed these limits through seven bands, classified on the basis of flight duration, till August 24. Later, it was extended till November 24.
- **Leave without pay scheme launched by Air India:** The aviation ministry has called Air India's leave without pay (LWP) scheme a "win-win for employees and management" as it provides the opportunity for employees, to take up alternative employment during the period of the leave with the approval of the management. The news came shortly after the former comments made on Air India's

shut down by GOI due to the unprecedented financial loses.

- **DCGA issues guidelines on air tickets refund after SC verdict:** After the Supreme Court's verdict on a full and immediate refund of air tickets booked & cancelled between March 25 and May 24, the Directorate General of Civil Aviation, issued guidelines for the same by categorizing passengers in three categories, and promised to "make all endeavors" to refund the amount at the earliest. Read More

Competition Law

- **Airtel issued Nxtra securities to the Carlyle group:** Bharti Airtel announced a deal with Carlyle on 1st July, 2020, to sell 25% its stake holding in its data centre unit Nxtra Data Ltd. to the Carlyle Group for $235 million. This deal was subsequently approved by the Competition Commission of India in the month of August. On 15th October 2020, Bharti Airtel completed the issue of the securities. Subsequently, the stake will be bought by Comfort Investments II, which is an affiliated entity of CAP V Mauritius Limited.
- **CCI dismissed ILMA's complaint:** The Competition Commission of India has disposed of the complaint which was filed by the Indian Laminate Manufacturer's Association (ILMA) on the grounds of lack of cogent evidence. The complaint highlighted that the local production of Phenol (raw material for making sunmica) is unable to meet the domestic demands which subsequently has increased the dependency on the import of Phenol. It alleged that these importers have formed a cartel to control the supply of Phenol in the Indian market.
- **B. L. Bhatt gets another extension:** The Government has again extended the term of Justice B.L. Bhatt as the officiating chairperson of NCLAT till 31st December 2020or till a regular chairperson is appointed or till any further order has been issued. This is the third extension which he has received. He was first appointed on March 15 for 3 months. The NCLAT does not have a regular chairperson since Justice S J Mukhopadhaya retired.
- **CCI Approves Acquisitions of Solar Projects by Adani Green Energy Twenty–Three Ltd.:** The Competition Commission of India (CCI) has approved the acquisition of several solar energy assets by a joint venture of Adani Energy and Total Solar. Adani Green Energy Twenty-Three Ltd, which is a joint venture of Total Solar Singapore Pte Ltd and Adani Green Energy Ltd, will be buying assets from the Adani Green Energy Ltd. Adani Green Energy Twenty-Three Ltd will be acquiring 100% stake in 10 target companies.

Read more

Data Protection/TMT Laws

- **Mandatory News Media Bargaining Code:** The draft version of the News Media Bargaining Code released by ACCC (The Australian Competition and Consumer Commission) is being highly criticized by Google and Facebook. The draft code allows media companies to negotiate with Google and Facebook over inclusion of their news on the platforms and force the tech giants to share revenue with news organizations. Further, it imposes data sharing obligations on the digital platforms. Read more
- **Classification of "qualified entities" in Belgium Courts:** In a decision published in the Official Gazette on 30th September 2020, the Belgian Minister of Employment, Economy and Consumer Affairs approved a non-governmental organization to be classified as a qualified entity under Belgian Economic Code. In furtherance of this, NGOs can now file class actions and claim damages on behalf of consumers for violations of various laws regarding consumer protection and data protection. Read more
- **The French Health Data Hub Case:** In wake of the *Schrems II judgment*, France's highest administrative court has rejected the request of data protection authority (CNIL) for the suspension of centralized health data platform, Health Data Hub, where the data on health is currently hosted by Microsoft. The judgment also emphasized on the greater public interest involved in allowing the continuous processing of health data, especially in the times of COVID 19.
- **China publishes Draft Law on Personal Data Protection:** On 21 October 2020, China published the Draft Personal Information Protection Law ("Draft PIPL") for public comments. The Draft PIPL lists seven data protection principles including legality, explicit purpose, minimum necessity, transparency, accuracy, accountability and data security. The law is also applicable to foreign companies and restricts cross-border transfer of data unless deemed secure by cyber security administrative authorities. Read more
- **Personal Data Protection (Amendment) Bill introduced in Singapore:** Singapore introduced the Personal Data Protection (Amendment) Bill on 5 October 2020. The amendments seek to keep Singapore's data protection laws up to date with evolving technology developments. It has introduced a mandatory data breach notification requirement to increase accountability of organizations and to lay emphasis on providing greater consumer autonomy and increasing protection from unsolicited messages. Read more
- **Appointment of Privacy Protection Officers in Israel:** The Israel Privacy Protection Authority has recently published a document which contains recommendations to organizations and companies from all

sectors of the economy regarding the appointments of Privacy Protection Officers (PPOs). The PPOs are required to monitor and advice the company on privacy and data protection issues. This will help in raising awareness among the organizations regarding risks and opportunities of personal information management. Read more

