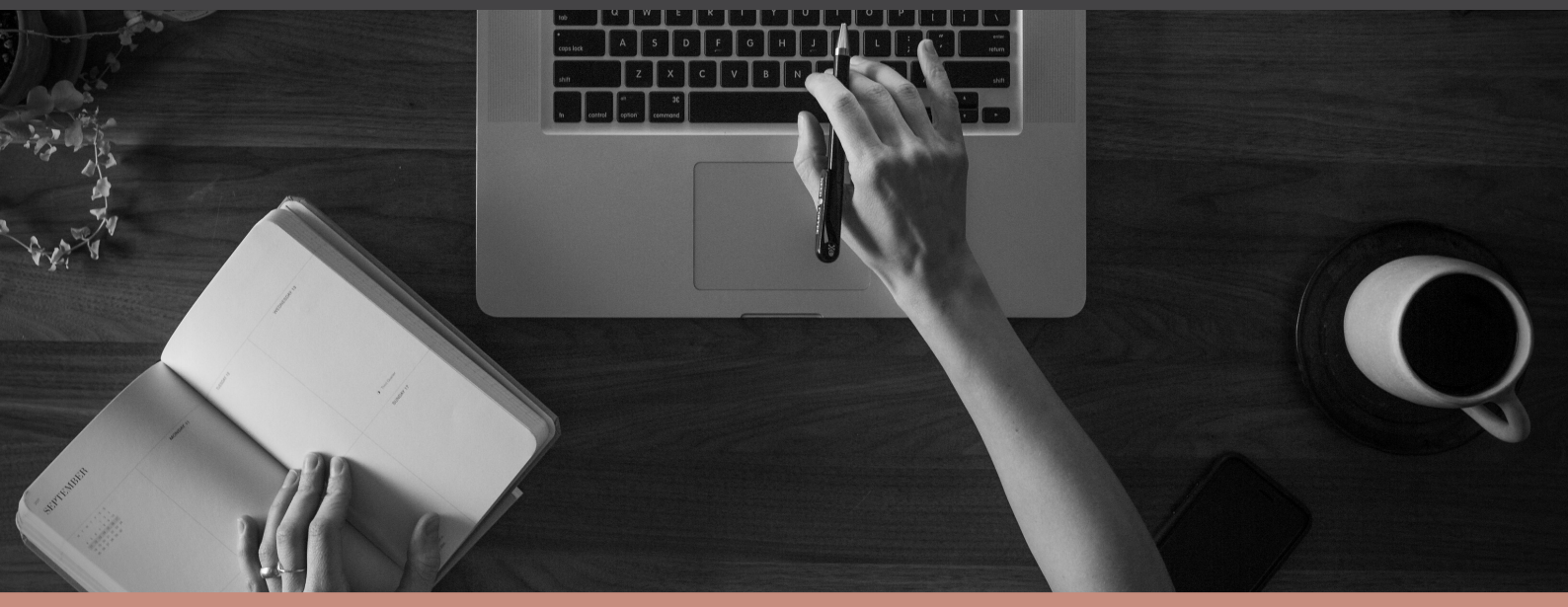
RFM
Law Review

RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

AU COURANT

APRIL'22

IN THIS ISSUE



PREFACE

It gives us immense joy to share with our readers, the April edition of our monthly newsletter, "Au Courant".

In this edition, the current on-goings in various fields of law have been analyzed succinctly in the 'Highlights' section to provide readers with some food for thought. These include brief comments on the CCI order to probe into food delivery platforms Zomato and Swiggy, the insider trading case of PC Jewellers, Bombay High Court's interim order to not take any coercive action against Star India and Disney, and the fall of Reliance-Future $3.2 Billion deal.

Major happenings in various fields of law such as Arbitration, Competition, International Trade Law, Securities, Taxation, Intellectual Property, and Technology, Media & Telecommunication have been recorded in the 'News Updates' segment to keep the readers abreast of the latest legal developments.

The 'Interview' segment contains an exciting and insightful discussion with Mr. Ambuj Sonal (Associate Partner at Link Legal) on the topic of 'Cross-Border M&A in India post Covid-19'.

The 'Recent on the Blog' section provides the readers with a quick guide to the latest pieces published on the blog.

The section 'Call for Comments' encourages readers to express their views and concerns on the measures under development and provide critical suggestions on issues that may have a bearing on financial and mercantile laws. Comments are invited by TRAI regarding the publishing of the Consultation Paper on cross-media ownership.

We hope that this Edition of the Au Courant finds you well and is once again an enjoyable and illuminating read for our readers!

HIGHLIGHTS

CCI ORDERS PROBE INTO FOOD DELIVERY PLATFORMS ZOMATO AND SWIGGY

The Competition Commission of India (CCI) in its order dated 4th April 2022 launched a probe into Zomato and Swiggy for prima facie violation of Sections 3(1) and 3(4) of the Competition Act, 2002. The sections deal with Anti-Competitive Agreements which have an Appreciable Adverse Effect on Competition (AAEC) in India. The probe has been launched upon information provided by the National Restaurant Association of India (NRAI).

First of all, the NRAI averred that the degree of market power required for analysis under Section 3(4) is lower than that required under Section 4 of the Act which deals with abuse of dominant position. A party (although not declared dominant) with sufficient market power can cause AAEC by entering into anti-competitive vertical agreements. NRAI claimed that Zomato's market share is close to 52% in terms of gross order volume and that of Swiggy's is 43 % (pan-India basis) which enables them to cause AAEC in the market through their anti-competitive and restrictive vertical agreements with the Restaurant Partners (RPs).

NRAI then alleged that Swiggy and Zomato were indulging in deep discounting, data masking, exorbitant commissions, and imposing price parity terms on RPs. Further, owing to their huge market share, the companies are able to impose one-sided and unfair agreements with the RPs. The Association also said that the two food delivery apps are engaging in a dual role on their platform where they list their own cloud kitchen brands exclusively on their platform, akin to private labels, thereby creating an inherent conflict of interest in the platform's role as an intermediary on one hand and as a participant on the other hand. Moreover, Zomato and Swiggy often induce RPs to commit exclusively to the respective platform.

NRAI also submitted that the market has seen a consolidation to the point where it consists of only two major online food platforms that do not face competitive pressures from other players and/or the RPs. Further, there has not been any effective credible entry into the market in the last three years and other players have been absorbed either by Zomato or Swiggy, demonstrating significant entry barriers. Further, NRAI also detailed the funds raised by Zomato and Swiggy for their operations in India and stated that the access to funding that these platforms have, also acts as an entry barrier.

HIGHLIGHTS

Upon hearing the submissions made by the association and the companies, the CCI was of the view that there exists a prima facie case with respect to some of the conduct of Zomato and Swiggy, which requires an investigation by the Director-General (DG), to determine whether their conduct has resulted in contravention of the provisions of Section 3(1) of the Competition Act, 2002 read with Section 3(4). The DG has been directed to carry out a detailed investigation and submit a report within 60 days from the date of the order. Read More.

By Tarpan Soni, Assistant Editor

HIGHLIGHTS

THE INSIDER TRADING CASE OF PC JEWELLERS: SUPREME COURT SETS ASIDE ORDER OF SEBI & SAT

In the recent case of Balram Garg and Shivani Gupta vs SEBI, the Supreme Court of India on April 19, 2022 (Tuesday) overturned the orders of the Securities and Exchange Board of India (SEBI) and the Securities Appellate Tribunal (SAT) that held the Managing Director of PC Jewellers and some of his relatives guilty of insider trading. A bench of Justice Vineet Saran and Justice Aniruddha Bose noted that the Appellate Tribunal was exercising First Appellate Court jurisdiction and was required to independently assess the evidence and material on record, which it evidently failed to do.

The SEBI fined the appellants Rs. 20 lakh and barred them from accessing the securities market and buying, selling, or dealing in securities directly or indirectly for a year. SEBI also barred the appellants from dealing with their company's scrips for two years. The order was based on the SEBI's determination that the family members in question had traded based on 'Unpublished Price Sensitive Information' (UPSI) obtained as a result of their alleged closeness to the company and its Managing Directors between the period commencing April 1, 2018, to July 31, 2018. The same was upheld by the SAT.

It was observed by the Apex Court that the charge of Insider Trading by communication of UPSI by an insider to other insiders or any other persons (Regulation 3 of SEBI (Prohibition of Insider Trading) Regulations,2015), is required to be established by adequate material on record and cannot be established from only circumstantial evidence of share trading timing/pattern. To raise the statutory presumption of communication of UPSI, there needs to be adequate material on record to show frequent communication between the parties. Moreover, in the absence of any material available on record to show frequent communication between the parties, there could not have been a presumption of communication of UPSI by the appellant.

Furthermore, the Supreme Court ruled that the SAT order is void for lack of application of mind and is merely a repetition of facts stated by the SEBI. It has further been held that merely because a person was related to the connected person cannot by itself be a foundational fact to draw an inference. The Appellate Tribunal was exercising First Appellate Court jurisdiction and was required to independently assess the evidence and material on record, which it evidently did not do. As a result, the appeals were granted, and the contested judgment and final orders of SEBI and SAT were reversed. Read More

By *Raghav Sehgal, Copy Editor*

HIGHLIGHTS

BOMBAY HC PROVIDES INTERIM RELIEF TO STAR INDIA, DISNEY; ASKS CCI NOT TO TAKE ANY COERCIVE ACTION

The Bombay High Court has directed the Competition Commission of India (CCI) to not take any coercive action against Star India, Disney India and Asianet Star Communications. The CCI had ordered a detailed investigation against Star India, Asianet Star Communications Pvt Ltd (Asianet) and Disney Broadcasting India Ltd (Disney) in a case related to alleged abuse of dominant position.

The probe was ordered on the basis of information filed by Asianet Digital Network Private Limited (ADNPL), a Multiple System Operator operating in Kerala, Karnataka, Telangana and Andhra Pradesh. According to the complaint, Star India was providing a bouquet of channels to its competitors at lesser prices resulting into denial of market access and also amounting to unfair and discriminatory pricing. The complainant alleged that Star India provided additional discounts some choosen MSOs, including the competitor of Asianet Digital Network, i.e., Kerala Communicators Cable Ltd. (KCCL)

The CCI prima facie found abuse of dominance, discrimination and denial of market access on part of Star India. It predicated that Star India is circumventing TRAI's New Regulatory Framework by entering into marketing agreements for offering additional discounts beyond the prescribed cap to KCCL, thereby placing MSOs like Asianet Digital Network at a disadvantage.

Further, it found Star India as a dominant entity because of its exclusive content (thus making access to its TV channels indispensable for any MSO), significant market share, size and economic resources and countervailing power.

Star India and Disney filed individual application to challenge the order given by CCI whereby it directed an investigation on the grounds that CCI did not have subject matter jurisdiction on the issue of circumvention of TRAI's framework and discriminatory pricing of TV channels as the same falls within the purview of TRAI. The writs came up for consideration before the Bombay HC on Thursday.