Insolvency Law

- **NCLT excludes lockdown period in CIRP:** A bankruptcy Court in Mumbai has allowed a plea by travel company Cox and Kings Ltd. for the extension of its duration of CIRP, after taking into account the disruption caused by COVID-19. The bench directed that the period of CIRP during the promulgation of lockdown will be exempted from March 23 to July 31. Read at

- **NCLT admits insolvency plea against UGSL:** NCLT has admitted insolvency case against Uttam Galva Steels Ltd (UGSL) after the petition was filed by State Bank of India. Major lenders to the company were State Bank of India, Deutsche Bank, Oriental Bank of Commerce, Indian Overseas Bank and Vijaya Bank. Ajay Joshi has been appointed as an interim resolution professional by the lenders.
- **Dhoot Family Offered to Pay Rs 30000 Crore:** Venugopal Dhoot was the Chairman and MD of the suspended board of Videocon Industries. The board was suspended after the initiation of CIRP under the Insolvency and Bankruptcy Code. Recently Dhoot family has offered to pay a sum of Rs. 30000 Crores to the lenders to settle their outstanding claims and pull out 13 Videocon group companies from the insolvency proceedings.
- **Resolution Plan once accepted cannot be withdrawn:** The NCLAT has said that once the Resolution Plan for a debt-ridden company has been approved by the lenders, then the bidder cannot revoke his offer. The 3-judge bench observed that if the Resolution Plan is allowed to be withdrawn, it would frustrate the whole process of CIRP.
- **Jet Airways likely to submit its revival plan by Oct-end:** Jet Airways is likely to submit its revival plan by the end of October. The debt-ridden airlines may sell their current A330 and B737 aircrafts to make a forward payment to the creditors. London investment fund Kalrock Capital and Dubai-based tycoon Murari Lal Jalan proposed the rescue that was duly approved by a creditors' committee.

International Trade Law

- **Trade policy of sanitizers and air conditioners revised:** The Directorate General of Foreign Trade (DGFT) has

notified that the export of alcohol-based hand sanitizers in containers with dispenser pumps is now permissible, making alcohol-based hand sanitizers in any form/packaging freely exportable. Their exports were banned in March in light of the pandemic. In a separate notification, DGFT banned the imports of both split and window air conditioners with refrigerants. Read more

- **DGFT amends trade policy of NBR gloves and N-95 masks:** DGFT has revised the export policy of Nitrile/NBR Gloves from 'prohibited' to 'restricted' category, which means exporters will be able to export the gloves on obtaining licenses from the government. Earlier in October, DGFT had eased the export policy of N-95/FFP-2 masks or its equivalent from 'restricted' to 'free' category, making all types of masks freely exportable. Read more
- **Validity of 'tur' import license extended:** DGFT has extended the validity of the license for the import of 'tur' from 15th November to 31st December of this year. Accordingly, the cut-off date for ICLC (Irrevocable Commercial Letter of Credit) for the import is 31 December. Eligible and verified applicants will have to ensure that their import consignments reach the Indian ports on or before 31 December 2020. Read more

Intellectual Property Rights

- **Patents (Amendment) Rules, 2020:** The Central Government, on 20th October 2020, published the Patent (Amendment) Rules, 2020 containing the revised rules. The amended rules simplify the filing of form (Form-27), which prescribes the working of patented inventions on a commercial scale in India. It now includes the revenue accrued to the patentee in India and brief details regarding the same. Further, the rules allow the filing of statement of commercial working jointly by patentees. Read more
- **Major amendments to the Chinese Patent law:** The Standing Committee of the National People's Congress in China has approved the fourth amendment to the Chinese Patent Law. Article 71 of the amendment has made significant changes to the methods of calculating damages in patent infringement cases and shifted the burden of proof onto the infringer. The stipulated time limit for suing patent infringement has also been increased from two years to three years under Article 74 of the law. Read more
- **USPTO Report on Artificial Intelligence and Patents:** The United States Patent and Trademark Office (USPTO) released a report titled "Inventing AI-Tracing the diffusion of artificial intelligence with U.S. patents ". The report recognizes the rapidly growing number of inventor-patentees who are active in Artificial Intelligence (AI). Further, it focuses on the increasing

importance of AI in invention and Diffusion of AI across technology, inventors, patent owners, organizations and geography. Read more

- **Joint-Waiver Proposal related to TRIPS Agreement:** Recently, India and South Africa have requested WTO to grant a waiver from certain provisions of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement for the containment and treatment of COVID-19. The request has been made citing reasons such as cumbersome process and requirements for the import and export of pharmaceutical products under Article 31bis. However, despite the support of WTO and developing countries, consensus on the proposal couldn't be reached. Read more
- **'Public Interest' defense in patent infringement case:** Recently, Indoco Remedies Ltd, a pharmaceuticals company approached the Delhi High Court on 'public interest' grounds, seeking permission for the sale of drug Apixabid, manufactured by them, establishing its necessity for COVID-19 treatment. Earlier, in the case of ***Bristol-Myers Squibb Holdings Ireland Unlimited Company & Ors*** **v.** ***Indoco Remedies Limited***, the Court had granted an ad-interim injunction in favor of Bristol Myers Squibb Holdings Ireland (BMS) for the infringement of patent by Indoco. In the current case, the Court refused to grant interlocutory injunction merely on basis of public interest. Read more

Securities Law

- **Framework for monitoring of foreign holding:** SEBI has released a framework to monitor foreign holding in Depository Receipts (DRs). Now, any listed company can designate an Indian depository to monitor the limits of DRs. Further, the designated and other depositories will disseminate the DRs Information, as prescribed in the framework, on their websites. If the investment holdings breach specified limits, the investor will be advised to divest the excess holding within 5 trading days. Read more
- **Recovery Expense Fund created:** SEBI has come up with a framework for the creation of a Recovery Expense Fund to enable Debenture Trustees to take prompt action for enforcement of security in case of a default in listed debt securities. Issuers proposing to list debt securities would have to deposit 0.01% of the issue size or a maximum of Rs 25 lakh per issuer. Read more
- **Uniform timeline for listing securities:** SEBI has come out with a uniform timeline for listing of securities issued on a private placement basis. Now, an issuer has to make listing application to stock exchanges and obtain approval by T+4 trading days, where 'T' day' refers to closure of the issue. The

timeline will be applicable for securitized debt instruments and security receipts, municipal bonds, debt securities, and non-convertible redeemable preference shares. Read more

- **NTPC granted exemption:** SEBI has granted exemption to NTPC from ensuring compliance with the requirement of Regulation 24(ii) of the Buy–back Regulations, 2018, regarding a proposal for buy–back of equity shares. NTPC had earlier filed an application seeking relaxation from the strict enforcement of a rule that prohibits a company from making any announcement of buy-back during the pendency of any scheme of amalgamation. Read more
- **Birla barred from securities market:** SEBI has barred Yash Birla, Birla Pacific Medspa (BPML), and eight other individuals from accessing the securities market, directly or indirectly, for two years for mis-utilisation of IPO proceeds. SEBI observed that BPML made misleading statements in its Prospectus in respect of objects of the IPO, and diverted IPO proceeds to third parties under the pretext of work contract. Read more
- **FEMA (Margin for Derivative Contracts) Regulations, 2020:** In order to boost uniform development and maintenance of foreign regulations in India, the Reserve Bank of India (RBI) has notified the Foreign Exchange Management (Margin for Derivative Contracts) Regulations, 2020. The regulations discuss the provisions in relation to prohibition, and permission related to derivatives, in detail. Read More

Tax Law

- **Amendment to Equalisation Rules, 2016:** The Finance Act, 2020 amended the Chapter-VIII of the Finance Act, 2016 to extend the provisions of Equalisation Levy to the e-commerce supplies. The CBDT has notified the Equalisation levy (Amendment) Rules, 2020 to amend the Equalisation levy Rules, 2016. The Rules have been amended considering the changes brought by the Finance Act, 2020. The board has also amended forms for filing statement and appeal before CIT (Appeals) & ITAT. Read More
- **Tax Treaty between Georgia & Japan:** Georgia and Japan are renegotiating the current tax treaty based on OECD model tax convention 2017. Georgia, the current successor to the tax treaty between USSR and Japan, till now is paying around 15% tax at source on the interest payment and 10% withholding tax was applicable in case of interest and royalty payments.
- **Denial of rebate to AA Licenses:** Gujarat High Court in the case of Cosmo Films Ltd. upheld the validity of Rule 96(10) of the CGST Rule. The court while questioning on the validity of the amendment by the Notification of October 2018 to Rule 96(10) stated that 'denial of rebate' to Advance

Authorisation Licenses holder operates prospectively from 23 October 2017.

- **Relief under Vivad se Vishwas Scheme:** The Central Board of Direct Taxes (CBDT) has granted major relief to taxpayers who opted for Vivad se Vishwas Scheme. In its latest decision, the Board clarified that the titled authority shall allow the declarant to make payment without additional amount on or before 31-03-2021 if he files declaration by 31-12-2020. The requirement of payment within 15 days from date of receipt of certificate from designated authority shall not be applicable in that case. Read More
- **Vodafone Wins against India at Hague:** British telecom giant Vodafone Group Plc won the arbitration case against India at Permanent Court of Arbitration. Since the entry of Vodafone in India, the tax department has been asking for an amount Rs. 20,000 crores from the company. The tribunal held that Indian tax department was in breach of "guarantee of fair and equitable treatment" of the terms stated in the India-Netherlands bilateral investment treaty (BIT).

INTERVIEW WITH MR. TARIQ KHAN

MR. TARIQ KHAN

(Principal Associate at Advani & Co.)