The Bombay HC, passed an interim order asking CCI not to take any coercive action against Star India, Disney and Asianet, and directed the Director General (Investigation) of CCI not to file its report and CCI not to undertake any adjudication until the High Court decides the issue of jurisdiction. Read More.

By *Srishti Kaushal, Associate Editor*

HIGHLIGHTS

THE FALL OF RELIANCE – FUTURE $3.2 BILLION DEAL

It was a contentious plan to repay overseas bondholders in full that brought what would have been India's biggest retail deal to a grinding halt.

Debt-laden Future Retail Ltd.'s offshore bondholders -- a relatively smaller part of the creditor pool -- were promised 100% payment in the rescue offer from billionaire Mukesh Ambani. The unequal treatment led to the move last week, when the local banks rebuffed the $3.2 billion offer from Ambani's conglomerate. Reliance Industries Ltd. announced the purchase plan in August 2020 but struggled to complete the transaction in the face of legal challenges mounted by Amazon.com Inc., which argued it had the first right of refusal contractually.

State-run lenders risked probes from federal agencies if they accepted these discriminatory terms, they said, explaining their preference now for a court-mediated insolvency process where bids are called in and there's no risk of them being accused of cutting a bad deal. Bank of India has already requested an Indian court to initiate the process. The hard-nosed decision by Indian banks has pushed the teetering Future Retail, which ran one of the nation's largest retail grocery chains before the pandemic struck, one step closer to bankruptcy. Future Retail is almost certain to default on its $500 million bond coupon payment due July 22, S&P Global Ratings said Tuesday, while downgrading the company's ratings deeper into junk territory.

The lenders' action has also taken the wind out of a tortuous two-year-old litigation between Reliance and Jeff Bezos-owned Amazon -- the e-tailer had started arbitration proceedings in Singapore to block the deal -- but left the door open for Ambani to snag these retail assets, possibly at an even cheaper price, under the bankruptcy process. While the local lenders were agreeable to the deal when it was first announced, a lot changed in the past year or so, the people said. While the Amazon lawsuit dragged on, the asset value eroded and the pandemic worsened the cash crunch at Future Retail that began defaulting on its debt repayments.

HIGHLIGHTS

Reliance dealt a body blow to the Kishore Biyani-led Future Group in February when it quietly began poaching employees and taking over rental leases of hundreds of stores earlier run by Future Retail and Future Lifestyle Fashions Ltd. Ambani's bloodless coup prompted Amazon to suggest settlement talks on the bitter dispute and alarmed Future's investors and lenders who worried about asset-stripping.

Reliance's unexpected takeover of Future's stores eroded bankers' confidence in the deal as it stripped off value from the chain and potentially could erode Reliance's offer terms. The out-of-court truce talks between Amazon, Future and Reliance collapsed soon after the store-purchases were initiated, the companies informed India's top court on March 15. Amazon will continue with its arbitration proceedings against Future Group in Singapore. Read More.

By *Shashwat Sharma, Assitant Editor*

NEWS UPDATES

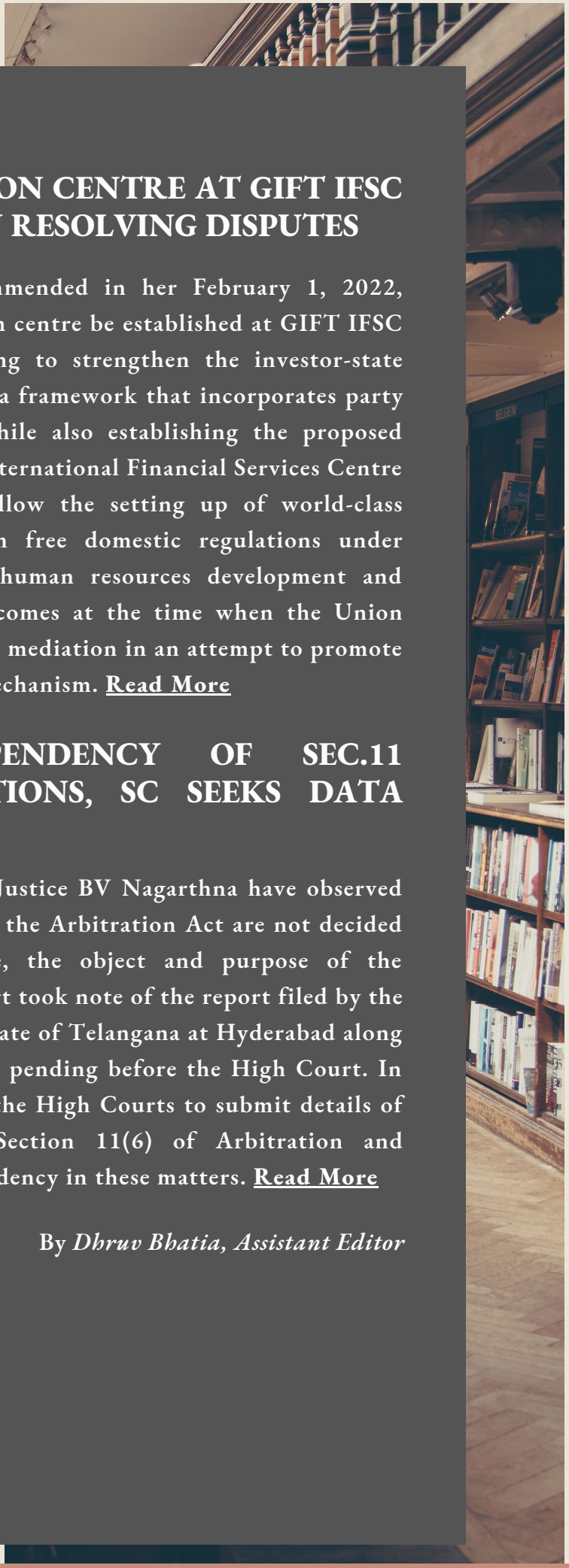
ALTERNATIVE DISPUTE RESOLUTION

1. TELANGANA BECOMES 1ST STATE TO DESIGNATE IAMC, HYDERABAD AS THE ARBITRAL/MEDIATION INSTITUTION IN ALL CONTRACTS ABOVE 3 CRORES.

In furtherance of a Memorandum of Understanding (MoU) which was entered between the Government of Telangana and the International Arbitration and Mediation Centre Trust (IAMC Trust), the Law Department of the Government of Telangana issued an order designating International Arbitration and Mediation Centre (IAMC), Hyderabad as the arbitral/mediation institution in all contracts above 3 crores. Accordingly, concerning subsiding contracts valued at more than 10 crores, all ministries, departments, etc., must discuss with counterparties to suitably amend the same to designate IAMC, Hyderabad as the concerned arbitral/mediation Institution. Further, any ongoing ad-hoc arbitrations valued at more than Rs 10 crores to which the Government of Telangana or its instrumentalities are parties are to request the arbitral tribunal to use the facilities and services of IAMC, Hyderabad for conducting their proceedings. **Read More**

2. FLORIDA SC UPHOLDS AIRBNB 'CLICKWRAP' ARBITRATION CLAUSE

In the case of Airbnb, Inc. v. Doe, the Florida Supreme Court aligned itself with nearly every federal circuit in holding that a "clickwrap" agreement that incorporates arbitration rules expressly delegating arbitrability determinations to an arbitrator constitutes "clear and unmistakable" evidence of the parties' intent to empower an arbitrator to resolve questions of arbitrability. The court, therefore, ruled that an arbitrator should decide whether the claims against Airbnb are subject to binding arbitration. Further, the court ruled that the AAA Rules attached to the agreement vide a link, became part of the parties' agreement, and since those rules specifically empower the arbitrator to resolve the questions of arbitrability, there is clear and unmistakable evidence that the parties intended to empower an arbitrator to resolve the questions of arbitrability. **Read More**



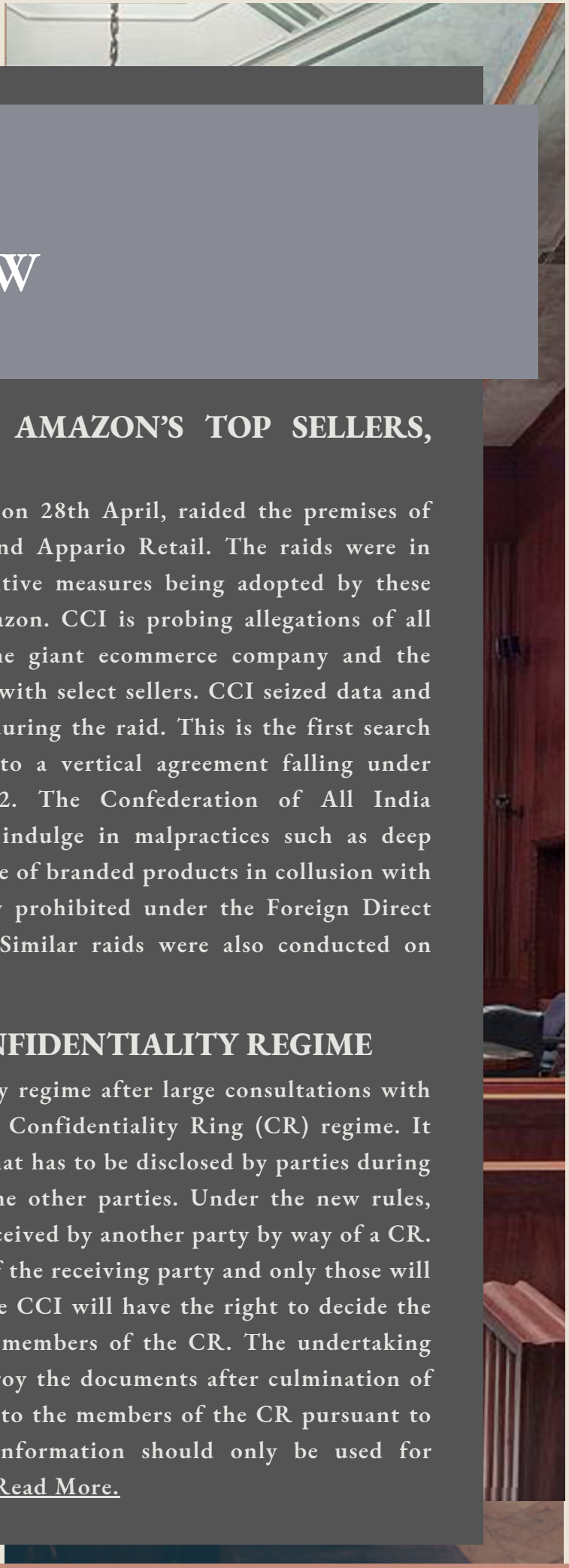
3. INTERNATIONAL ARBITRATION CENTRE AT GIFT IFSC SET TO IMPROVE CERTAINTY IN RESOLVING DISPUTES