Youngest BW (Business World) Legal 40 under 40, 2020. Featured in Fortune 500 (India) magazine (Special Issue, 2017-2018) for authoring the best seller book 'On the Rise' published by Universal Law Publishing (an imprint of Lexis Nexis). Qualified to the conference round of Judge Advocate General, Indian Army.

Frequently invited to speak in various law conferences and events by domestic bar associations, law schools, alternative dispute resolution centres amongst other organizations. Teaching arbitration as a guest faculty for the past six years in some of the prominent law schools of India. Have more than 50 publications to his credit in various journals, magazines and popular legal news portals.

Question 1: Brief discussion on landmark judgments and the approach of Supreme Court on enforcement of foreign arbitral awards.

Arbitration in India is often criticized due to unruly court interference. However, recent judicial pronouncements indicate that Indian courts are taking an increasingly pro-arbitration stance by adopting a minimal interference model. This would help in bringing India's Arbitration regime in line with International standards and eventually make India a center for arbitration.

The enforcement of foreign arbitral awards in India has seen paradigm shift, which is in consonance with the framework laid down by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, famously coined as the New York Convention. Despite efforts made to make India a leading arbitration hub by the legislature, the regressive approach adopted by the Indian courts in enforcement of foreign awards, in judgments like *NAFED v Alimenta S.A.* and *Venture Global Eng. LLC v. Tech Mahindra* is undoubtedly acting as a huge stumbling block.

However, the regressive view taken in NAFED's case has been overshadowed by the Supreme Court of India in its recent judgment Government of India v. Vedanta Ltd.

Question 2: What are your views on the Vedanta judgment?

The Vedanta judgment is a step forward in making India the global arbitration hub. In my view, the judgment will have far reaching consequences in making India a preferred arbitration hub and foster a foreign venture climate.

By way of this judgment, the Apex Court has vehemently reiterated that the courts ought to be reluctant in declining the enforcement of foreign awards and minimize judicial intervention.
Having a pro-enforcement system in place will go a long way to convert India into a preferred arbitration destination and in order to do so, the country has to take significant steps. The government must adopt an approach which instills confidence in foreign companies to invest in India. Also, in order to actually achieve the dream of India of becoming a global arbitration hub, the courts would have to embrace the pro-arbitration system wherein they follow limited intervention when it comes to enforcement of a foreign arbitral award, as pictured by the judiciary in the Vedanta Judgment.

Question 3: What are your views on the Vodafone judgment now that the government is challenging the vote?

In my view, India should not have challenged the Award in view of fact that Vodafone won the taxation dispute in the SC in January 2012 and there are very slim chances of succeeding in Singapore. Also, this was an opportunity for India to show the world that it is going to accept well-reasoned Awards and will do away with the practice of challenging each and every Award.

The Indian government must realise that the idea is to promote investment and not to create an unstable and unpredictable business environment. Therefore, this is an opportunity to give a positive message to the international community that the government will respect the arbitral Awards and will enforce them. Incidentally, there is a practice in public sector undertakings to challenge every Award which is against them. This tradition must go and the government, by not challenging this decision, will in fact encourage other PSUs also to not challenge reasoned Awards which will eventually gain confidence of the investors to invest in India.

Question 4: How to make arbitration more robust in India? Where are we lacking how to attract more investments? Whether India is a safe jurisdiction for investment right now and how to improve upon that?

To ensure an efficient arbitral mechanism and see it grow substantially in the near future, appointment of young lawyers as arbitrators must be encouraged. Despite the existence of various arbitral institutions, institutional arbitration in India remains in a nascent state which is evident from the fact that almost 90% of arbitrations in India are ad hoc. The main reasons of parties being reluctant in approaching these institutions are lack of awareness about the advantages of institutional arbitration over ad hoc arbitration, outdated rules of procedures and poor infrastructure.

The government has taken steps to make India the hub of International Arbitration. However, larger issue has been missed i.e. why India is languishing for decades and has not been able to become an arbitration hub. The reason in my view is that emphasis is put only on cities like Delhi and Mumbai and that the concerns of other cities which are in need of an arbitration culture and institutions are not addressed. We must also promote arbitration culture in Kanpur, Lucknow, Ahmedabad, Kolkata, Jaipur etc. if we really want to make India a hub of arbitration.

Additionally, we must also learn from the development of the best three arbitral institutions i.e. ICC, SIAC and LCIA that have huge number of cases, growth in revenue etc. (e.g SIAC's case filings have increased by over 300% in the last ten years). Therefore, it is necessary that arbitral institutions in India adopt modern rules, make effective use of technology and provide organized structure of proceedings, excellent administrative support and good infrastructure. Additionally, ease of doing business in India also needs to be facilitated, to provide a solid base and ensure longevity. Not only will it make India the hub, but also create a dynamic arbitration culture.

Stakeholders will also have an important role to play in shaping up the future of arbitration in India. For instance, lawyers must understand that the practice of challenging every arbitral award must be discouraged and the focus should not be on getting more work from one client by filing frivolous challenges to the award, instead we must focus on making arbitration more effective which will eventually generate more work as there will be more investment.