Finance Minister Nirmala Sitharaman recommended in her February 1, 2022, budget speech that an international arbitration centre be established at GIFT IFSC in due course. The government is attempting to strengthen the investor-state dispute settlement mechanism by establishing a framework that incorporates party autonomy, neutrality, and legal certainty while also establishing the proposed international arbitration centre at the GIFT International Financial Services Centre (IFSC). The budget has also proposed to allow the setting up of world-class Financial Institutions and Universities from free domestic regulations under IFSCA. This will give a further boost to human resources development and expansion in GIFT IFSC. The development comes at the time when the Union Government has already released a draft bill on mediation in an attempt to promote mediation as an alternate dispute resolution mechanism. **Read More**

4. CONSIDERING LONG PENDENCY OF SEC.11 ARBITRATION ACT APPLICATIONS, SC SEEKS DATA FROM ALL HCS

The Division Bench of Justice MR Shah and Justice BV Nagarthna have observed that if the applications under Section 11(6) of the Arbitration Act are not decided at the earliest and within reasonable time, the object and purpose of the Arbitration Act would be frustrated. The Court took note of the report filed by the Registrar General of the High Court for the State of Telangana at Hyderabad along with the statement of arbitration applications pending before the High Court. In the light of the same, the SC has directed all the High Courts to submit details of applications pending before them under Section 11(6) of Arbitration and Conciliation Act, after taking note of long pendency in these matters. **Read More**

By *Dhruv Bhatia, Assistant Editor*



NEWS UPDATES
COMPETITION LAW

1. CCI CONDUCTS RAIDS ON AMAZON'S TOP SELLERS, CLOUDTAIL AND APPARIO

The Competition Commission of India (CCI) on 28th April, raided the premises of Amazon's top retailers, including Cloudtail and Appario Retail. The raids were in relation to complaints about the anti-competitive measures being adopted by these sellers that move large order volumes for Amazon. CCI is probing allegations of all sellers not receiving equal treatment from the giant ecommerce company and the vertical agreements which Amazon enters into with select sellers. CCI seized data and documents from the premises of these sellers during the raid. This is the first search and seizure which has happened in relation to a vertical agreement falling under section 3(4) of the Competition Act, 2002. The Confederation of All India Traders(CAIT) has alleged that these sellers indulge in malpractices such as deep discounting, predatory pricing and exclusive sale of branded products in collusion with the ecommerce companies which are explicitly prohibited under the Foreign Direct Investment (FDI) policy of the government. Similar raids were also conducted on Flipkart's top retailers. **Read More**

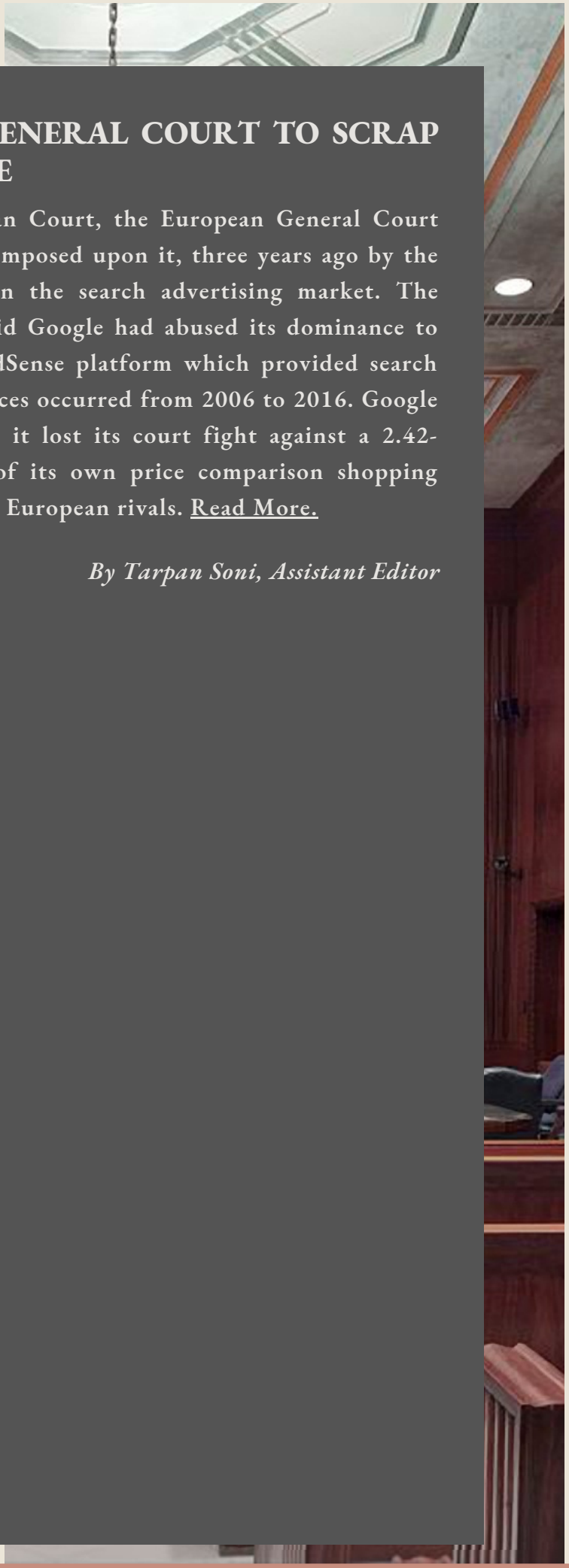
2. CCI NOTIFIES ITS REVISED CONFIDENTIALITY REGIME

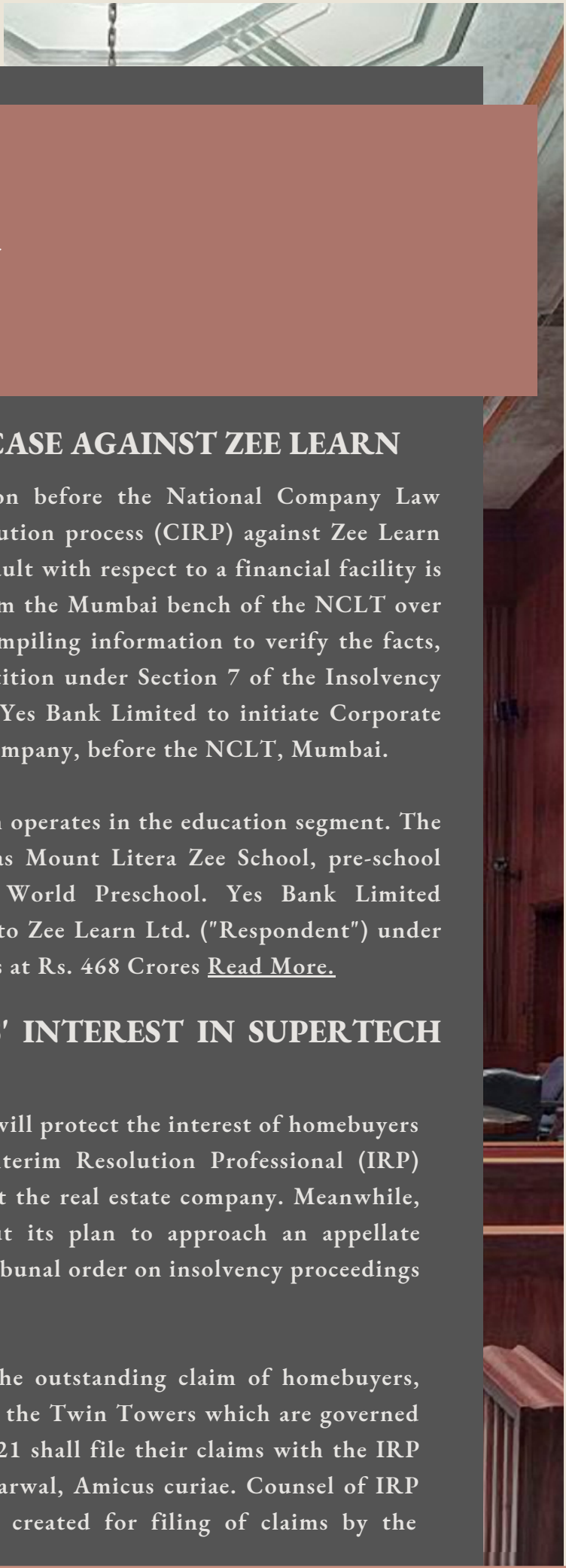
The CCI has notified its revised confidentiality regime after large consultations with the stakeholders. The CCI has adopted a new Confidentiality Ring (CR) regime. It deals with aspect of confidential information that has to be disclosed by parties during competition proceedings or investigation to the other parties. Under the new rules, confidential information of one party can be received by another party by way of a CR. A CR will include certain authorized persons of the receiving party and only those will have access to the undisclosed information. The CCI will have the right to decide the extent of information made available and the members of the CR. The undertaking shall also state that the CR members will destroy the documents after culmination of the present proceedings.n will only be granted to the members of the CR pursuant to confidentiality undertakings. Further, such information should only be used for proceedings under the Competition Act, 2002. Read More.

3. GOOGLE URGES EUROPEAN GENERAL COURT TO SCRAP $1.6 BILLION EU ANTITRUST FINE

Google has urged the second highest European Court, the European General Court (EGC) to scrap the $1.6 billion fine that was imposed upon it, three years ago by the European Commission for hindering rivals in the search advertising market. The European Commission in its 2019 decision said Google had abused its dominance to stop websites using brokers other than its AdSense platform which provided search adverts. The Commission said the illegal practices occurred from 2006 to 2016. Google has already suffered a setback last year when it lost its court fight against a 2.42-billion-euro antitrust decision over the use of its own price comparison shopping service to gain an unfair advantage over smaller European rivals. Read More.

By Tarpan Soni, Assistant Editor





NEWS UPDATES

INSOLVENCY LAW

1. YES BANK FILES INSOLVENCY CASE AGAINST ZEE LEARN

Yes Bank Ltd on Monday filed an application before the National Company Law Tribunal to initiate corporate insolvency resolution process (CIRP) against Zee Learn Ltd. The bank claimed the total amount in default with respect to a financial facility is ₹468 crore. Zee Learn has received a notice from the Mumbai bench of the NCLT over Yes Bank's petition and is in the process of compiling information to verify the facts, the filing said on Monday. It affirmed that petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 has been filed by Yes Bank Limited to initiate Corporate Insolvency Resolution Process (CIRP) of the Company, before the NCLT, Mumbai.

Zee Learn Ltd. is an Essel group company which operates in the education segment. The company owns a chain of K-12 schools such as Mount Litera Zee School, pre-school network called 'Kidzee' and Mount Litera World Preschool. Yes Bank Limited ("Petitioner") had sanctioned financial facility to Zee Learn Ltd. ("Respondent") under which the current default as per the bank stands at Rs. 468 Crores Read More.

2. WILL PROTECT HOMEBUYERS' INTEREST IN SUPERTECH CASE: SC

The Supreme Court on Monday assured that it will protect the interest of homebuyers in Supertech's twin tower in view of the Interim Resolution Professional (IRP) appointed in the insolvency proceedings against the real estate company. Meanwhile, Supertech informed the Supreme Court about its plan to approach an appellate tribunal against the National Company Law Tribunal order on insolvency proceedings against it.

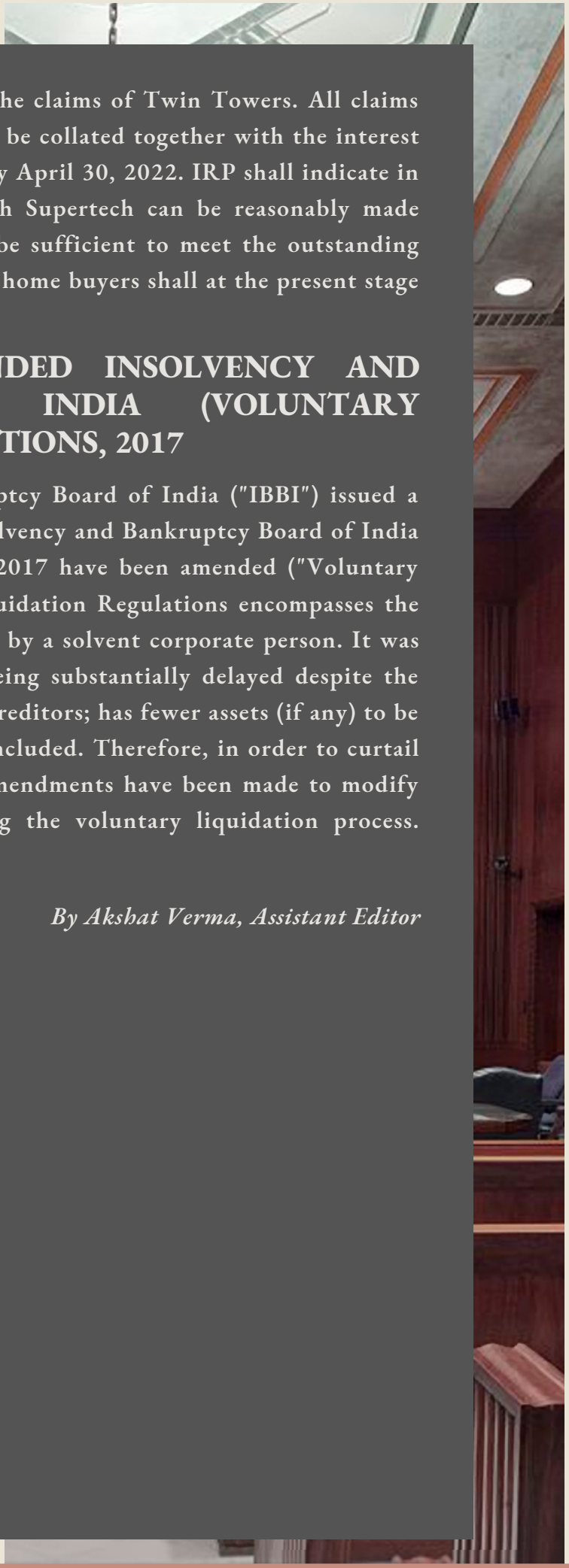
On Monday (April 4), the bench, to resolve the outstanding claim of homebuyers, issued the following directions: Homebuyers of the Twin Towers which are governed by the order of this court dated August 31, 2021 shall file their claims with the IRP by April 15, 2022 with copy to Mr Gurav Aggarwal, Amicus curiae. Counsel of IRP also states that in the portal which has been created for filing of claims by the

creditors, there is a separate tab provided for the claims of Twin Towers. All claims received upto 15th April 2022 by the IRP shall be collated together with the interest due and report be furnished before this court by April 30, 2022. IRP shall indicate in this report whether the amount available with Supertech can be reasonably made available in future running operations would be sufficient to meet the outstanding claim of the remaining homebuyers. Remaining home buyers shall at the present stage be segregated from other creditors. Read More.

3. IBBI NOTIFIES THE AMENDED INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (VOLUNTARY LIQUIDATION PROCESS) REGULATIONS, 2017

On April 8, 2022, the Insolvency and Bankruptcy Board of India ("IBBI") issued a press release informing the public that the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 have been amended ("Voluntary Liquidation Regulations"). The Voluntary Liquidation Regulations encompasses the process of voluntary liquidation to be followed by a solvent corporate person. It was realized that the process of liquidation was being substantially delayed despite the fact that liquidation does not involve claim of creditors; has fewer assets (if any) to be realized; and fewer litigations (if any) to be concluded. Therefore, in order to curtail such delays and ensure faster exit for firms, amendments have been made to modify the timelines for activities undertaken during the voluntary liquidation process. **Read More**

By Akshat Verma, Assistant Editor



NEWS UPDATES

INTERNATIONAL TRADE LAW

1. SRI LANKA'S STOCK MARKET HALTS TRADING, RESTRICTS TRADING HOURS DUE TO POWER CUTS

The Colombo Stock Exchange (CSE) stated in a statement that trading was suspended for 30 minutes on Thursday, the third such halt in two days, after an index tracking prominent businesses fell by more than 5%. The 22-million-strong island nation is experiencing its greatest economic crisis in decades, with drastically depleted foreign exchange reserves halting imports of basics such as gasoline, resulting in power outages lasting up to 13 hours in most regions of the country. Due to power outages, the CSE announced on Thursday that trading will be limited to two hours, rather than the typical four and a half hours, for the remainder of the week. Read More

2. INDIA, CHINA TRADE SURGES TO OVER $31 BILLION IN Q1 OF 2022 DESPITE BILATERAL CHILL

Despite poor ties caused by the extended military stalemate in eastern Ladakh, bilateral commerce between India and China surged by 15.3% to over USD 31 billion in the first quarter of this year, according to trade figures provided by the Chinese Customs on Wednesday.

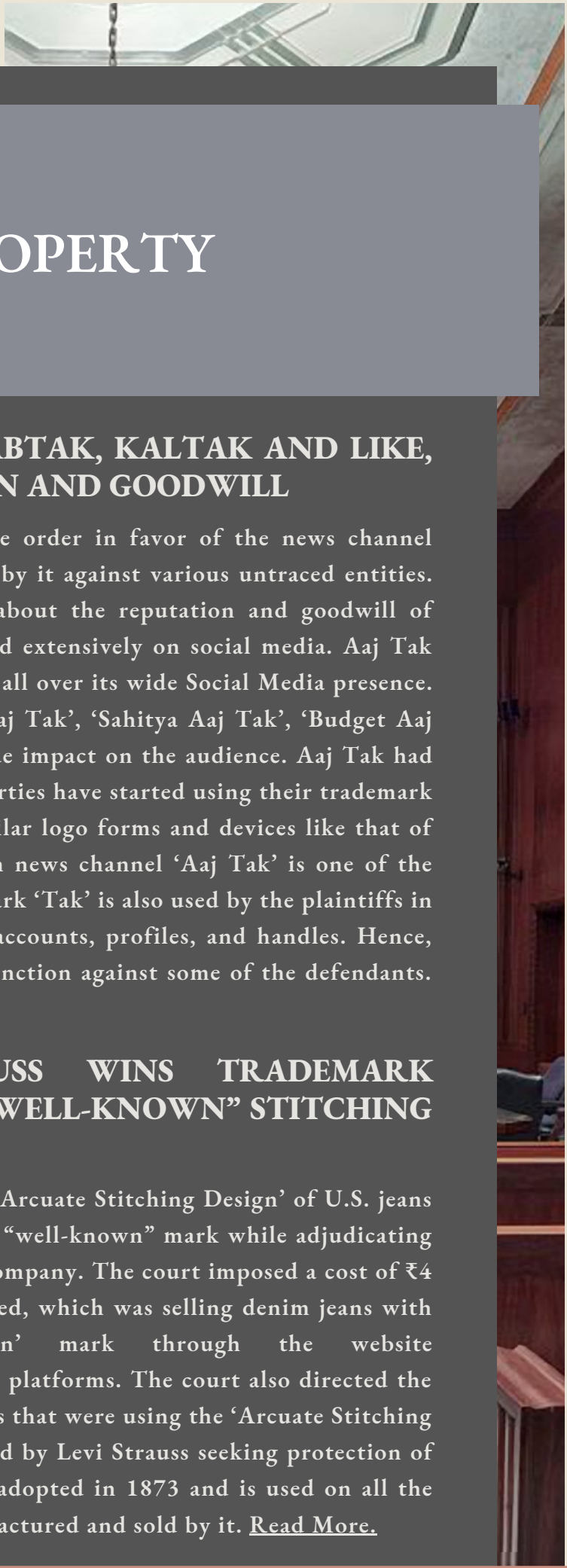
China's exports to India increased to USD 27.1 billion in the three months between January and March. Last year, bilateral trade between India and China reached a new high of nearly USD 125 billion. The increasing trend looked to be continuing, as bilateral commerce in the first quarter of 2022 totaled USD 31.96 billion, up 15.3% from the same time last year, according to trade figures issued by the General Administration of Customs, as reported by the state-run Global Times. Read More.

3. BRITAIN TO CUT UKRAINE TARIFFS TO ZERO TO HELP ITS ECONOMY

The British government said on Monday that all taxes on products imported from Ukraine under an existing free trade agreement will be eliminated to aid the Ukrainian economy. Following a direct request from Ukraine's President Volodymyr Zelenskiy,

London announced tariffs would be dropped to zero and all restrictions would be eliminated, adding that the decision would benefit Ukrainian enterprises involved in major exports such as barley, honey, canned tomatoes, and poultry. According to Britain, the average duty on Ukrainian imports is presently at 22%. According to the report, the proposed adjustment was given on a non-reciprocal basis, but Kyiv is expected to follow suit. In addition, the British government said that it will impose further export restrictions on Russian exports, including currency and marine goods. Read More.