Question 5: What are your views on Indian parties choosing a foreign seat of arbitration and enforcing the arbitral award in India?

One of the most essential considerations while parties sign an arbitration agreement is the "choice of seat." An arbitration-friendly jurisdiction is the criteria for parties, as that ensures the enforcement of arbitral awards in finality and in an efficient manner.

The question whether two Indian parties can choose a foreign seat of arbitration has been an obscure one. Earlier a divergence of opinion was seen, but the very recently passed judgment by the Gujarat High Court, while dealing with a dispute wherein two Indian parties had entered into an arbitration agreement and had chosen Zurich as the seat of arbitration, has settled the position of law in this regard. The court has laid that two Indian parties can choose a foreign seat of arbitration and that such award would be enforceable as a foreign arbitral award in India. However, while doing so they shall lose their right to approach Indian courts for interim relief which seems to be much of a disadvantage for the purpose of securing interest of the parties.

Question 6: What are your views on enforcement of interim awards passed by the emergency arbitrators?

Emergency arbitrators can prove to be advantageous as they offer relief to aggrieved parties on priority basis, thereby ensuring preservation of interest of the party. A petition before an emergency arbitration is carried out within a stipulated time frame, which is not the case when petitions are filed before a court of appropriate jurisdiction.

Though the term "emergency arbitration" is not defined in the Arbitration and Conciliation Act but, the rules provided under various arbitration institutions have tried to recognize it.
However, the need to incorporate the same in the Act and give it a formal statutory recognition remains as that would not only give a legal backing to the awards pronounced under the regime but would also be a step towards attracting arbitrations in Indi

EDITORIAL COLUMN

CROSS JURISDICTIONAL ANALYSIS OF OBLIGATIONS ON SOCIAL MEDIA PROVIDERS

This article is authored by Jotsaroop Singh and Bhumija Upadhyay, Junior Editors at RGNUL Financial and Mercantile Law Review (RFMLR).

Introduction:

Social Media is the new playground of the 21st century, and the laws are yet to catch up. Regulation of social media spaces has been a huge concern since their fast proliferation across the globe, especially considering the effects they have on the general populace as a group and as individuals. This influence which social media exerts has been demonstrably prone to misuse, with the disinformation campaign undertaken by Russia to influence the 2016 U.S. Election being a prime example of this.

This means that the paradigm of obligations on Social Media Providers is shifting across the world, with each jurisdiction introducing unique changes which affect the users and the providers alike in multifarious ways. This article aims to analyze various contemporaneous developments in this area, especially with regards to intermediary liability and censorship concerns in various countries.

Changing Obligations for Social Network Providers:

An interesting case study for understanding the changing paradigm of obligations on Social Media Providers is Turkey, a country where a semi-authoritarian regime's new social media law is coming under heavy scrutiny, given the country's past record of curbing dissent via crackdowns on websites such as Wikipedia.

The law was passed on 29 July 2020 by the Turkish Parliament and notified in the Official Gazette. Furthermore, the Turkish Information and Communication Technologies Authority ("ICTA") released a detailed regulatory framework for the Social Network Providers ('SNPs") titled "Procedures and Principles for Social Network Providers" ("Principles") in the Official Gazette dated 2 October 2020. The main ambit of this law is in two areas of operation that is new obligations imposed on social media providers and content removal.

The new obligations imposed on social media providers starts by defining a social media provider, as one with a presence of one million subscribers within the country. Such companies must appoint a representative in the country to help resolve grievances. This move is intended to provide better resolution of complaints and concerns which are raised by citizens.

The content removal provisions envisioned in the law state that if a certain piece of the content constitutes a crime, or otherwise violates a person's rights, then said provider can be ordered by the court to remove that content. This is an update to the previous methodology, wherein access to the whole site was restricted. Combined with the new obligations in place, the new law can aid the speedy removal of harmful content by the mere threat of court order. Additionally, rather than approach a third party for relief, individuals may file a suit themselves for the removal of the harmful content.

The problems that arise from these provisions are to do with the privatization of censorship, and Turkey is only one of the newer jurisdictions to introduce such provisions. In the early days of the Internet, policymakers felt that the best avenue for the commercial and social growth of this medium would be best achieved by reducing the direct liability burdens on service providers on it. This was mainly realized by reclassifying social media providers as a "distributor" rather than a "publisher," a distinction established via Section 230 of the Communications Decency Act, 1996 ("CDA") of the United States of America, where most of these operators are based. This entails a lower burden on the management of content. But, the recently highlighted problems have caused many governments to demand that companies take more responsibility in controlling harmful content.

While most jurisdictions cover the basest areas such as hate speech and child abuse imagery, the localized differences in laws can run counter to the internationally established standards or standards in the home country of most of these providers (i.e., USA). Compliance to such obligations can be inadequate due to the contextual nature of all of these laws. From the conservative Thailand government requesting takedowns of risqué photos of the King, to the

controversial partnerships with Governments of countries such as Israel to control content, these measures have come under fire.