By *Diya Vig, Assitant Editor*



NEWS UPDATES

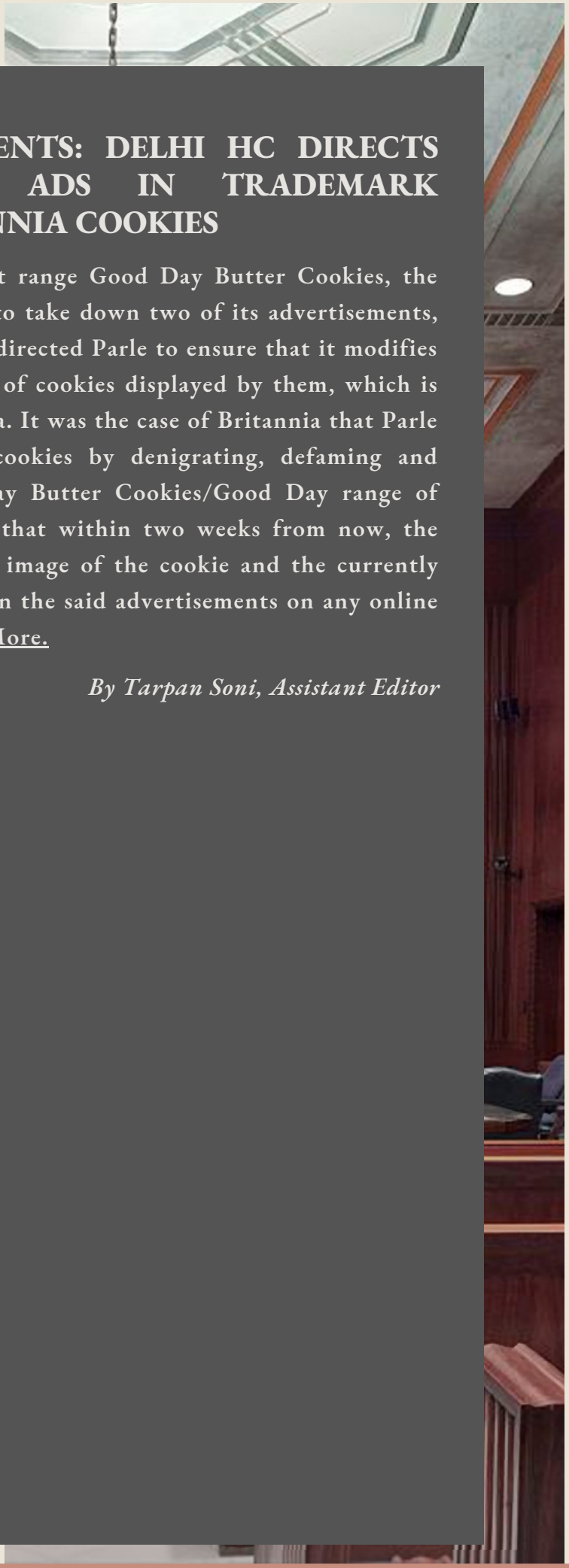
INTELLECTUAL PROPERTY RIGHTS (IPR)

1. DELHI HC INJUNCTS USE OF ABTAK, KALTAK AND LIKE, SAYS AAJTAK HAS A REPUTATION AND GOODWILL

The Delhi High Court has passed a John Doe order in favor of the news channel AajTak in a trademark infringement suit filed by it against various untraced entities. The Court observed that there is no doubt about the reputation and goodwill of AajTak and the mark 'AAJ TAK' has been used extensively on social media. Aaj Tak hadsubmitted that the mark is extensively used all over its wide Social Media presence. It is used to title its shows such as 'Agenda Aaj Tak', 'Sahitya Aaj Tak', 'Budget Aaj Tak' and 'Panchayat Aaj Tak' to create a unique impact on the audience. Aaj Tak had submitted that various known and unknown parties have started using their trademark on online platforms. Some parties also use similar logo forms and devices like that of 'Aaj Tak'. The Court noted that the television news channel 'Aaj Tak' is one of the most popular news channels in India and the mark 'Tak' is also used by the plaintiffs in respect of various programs and social media accounts, profiles, and handles. Hence, the Court provided an ex parte ad interim injunction against some of the defendants. Read More.

2. DELHI HC: LEVI STRAUSS WINS TRADEMARK INFRINGEMENT BATTLE OVER "WELL-KNOWN" STITCHING DESIGN

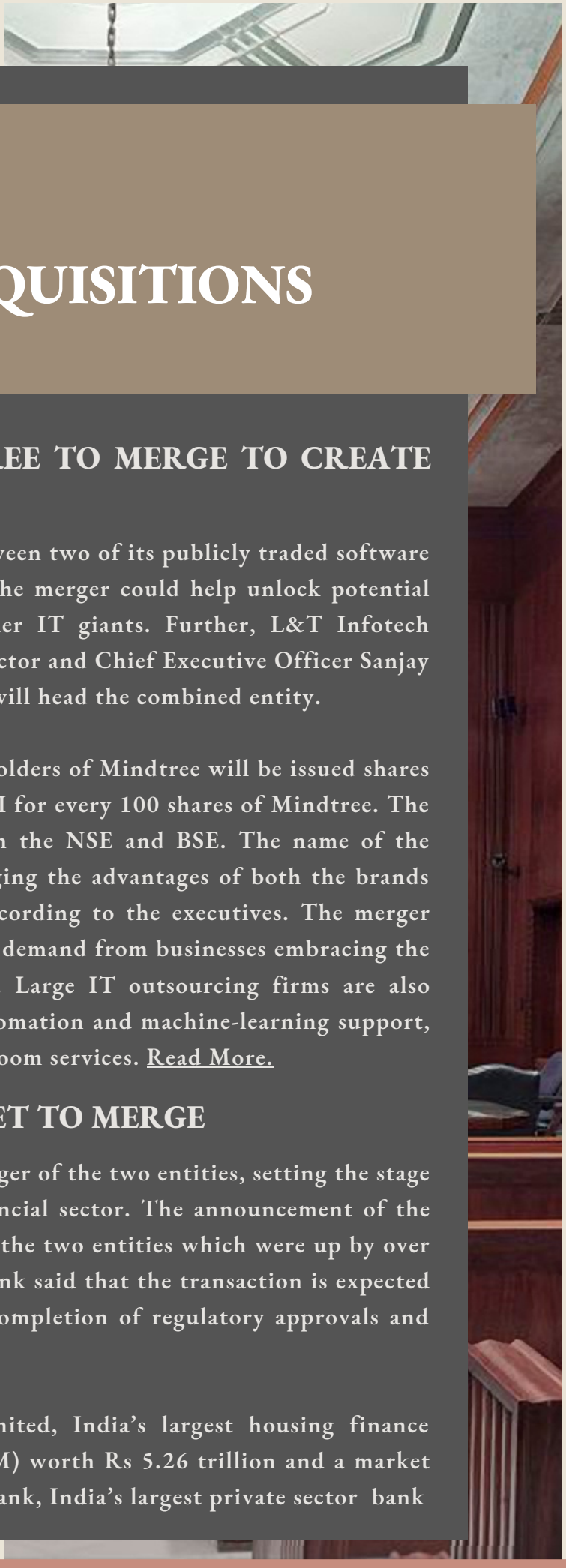
The Delhi High Court held that the signature 'Arcuate Stitching Design' of U.S. jeans brand Levi Strauss had achieved the status of a "well-known" mark while adjudicating a trademark infringement suit in favor of the company. The court imposed a cost of ₹4 lakh on Imperial Online Services Private Limited, which was selling denim jeans with an identical 'Arcuate Stitching Design' mark through the website www.urbanofashion.com and other e-commerce platforms. The court also directed the e-commerce sites to take down links to garments that were using the 'Arcuate Stitching Design' mark. The direction came on a suit filed by Levi Strauss seeking protection of its stitching design, saying that the mark was adopted in 1873 and is used on all the textiles including denim jeans, which are manufactured and sold by it. Read More.



3. DISPARAGING ADVERTISEMENTS: DELHI HC DIRECTS PARLE TO MODIFY TWO ADS IN TRADEMARK INFRINGEMENT SUIT BY BRITANNIA COOKIES

In relief to Britannia which runs the product range Good Day Butter Cookies, the Delhi High Court has directed Parle Biscuits to take down two of its advertisements, disparaging the former's products. The Court directed Parle to ensure that it modifies the ads within 2 weeks by blurring the image of cookies displayed by them, which is similar to those sold and marketed by Britannia. It was the case of Britannia that Parle seeks to promote its product Parle 20-20 cookies by denigrating, defaming and disparaging the plaintiffs Britannia Good Day Butter Cookies/Good Day range of cookies. The Order stated Parle shall ensure that within two weeks from now, the impugned shall be modified with the blurred image of the cookie and the currently used cookie image would be no longer visible in the said advertisements on any online platforms from 1st May 2022, onwards. Read More.

By Tarpan Soni, Assistant Editor



NEWS UPDATES

MERGERS AND ACQUISITIONS

1. L&T INFOTECH AND MINDTREE TO MERGE TO CREATE LARGE-SCALE IT COMPANY

Larsen & Toubro Ltd. announced a merger between two of its publicly traded software firms L&T Infotech Ltd. and Mindtree Ltd. The merger could help unlock potential scale and fight for mega deal wins with other IT giants. Further, L&T Infotech informed the exchanges that it's Managing Director and Chief Executive Officer Sanjay Jalona and Mindtree CEO Debashis Chatterjee will head the combined entity.

Upon the scheme becoming effective, all shareholders of Mindtree will be issued shares of L&T Infotech at the ratio of 73 shares of LTI for every 100 shares of Mindtree. The new shares of LTI so issued will be traded on the NSE and BSE. The name of the combined entity will be "LTIMindtree" leveraging the advantages of both the brands and creating value for all the stakeholders, according to the executives. The merger comes as software companies are seeing surging demand from businesses embracing the digitization that accelerated during Covid-19. Large IT outsourcing firms are also expanding into areas such as cybersecurity, automation and machine-learning support, moving beyond lower-margin traditional back-room services. Read More.

2. HDFC LTD. AND HDFC BANK SET TO MERGE

HDFC Bank and HDFC Ltd announced the merger of the two entities, setting the stage for one of the biggest deals in the Indian financial sector. The announcement of the merger led to a sharp rise in the share prices of the two entities which were up by over 7 per cent in the early trading hours. HDFC Bank said that the transaction is expected to close over the next 18 months, subject to completion of regulatory approvals and other customary closing conditions.

As per the transaction structure, HDFC Limited, India's largest housing finance company with Assets Under Management (AUM) worth Rs 5.26 trillion and a market cap of Rs 4.44 trillion will merge with HDFC Bank, India's largest private sector bank

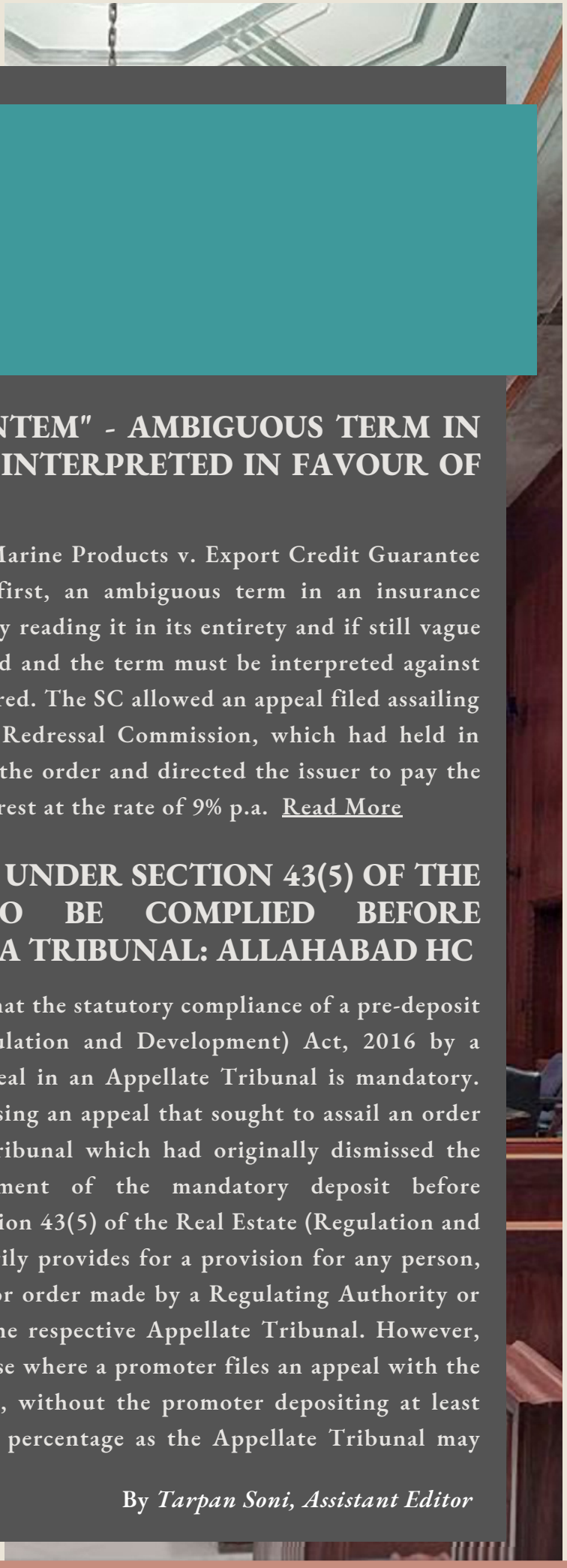
by assets with a market cap of Rs 8.35 trillion. Shareholders of HDFC Limited, as on record date, will receive 42 shares of HDFC Bank for 25 shares of HDFC Limited. While this will improve the ability to cross-sell products to a larger customer base, the move will help them leverage their distribution across urban, semi-urban and rural geographies. The combined balance sheet of Rs 17.87 trillion and Rs 3.3 trillion net worth will enable larger underwriting at scale. Read More

3. M&T BANK COMPLETES $8.3 BILLION ACQUISITION OF PEOPLE'S UNITED

M&T Bank Corporation announced successful completion of M&T's acquisition of People's United Financial, Inc. valued at $8.3 Billion. The combined company employs more than 22,000 people and has a network of over 1,000 branches and 2,200 ATMs that span 12 states from Maine to Virginia and Washington, DC. People's has branches across Vermont and is the former Chittenden Bank. People's United common stock no longer trades on the NASDAQ after April.

The acquisition accelerates M&T's growth trajectory and strengthens the company's financial profile for continued success. M&T will build on People's United's complementary footprint to reach a broad range of customers and expand into new regions. The franchise will operate across some of the most populated and attractive banking markets in the U.S. As part of this effort, People's United's headquarters in Bridgeport, Connecticut, is now M&T's New England regional headquarters. The combined company will continue to focus on delivering superior customer service and strong engagement in the communities it serves. Read More.

By Shashwat Sharma, Assistant Editor



NEWS UPDATES

MISCELLANEOUS

1. RULE OF "CONTRA PROFERENTEM" - AMBIGUOUS TERM IN INSURANCE CONTRACTS TO BE INTERPRETED IN FAVOUR OF INSURED : SC

The Supreme Court (SC) in the case of Haris Marine Products v. Export Credit Guarantee Corporation (ECGC) Limited has held that first, an ambiguous term in an insurance contract ought to be construed harmoniously by reading it in its entirety and if still vague the rule of Contra Proferentem must be applied and the term must be interpreted against the drafter of the policy, i.e in favor of the insured. The SC allowed an appeal filed assailing the order of the National Consumer Dispute Redressal Commission, which had held in favor of the insurer. The Apex Court set aside the order and directed the issuer to pay the claim amount of Rs. 2.45 crores along with interest at the rate of 9% p.a. Read More

2. COMPLIANCE OF PRE-DEPOSIT UNDER SECTION 43(5) OF THE RERA ACT MANDATORY TO BE COMPLIED BEFORE ENTERTAINMENT OF APPEAL IN A TRIBUNAL: ALLAHABAD HC

The Allahabad High Court (HC) has observed that the statutory compliance of a pre-deposit under Section 43(5) of the Real Estate (Regulation and Development) Act, 2016 by a 'promoter' before the entertainment of an appeal in an Appellate Tribunal is mandatory. The HC rendered this observation while dismissing an appeal that sought to assail an order of the Uttar Pradesh Real Estate Appellate Tribunal which had originally dismissed the appellant's appeal on grounds of non-payment of the mandatory deposit before entertainment of appeal as mandated under Section 43(5) of the Real Estate (Regulation and Development) Act, 2016. Section 43(5) statutorily provides for a provision for any person, who is aggrieved by any direction or decision, or order made by a Regulating Authority or by any adjudicating officer, to appeal before the respective Appellate Tribunal. However, the proviso to the clause provides that in the case where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter depositing at least thirty percent of the penalty or such a higher percentage as the Appellate Tribunal may determine. Read More

By *Tarpan Soni, Assistant Editor*

NEWS UPDATES

SECURITIES RIGHTS

1. SEBI PENALISES BSE AND NSE FOR LAXITY IN KARVY SCAM

The Securities and Exchange Board of India (Sebi) fined BSE 3 crore and NSE 2 crore on Tuesday night for their alleged weak attitude in spotting Karvy Stock Broking Ltd's abuse of customer securities. Karvy is accused of illegally moving stocks worth Rs. 2300 crores from over 95,000 clients into a single demat account, Karvy Stock Broking Ltd. (BSE). Furthermore, the brokerage business pledged these securities without authority for itself and its group organisations in order to raise Rs.851.43 crores from eight banks and non-banking financial services firms (NBFCs). Sebi judged the exchanges to be lax in early identification of the brokerage firm's manipulation of clients' securities in two distinct orders. **Read More**

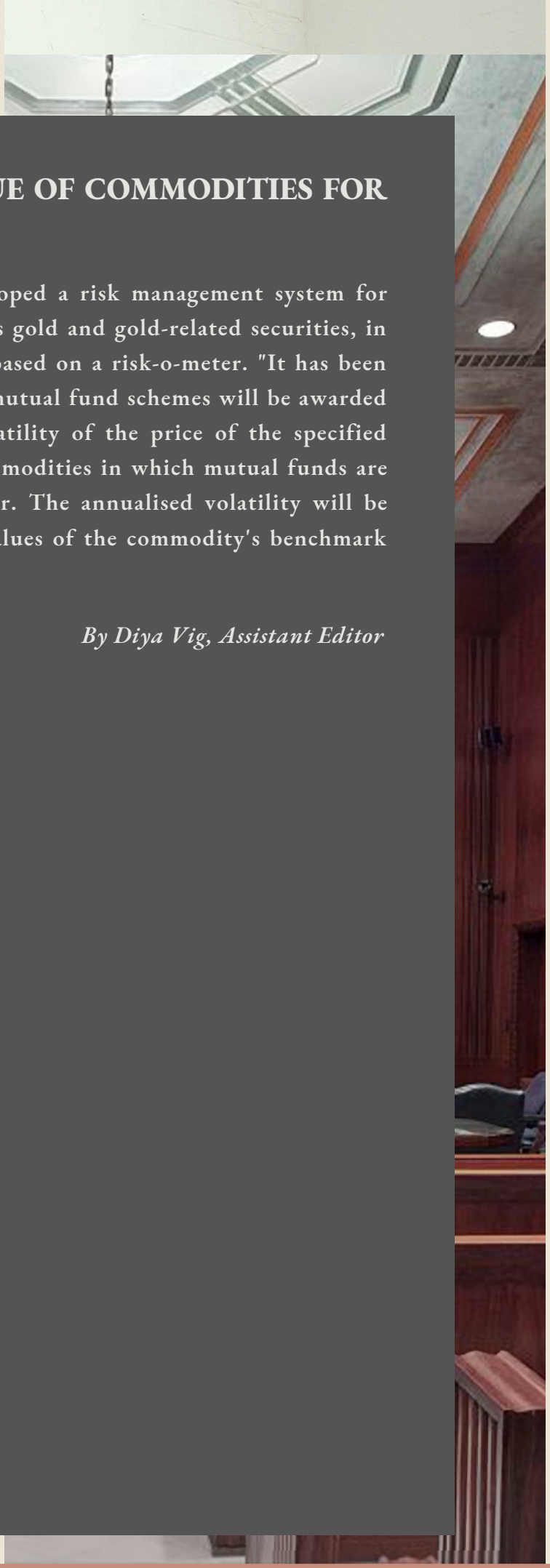
2. SEBI ISSUES COMPREHENSIVE RISK MANAGEMENT FRAMEWORK FOR ELECTRONIC GOLD RECEIPTS