All these measures have essentially shifted the burden of content regulation to the social media providers, with enforcement ensured through measures such as escalating fines, throttling of access and website shutdowns. The higher burden, as envisioned under the Turkish law, and similar laws in other jurisdictions like the EU and South Korea can lead to social media providers slowing operations in certain jurisdictions due to an inability to adequately comply. The same impetus may be behind a shift to more cost-effective AI Content Moderation systems (which come with their own problems, such as various recorded instances of Digital Millennium Copyright Act (DMCA) controls being used to target political targets).

While increasing the responsibility of social media providers in ensuring that harmful messages are not spread on their platforms is certainly an admirable endeavour, with many providers already taking steps such as Facebook's Supreme Court and Twitter placing fact check warnings on harmful tweets by U.S. President Donald J. Trump, there are many ethical concerns about shifting the power to control content on the internet from representative bodies to private corporations. In recent hearings before the U.S. Senate, the C.E.O.s of Facebook, Twitter and Google reiterated that a careful approach needs to be taken to implement checks and balances in this regard.

Intermediary Liability of Social Network Providers:

Social Media Intermediaries exert a direct influence on an individual's right to exercise freedom of expression and information. Jurisdictions across the globe follow three broad Governance models for intermediary liability of social media websites. First, there are jurisdictions such as China where strict liability is imposed and Network Services Providers are held jointly and severally liable under Article 36 of the Tort Law of China. On the other end of the spectrum is the 'broad immunity model' as practised by the USA where intermediaries are largely self-regulated. They enjoy conditional immunity in terms of content liability under Section 230 of the CDA and are provided with a safe harbour under Section 512 of the DMCA.

There is a third 'notice-and-takedown model' where a conditional safe harbour is provided. For instance, the European Union, Directive 2000/31 grants immunity to intermediaries provided they remove/disable access to unlawful content upon knowledge. The Principles adopted by ICTA follow a similar notice-and-takedown model that requires social media websites to respond to requests to delete material within 48 hours, a broad power that enables authorities to restrict access

to something they may deem illegal thus posing a threat to civil liberties. The Principles further constrain the space of Social Media intermediaries by reducing their bandwidths up to 90% in the case of non-compliance, in effect making it impossible for users to access these websites.

Parallels can be drawn between India and Turkey where The Ministry of Electronics and Information Technology released the Information Technology [Intermediaries Guidelines (Amendment) Rules], 2018 stating similar requirements as adopted by the ICTA. The rules require intermediaries to use automated content moderation tools and allow user-generated content to be monitored on their providers. However, contrary to the Turkish regime, the intermediaries are exempted from liability, provided certain due diligence is followed. The liabilities for Intermediaries in India are expected to undergo significant changes with the proposed Personal Data Protection Bill, 2019 as Section 93(d) of the Bill mandates Social Media intermediaries to provide methods of voluntary verification to identify users of social media. The penalties for non-compliance with the Principles under Turkish law range from advertising bans and exorbitant monetary penalties to access blocking mechanisms. Unlike Turkey, intermediaries in India are provided immunities under Section 79 of the Information Technology Act and the onus of determining the legality of the content does not solely lie on intermediaries.

Indian Perspective:

Comprehending India's position on the status of the drivers in this dispute has left us with ambiguities in the existing Indian laws and their decreasing relevance, as well as the future implications of a decision in either party's favour.

The definitions given by the Motor Transport Workers Act, 1961 or the tests laid down by the Supreme Court were considered to be beneficial in making a well-informed distinction between an employee and an independent contractor, however, with changing times, varying circumstances and different work environment for such drivers, there exists an overlap of elements among the two categories signifying a desperate need for reform in the legal framework or a new model to protect their interests to the fullest.

A decision categorizing these drivers as employees could have serious implications for these companies in India. This would imply that these service platforms are no longer an intermediary between the drivers and customers, rather, a business which provides transport services electronically. For this, no FDI is allowed in India which would significantly affect their global

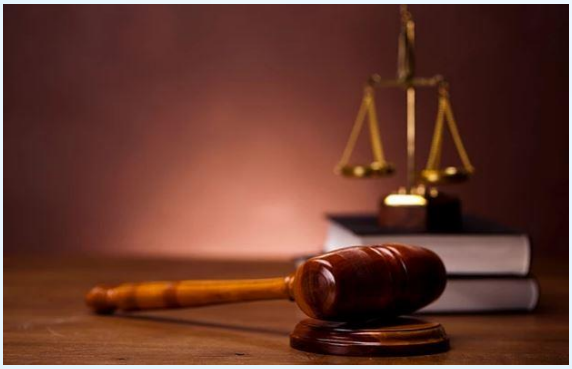
market. However, if the drivers remain independent contractors, there may not be any reform in their conditions and work environment.