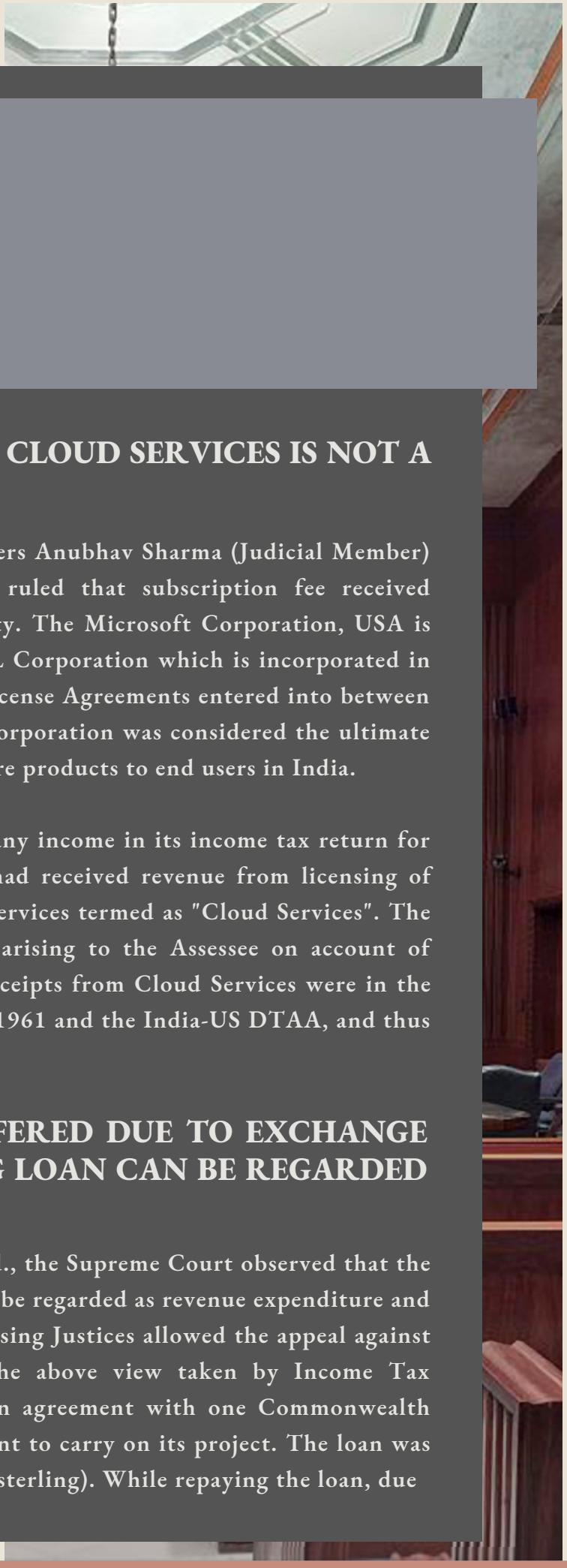
Sebi, the capital markets regulator, implemented a comprehensive risk management framework for electronic gold receipts on Monday. The watchdog has released a circular on Electronic Gold Receipts (EGRs) that covers a number of topics, including margin collection, early fund pay-in for EGRs, short-collection or non-collection of client margins, risk reduction mode, and settlement. The circular will take effect immediately. Under the Securities Contracts (Regulation) Act 1956, the government declared EGRs to be "securities" in December 2021. Sebi issued guidelines for vault managers the same month, opening the path for the gold exchange to become live. Sebi established multiple frameworks for operationalizing the gold exchange, where the yellow metal would be exchanged in the form of EGRs, in response to the notifications. Read More.

3. SEBI INTRODUCES RISK VALUE OF COMMODITIES FOR RISK-O-METER SYSTEM

Sebi, the capital markets regulator, has developed a risk management system for assessing the risk level of commodities, such as gold and gold-related securities, in which mutual funds are authorised to invest based on a risk-o-meter. "It has been determined that investing in commodities by mutual fund schemes will be awarded a risk score equivalent to the annualised volatility of the price of the specified commodity for evaluation of risk value of commodities in which mutual funds are authorised to invest," Sebi stated in a circular. The annualised volatility will be calculated quarterly using the last 15 years' values of the commodity's benchmark index. Read More.

By Diya Vig, Assistant Editor





NEWS UPDATES

TAXATION LAW

1. SUBSCRIPTION RECEIVED FOR CLOUD SERVICES IS NOT A ROYALTY INCOME

The Delhi Bench of ITAT, consisting of members Anubhav Sharma (Judicial Member) and R.K. Panda (Accountant Member), has ruled that subscription fee received towards Cloud Services is not taxable as royalty. The Microsoft Corporation, USA is the ultimate parent entity of the Assessee MOL Corporation which is incorporated in the United States of America. Due to certain License Agreements entered into between the associated enterprises, the Assessee MOL Corporation was considered the ultimate beneficiary of the licensing of Microsoft software products to end users in India.

The Assessee MOL Corporation did not show any income in its income tax return for the relevant assessment year, even though it had received revenue from licensing of Microsoft Software products and from online services termed as "Cloud Services". The Assessing Officer (AO) held that the income arising to the Assessee on account of licensing of software products as well as the receipts from Cloud Services were in the nature of 'Royalty' under the Income Tax Act, 1961 and the India-US DTAA, and thus were taxable. Read More.

2. INCOME TAX ACT - LOSS SUFFERED DUE TO EXCHANGE FLUCTUATION WHILE REPAYING LOAN CAN BE REGARDED AS REVENUE EXPENDITURE: SC

Allowing the appeal filed by Wipro Finance Ltd., the Supreme Court observed that the loss suffered owing to exchange fluctuation can be regarded as revenue expenditure and thus an allowable deduction. The bench comprising Justices allowed the appeal against High Court judgment which had reversed the above view taken by Income Tax Appellate Tribunal. Wipro entered into a loan agreement with one Commonwealth Development Corporation for borrowing amount to carry on its project. The loan was obtained in foreign currency (5 million pounds sterling). While repaying the loan, due

to the difference of rate of foreign exchange, it had to pay higher amount, resulting in loss. The loan amount was utilised by the appellant for financing the existing Indian enterprises for procurement of capital equipment on hire purchase or lease basis.

Before the ITAT, Wipro claimed deduction in respect of loss of Rs.1,10,53,909/ arising on account of exchange fluctuation, and also set up a fresh claim in respect of revenue expenses to the tune of Rs.2,46,04,418/, erroneously capitalised in the returns. The ITAT allowed this claim relying on India Cements Ltd. vs. Commissioner of Income Tax, Madras AIR 1966 SC 1053. This was later reversed by the High Court. Read More.

3. CBIC ISSUES REVISED GUIDELINES OF NRMC OR LRMC FOR EFFECTIVE IMPLEMENTATION OF THE RISK MANAGEMENT SYSTEM

The Central Board of Indirect Taxes and Customs (CBIC) has issued the revised guidelines for the National Risk Management Committee (NRMC) or Local Risk Management Committee (LRMC) for Customs and GST. The CBIC's Circulars dated 28.06.2007 and 24.11.2005 on the Risk Management System and Charter of Functions for the National Customs Targeting Centre (erstwhile Risk Management Division (2005-2017) and Risk Management Centre for Customs (2017-2020)) and the constitution of the National/Local Risk Management Committee Following the establishment of the Directorate General of Analytics and Risk Management (DGARM), the Directorate has been investigating the Customs, Passenger Profiling, and GST risk criteria. As a result, there was an urgent need to revisit the guidelines and mandate of the NRMC. A National Risk Management Committee for Customs and GST has been formed by the CBIC. The DGARM, Delhi, would be the nodal agency in charge of organising the NRMC meeting to examine the operations of the NCTC-Cargo, NCTC, and GST Business Analytics Wing. These DGARM wings will oversee the deployment and refinement of RMS, APIS, and DGARM applications, as well as give input to improve the efficacy of risk management and other connected elements. Read More.

By Akshat Verma, Assistant Editor

NEWS UPDATES

TMT LAW

1. PARLIAMENTARY PANEL SUMMONS TECH GIANTS TO DISCUSS COMPETITIVE CONDUCT

With a number of global tech giants facing CCI probe for alleged anti-competitive practices, a key Parliamentary panel in April decided to summon representatives of Google, Amazon, Facebook, Twitter and others to examine their competitive behaviour. The issue was discussed in detail by members of the Parliamentary Standing Committee on Finance after a presentation was made before it by the Competition Commission of India.

The regulator told the panel that it was setting up a 'Digital Markets and Data Unit' for effectively dealing with anti-competition practices of big tech companies and bringing a new bill to amend the CCI Act. CCI also cited a number of investigations it is carrying out in the digital space, including those against Google, Facebook-WhatsApp, Apple, Amazon, Flipkart, MakeMyTrip, Goibibo, Swiggy and Zomato. The meeting also comes against the backdrop of mounting concerns globally, including in India, about alleged practices of big tech players and technology platforms that could be adversely impacting competition in the market place. The discussions were to assess how the competition law is evolving and what else is required to position it for the future. Read More.

2. RUSSIAN DRAFT LAW MAKES WAY FOR FAST RETALIATION AGAINST FOREIGN MEDIA

News organisations from countries that "discriminate" against Russian media could have their Russian operations promptly shut down under a draft law proposed by a new Russian parliamentary commission in April. The move - which the commission's head said was a response to Western restrictions on pro-Kremlin media such as the Sputnik news agency and RT television channel - adds to the challenges facing foreign media, already under scrutiny over their coverage of Russia's war in Ukraine.

The draft law was put forward at the first meeting of the new commission. Piskarev said it would mean that if a foreign state took discriminatory action against Russian journalists, the prosecutor general could quickly ban or restrict the activities of media from that country. Some leading foreign media have already pulled out correspondents from Russia since parliament adopted a law on March 4 that makes public actions aimed at what it terms "discrediting" Russia's army illegal.

The law sets a jail term of up to 15 years for the spread of fake news or "public dissemination of deliberately false information about the use of the Armed Forces of the Russian Federation". Read More.

3. DRAFT GUIDELINES FOR UNIFORM RIGHT OF WAY TO BOOST TELECOM INFRA

The Department of Telecommunications (DoT) has released draft policy guidelines to bring consistency in Right of Way related procedures across states and spur the deployment of telecom infrastructure ahead of a pan-India roll out of fifth-generation or 5G technology. The inconsistencies around RoW across states have been a major pain point for telecom operators and tower companies. The 'Draft Policy Guidelines on Right of Way (RoW) for Establishment of Telecommunications Infrastructure' have been prepared by the central government for outlining general principles related to RoW permissions, the ministry of communications said in an official memorandum.

The existing RoW policy has been adopted by about 18 states and the rest of the states are also close to aligning with the government's RoW policy. In its draft guidelines, the telecom department has prescribed the methodology for calculation of RoW area, establishment of poles for the deployment of small cells, usage of street furniture for the deployment of small cells, mandatory in-building solutions (IBS), the provision of an online RoW portal and deemed approval, among other things. DoT has prescribed, adding that central government authorities shall permit deployment of small cells on government buildings and structures free of cost.

To recall, the Telecom Regulatory Authority of India (TRAI) has taken up a pilot programme to use street furniture to accelerate the expansion of telecom infrastructure in the wake of impending 5G commercial roll outs. Read More

By Shashwat Sharma, Assistant Editor

INTERVIEW

CROSS-BORDER M&A IN INDIA POST COVID-19

Interviewee: Mr. Ambuj Sonal (Associate Partner at Link Legal)

Brief Introduction of the Interviewee:

Ambuj has completed his BA LLB (Hons.) from Chanakya National Law University in the year 2012 and is a member of the Maharashtra and Goa Bar Council. Ambuj started his professional career as a transactional and general corporate lawyer. His prime area of practice includes mergers and acquisitions, strategic alliance, real estate transactions, cross border transactions, joint ventures and private equity.

Ambuj has extensive experience in advising on structuring and acquisition of companies by foreign investors, brand acquisitions, real estate transactions, and assisting clients on business related compliances for entities engaged in various sectors, including pharmacy, logistics, warehousing amongst others. Apart from this Ambuj has keen interest in dispute resolution and has represented clients in domestic and foreign seated arbitrations including proceedings held at Singapore International Arbitration Centre (SIAC). Ambuj's articles on legal subjects have been published on various media platforms and reputed journals such as moneycontrol, CNBC, Business World Legal, Live Law, Mondaq and Criminal Law Journal. Ambuj has recently been named as one of the top lawyers in India by Forbes India.