Conclusion:

This decision has come at a time when there exists a despairing need for transformation for independent workers, particularly with the evident evolution of the gig economy. The AB5 plays a significant role in ascertaining that companies cease to exploit their employees by categorizing them as independent contractors.

The stringent Principles devised by ICTA can be considered hostile towards intermediaries. In order to establish best practices within its 'notice and takedown' regime, Turkey should enact a regulatory framework that involves multiple stakeholders such as government, the legal community and tech companies to ensure transparency of digital platforms without curbing free speech. Lessons can be drawn from the Manila Principles which prescribe that content restriction orders must comply with the test of proportionality. In conclusion, proactive monitoring of content should be encouraged but not at the cost of Right to Freedom of Speech and Expression on Social Media.

NCLT VIS-A-VIS DOCTRINE OF FRUSTRATION



This article is authored by Akshat Jaithlia and Rohan Gajendra Pratap Singh, Junior Editors at RGNUL Financial and Mercantile Law Review (RFMLR).

Introduction

The Insolvency and Bankruptcy Code (IBC), 2016 was enacted with a view to streamlining the insolvency resolution process and making it economically viable for individuals as well as companies. However, resolution applicants and creditors have had to endure long delays even under the new framework, as the data from the Insolvency and Bankruptcy Board's latest quarterly newsletter underscores. Out of the 2108 Corporate Insolvency Resolution Processes (hereinafter "CIRP") filed and pending under the IBC as of 30th June 2020, 1094 have been going on for more than 270 days, while another 594 have been pending for more than 180 but fewer than 270 days.

Facts:

One of the 1094 was the case of Wind World (India) Ltd., an insolvent wind power company first admitted to CIRP in February 2018, pursuant to which the Resolution Professional released an invitation for Expression of Interest (EOI) in May. The process document issued by the Process Advisors, KPMG India Pvt. Ltd., in June 2018 was amended a few times, the last revision being on 6th August. Suraksha Asset Reconstruction Company (ARC), along with other applicants, first submitted a Resolution Plan (hereinafter "RP") on 20th August. The initial plan was revised after discussions with the Committee of Creditors for the Corporate Debtor (hereinafter "CoC") and the final RP was subsequently submitted on 13thNovember of the same year. The RP was then promptly approved by the CoC with a majority of 69.87%, following which an application for approval of the RP was filed by the Resolution Professional before the Ahmedabad Bench of the National Company Law Tribunal (hereinafter "NCLT"). An amount of 75 crores was also rendered as Performance Bank Guarantee by the applicants.

It took less than two weeks from the time of submission of the final RP by the applicants to the filing before NCLT. However, after almost two years since, the CIRP was still pending, despite the fact that the IBC allows for a maximum time of 330 days for the completion of a CIRP. Faced with such excessive delay, the applicants filed another application before the NCLT, this time for withdrawal of the RP. The applicants argued that they are entitled to withdraw the RP in light of Section 12 of IBC which mandates that CIRP be completed within 330 days from the date of admission of the application, a duration which can only be extended in extraordinary circumstances. The period of 330 days had expired in January 2019 in this matter. The CoC and the Resolution Professional countered by contending that neither the IBC nor the process document provided for the withdrawal of an RP once approved by the CoC.

Decision

On 8th September 2020, the Ahmedabad Bench of NCLT allowed Suraksha ARC to withdraw the original application for approval of the RP without any charges and discharged the Resolution Applicants on the ground of frustration under Section 56 of the Indian Contract Act, 1872, holding that "In terms of provisions of Section 56, the word "impossible" does not mean only physical impossibility but it also connotes impracticability...In the background of the facts of the present case, in our opinion, due to inordinate delay in approval of such Resolution Plan, object of the Resolution Plan has frustrated." It also observed that the process document made the RP valid in perpetuity by stating that it is not subject to any expiry once it is approved by the CoC.

The concerned clause of the process document was held to be in dissonance with the provisions of Regulation 38(2) of CIRP Regulations, which stipulates that an RP must provide the term of the plan and its implementation schedule. The word "term" was interpreted to mean "period" in the given context, an interpretation which, coupled with the requirement for an implementation schedule, made it conclusive in the eyes of the tribunal that there should be a specified period of validity of an RP. It was noted that as per the provisions of the process document, the Resolution Applicant would be bound to the RP even if it is not approved after ten years. NCLT was of the view that that could not be the intention of the legislature in light of the objects and scheme of IBC, 2016.

The tribunal ordered the Resolution Professional to return Rs. 75 crores submitted as performance security by the Resolution Applicant. NCLT further directed the Resolution Professional to amend the terms of the process document, allowing them to seek and finalize from other RPs within 15

days. An additional period of 75 days was set to complete the CIRP. The Resolution Professional is supposed to file an application for the liquidation of the Corporate Debtor under Section 33 of the IBC if no RP is submitted, or in case the CoC fails to approve it within the prescribed period of 90 days.

Analysis

While deciding the dispute, the NCLT has made a reference to the Doctrine of Frustration, which is an established principle under Section 56 of the Indian Contract Act, 1872, for allowing the applicant to withdraw its resolution plan. The doctrine of frustration comes within the umbrella of Law of Discharge of Contract which allows parties to not abide by the contractual obligations that have been entered into, due to subsequent impossibility or illegality. This principle has been reiterated several times by the Indian Courts, that if there is a fundamental change in the circumstances defeating the whole purpose of the contract, then it brings the contract to an end.[1]

The NCLT has also stated that the delay must not be "self-induced" which means that it must be outside the control of the party. In the present case, NCLT observed that there is a provision listed in the process document which elucidates that Resolution Applicant cannot unilaterally withdraw the RP from his side, but no circumstances have been prescribed in the process document whereby the RP can be withdrawn, even mutually. It further noted that in clause 1.7.4 of the process document it was stated that there is no expiry period of RP. Keeping in mind the contradictory nature of both the provisions, NCLT decided to apply Section 56 of the Indian Contract Act.
The NCLT has also analysed the Regulation 39(3) of CIRP Regulations which has evolved with amendments carried out within time to time. It was noted by the tribunal that before 25th July 2018, it was a mandatory requirement to quote reasons for acceptance or rejection of the Resolution Plan. In the main sub-regulation, the NCLT found that word "may" has been used which means that RP can either be accepted or rejected and there was no compulsory requirement to accepted the plan. Further, it was amended in the year 2019 and recording of reasons was substituted with "requirement to record its deliberations on the feasibility and viability of RP" to give it a wider scope.

The NCLT has also made a reference to the Essar Steel Case[2], under which the word "mandatorily" used in Section 12 of the IBC, was declared to be as unconstitutional by the Apex Court. The NCLT stated that despite the word being struck down, the provision still imposes an

obligation to complete CIRP within 330 days of its initiation, excepting few exceptional circumstances.

Although this decision was taken after taking into consideration all factors affecting the parties to the dispute, it would have been more sagacious if the NCLT had ordered renegotiation of the resolution plan instead of a withdrawal. It remains to be seen whether the decision can be used by other applicants to escape the financial commitments by quoting "pandemic reasons and liquidity crunch in the market". Therefore, it is imperative that the court take into consideration the interest of the Corporate Debtors and decide every case on its own merits. As aforementioned, there has been an excessive delay in CIRP which must be reduced to ensure effective as well as efficient justice system. Justice R M Lodha has also raised a similar concern and said that "it is high time that courts become sensitive to delays". Strict adherence to the ceiling of 270 days is the need of the hour to preserve the essence of the Insolvency and Bankruptcy Code, 2016.

RECENT ON THE RFMLR BLOG

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This blogpost is authored by Shreya Mukherjee, a B.A. LL.B. (Hons.) student at Symbiosis Law School, Pune.

The blogpost discusses collaborations and cartelization in the Covid hit economy. The Covid-19 pandemic has crippled the global economy. In order to lift the pandemic struck market, major competition regulators around the world have permitted collaborations between the businesses for enhancing the conditions of necessary sectors. In the same vein, the Indian Government has invoked relevant provisions of the Competition Act to rescue businesses in the country. Although the Competition Commission of India did not grant any express exemptions but it did issue necessary guidelines for healthy collaboration between the businesses.

- **ANALYSIS OF SEBI'S DENIAL OF WAIVER OF RIGHTS BY INVESTORS OF AIF**

This blogpost is authored by Anurag Shah, a B.A. LL.B candidate at School of Law, Christ University.

The blogpost puts forth a case that statutory rights under the AIF Regulations can be waived off by the consent of the investors. The article analyzes the stance of SEBI in the backdrop of the precedents related to the Doctrine of Waiver. Going by the precedents, a statutory right can be waived off if it is private in nature and does not impact the public interest.

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   RFMLR VOL. 6 ISSUE 1

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   "No one would think that the proposition that horizontal mergers can cause anticompetitive effects would be disproven if those effects were weaker in less concentrated markets or if the effects of all horizontal mergers (including those in unconcentrated markets) were weak, mixed, or statistically insignificant. Horizontal shareholdings cannot create anticompetitive effects when even horizontal mergers could not, so it is not surprising that the same propositions apply to horizontal shareholding."

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   YALE JOURNAL ON REGULATION, VOLUME 37 ISSUE 2

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4. **THE VOLCKER RULE IN PRACTICE: ITS IMPACT, RECEPTION, AND EVOLVING PROFILE**

   By Jordan Schiff (J.D. Candidate 2021, Columbia Law School; B.A. 2017, Yeshiva University)

   COLUMBIA BUSINESS LAW REVIEW VOL. 2020 NO. 2

   "Due to its dependence on regulatory implementation, the complexity of its subject matter, and the various inferences that may be reasonably drawn as to its effectiveness, the Volcker Rule tends to function as a lightning rod for charged rhetoric and unbalanced regulatory feedback, rather than a conductor of bilateral substantive exchange."

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