Ambuj has an illustrious working experience and has previously worked with DH Law Associates, Lodha Group of Companies, Pioneer Legal and is currently Associate Partner in the M&A and Private Equity Practice at Link Legal, Mumbai.

INTERVIEW

Q1: A number of restrictions were placed globally, for instance, Canada announced advanced scrutiny of foreign direct investment of any value, controlling or non-controlling in Canadian businesses related to public health and goods/services supply. Similarly, the European Commission released a guidance note highlighting the potential risk to strategic industries and noted the need to balance foreign investment with appropriate screening tools like prior approval or imposition of investment conditions. Accordingly, several European countries, like Germany, France, etc. announced changes in this regard. How did such regulatory change impact cross- border M&A?

As Covid 19 had impacted all businesses globally, there were ample of possibilities of the bigger players acquiring the mid-size/smaller players at a rate which was substantially discounted, considering the need of funds and requirement of meeting the obvious increase in expenses of such organizations. The primary reasons for implementing additional scrutiny in relation to foreign investment proposals by several countries, including Canada and European countries, was to control the misuse of the uncertain situation and opportunistic investment behavior. Certainly, any investor analyses the ease of doing business while approaching any cross-border acquisition. If the foreign investment regulations of the target's country are not smooth or tightened, the investors would tend to take a step backwards. This has indeed impacted the foreign investment flows. For example, the European Commission Report on foreign investment flows (released in November 2021) suggests that the FDI flow in European Countries have declined by approximately 71% during Covid times. While the governmental authorities of these countries had increased scrutiny on inbound foreign investments for ensuring that new risks on their economy or national security are avoided by regulating the opportunistic takeovers, this has resulted in a major impact on FDI flows which has directly affected the economy. Similar measures were also introduced by the Indian government by way of notifying press note 3 in 2020 which required that all investments from entities with which India shares a land border, will have to be made under the 'approval route' and will require security clearance. Post this notification, the Indian Government has not provided any approval for investments proposed by China, which was a major investor during pre-covid times. Given such approval route, the investors from China are reluctant in proposing any acquisitions in India, which obviously has adverse impact on the cross-border M&As from such countries.

Q2: The Material Adverse Changes Clause became a much talked about concept as a result of the pandemic. In international jurisprudence, there have been a number of cases wherein such a clause has not been of much help owing to how it has been phrased. Has there been a shift to reliance and acceptability of such clauses post the Covid-19 pandemic?

The Material Adverse Change (MAC), also known as Material Adverse Effect (MAE) clauses under any acquisition agreement would ideally mean that in case of occurrence of MAC, during the period between signing of the contract till closing, the buyer will have the right to cancel the contract or to renegotiate the same. There were lot of discussions around MAC provisions during COVID times (more particularly in earn-out structures) as the same could possibly be considered as a MAC event. That said, the entire interpretation of a MAC clause depends on how such clause has been constructed under a particular contract. Some of the MAC clauses would specifically cover situations beyond control of the parties which

results in financial loss to the target company, others may simply list out certain events which would 'materially' impact the business of the target such as, business discontinuity, regulatory actions, inability to conduct business, etc. In my experience, I have seen some buyers contemplating to invoke the MAC provisions and withdraw from the deal, however, mostly such matters have been commercially settled. Post COVID -19, the buyers and sellers have been considerate about MAC provisions under their contract and the parties have now focused on drafting MAC provisions more carefully in order to avoid any ambiguities of its applicability.

Q3: Similar to the Material Adverse Changes Clause, the Force Majeure clause was also much discussed in light of the pandemic. Do you think having this clause in the transaction documents in cross-border M&A transactions is of help? If so, are there some specific requirements that the drafters of the transaction documents must keep in mind to ensure that the Force Majeure clause helps the clients in the pandemic situation?

The outbreak of COVID-19 is a peculiar instance which probably no one would have considered while drafting a MAC or a force majeure clause. Under transaction documents of a cross-border M&A deal, a MAC provision would suffice the purpose and also cover the force majeure provisions, if properly constructed. These provisions are helpful under such documents as they provide a buyer an option to walk away in case any adverse impact is caused to the target. Post COVID, the parties to such transaction documents have adopted a safer approach to define MAC or force majeure under the contract in a manner which is more detailed, and all ambiguities are avoided. More particularly, the MAC or the force majeure provisions are now drafted in detail to include the factors like - (i) defining the 'materiality'; (ii) a threshold of financial loss; (iii) set parameters for determining the impact on target of the MAC event; (iv) burden of proof; and (iv) the commercial objective of having MAC or the force majeure. In some cases, parties have also agreed that a MAC event or a force majeure event, does not automatically trigger the termination right of the buyer, rather the sellers would prefer to have a specific cure period against each MAC or force majeure event. The idea is to draft the MAC or force majeure clauses in a manner which avoids any confusion as to what events are covered, what impact would result in a deal to fall through and what are the recourses each party would be entitled to.

Q4: Industries such as aviation, hospitality, and tourism saw a lot of uncertainty during the lockdown. While the recovery post lockdown has been noticeable, such industries still saw considerable impact. How did such uncertainty affect the cross-border M&A activities in such sectors and what impact did it have on the transactions?

Given that these sectors are considered as the backbone of any developing countries, the governments, in various jurisdictions had rolled out multiple schemes to support these industries. For example, Indian Government had announced the Emergency Credit Line Guarantee Schemes (ECLGS), Service Exports from India Scheme (SEIS), Loan Guarantee Scheme for Covid Affected Tourism Service Sector (LGSCATSS), etc. Insofar as the M&A activities are concerned, the FDI in these sectors had less attraction compared to other sectors such as tech (Fintech, Edtech, Healthtech, etc.), infrastructure, computer

software and hardware, trading, etc. In India, these sectors accounted for the least FDI in the year 2021 which shows that investors are still focusing on tech and infrastructure sectors more than any other businesses. While the schemes launched by the government may be useful in revival of these sectors post COVID, the M&A in these businesses would require more attention and probably the government would need to roll out certain relaxation under its FDI policy in relation to these sectors.

Q5: This ongoing pandemic is enlightening people on how health problems can destroy and paralyze the economic system. As such, society is reminded of the importance of resolving existing environmental issues. This leads to the demand for new green technologies which requires the transfer of technology from developed to developing countries like India. In this sense, what are your views regarding the post-COVID-19 era, where it is expected that M&A deals will be actively accomplished in target countries that are highly developed in the innovation index, particularly in green technologies (which is in line with the zeitgeist of the post-COVID-19 era and requires nature and society to coexist as a whole)? Would this have specific legal implications?

The thrust towards the climate consciousness can be seen across the world and India is no exception. Insofar as M&A activities are concerned, renewable energy sector has seen significant growth as this sector has accounted for almost USD 10 Billion investment in 2021 as compared to approximately USD 2 Billion between 2016-20. Recently, the Finance Minister of India has announced the issuance of sovereign green bonds which is supposed to provide the sufficient pool of funds in India that is required to finance the climate resilient infrastructure, lower carbon emission and transportation, also paving ways for new, green and clean technologies in the Indian market. The introduction of such green technologies would further provide a boom to the cross-border M&A in India. There are quite a few funds globally which are dedicated to support and fund the businesses which are working towards climate change. Green technologies requires innovation and there is a need to protect the patent of such technologies and their trade secrets. While the patent authorities of developed countries have introduced a robust mechanism for protection of the innovations involving green technologies by way of introducing the registrations of Green Intellectual Property, India is yet to develop such protections. Once India becomes a hot destination for cross-border M&A in green technologies, the Indian government would need to have in place a mechanism to protect the intellectual property rights relating to green technologies.

Q6: The cross-border movement of capital has suffered due to the COVID-19 pandemic since December 2019. According to the empirical evidence, COVID-19 indices do not hamper M&A deals in general. This indicates that the managerial capabilities, not the outbreak itself, determine locational decisions of M&A deals during the pandemic. In this vein, can we probably expect that the vaccination rate will become a key factor of locational decisions for M&A deals in near future? Would this have any effect on the Indian M&A transactions?

The pandemic initially caused a major fall in cross-borders M&A (both by value and volume), as the trades suffered due to uncertainty, unpreparedness, lack of clarity on prohibitions and cost-reductions. However, in 2021 the cross-border M&A deals have shown significant development, more particularly in the Asia Pacific region. The COVID outbreak also emerged as an opportunity for bigger multinational

groups to acquire the smaller groups in the developing countries. This led to the framework of restrictions imposed by various countries on opportunistic takeovers. A good vaccination rate will obviously provide a comfort to the investors for investing in targets situated at locations having better rate of vaccination as it provides a smoother operational advantage. However, the business projections, expansion in a particular market and acquisition of clients of competitors remains the primary objective for acquisition deals.

In India, the FDI has tremendously increased in 2021 irrespective of the vaccination rates. In any event, India has a very healthy vaccination rate which adds up to the interest of the foreign investors.

Q7: The pandemic has changed the perspectives of many people on sustainability, technology, CSR etc. As such, how did Covid-19 impact the due diligence carried out in cross-border M&A transactions?

It has been noticed that the concern over environmental, sustainability, technology, CSR compliances have increased after the COVID. For example, post COVID, ESG compliance is already gaining traction and has become a key aspect while making any investment decision especially in the context of cross-border M&A. The investors have approached the due diligence by setting a specific ESG Criteria. ESG investing is also referred as sustainable investment or impact investment or socially responsible investment. In addition to the environmental concerns, under the ESG criteria, the diligence is undertaken on the target to examine how the target manages its relationships with employees, vendors and the overall community where the business is being operated. This would include the CSR activities undertaken by the target. The ESG compliance is now seen as a major factor which effects the valuation of a target company and is also being scrutinized specially while undertaking a due diligence on targets. The laws relating to ESG are interspersed under various statutes and there is currently no need of a specific legislations in this regard, however, the investors are insisting on specific warranties relating to ESG compliances under the transaction documents.

RECENT ON THE BLOG

RATIONALITY OF "IPSO FACTO" CLAUSES IN LIGHT OF INSOLVENCY LAWS IN INDIA

This guest blog under the RFMLR-IBBI Blog Series Competition has been authored by Ms. Anjali Jain, Partner (Insolvency & Debt Restructuring), Areness Law. She was assisted by Varnit Jain, 5th-year B.A. LL.B. (Hons.) student at Rajiv Gandhi National University of Law, Punjab.

INTRODUCTION

In recent times, preserving the status of a corporate debtor as a 'going concern' has become incredibly challenging due to invocation of certain contractual obligations that were agreed to by the corporate debtor before the initiation of its Corporate Insolvency Resolution Process ("CIRP"). One such obligation, which is generally reflected as the essence of almost all commercial contracts is where the party is not legally bound to oblige and honour the contractual relation in case of occurrence of certain pre-defined insolvency related event of other party. The scope of this pre-defined event varies substantially based on the jurisdiction or type of financial distress or the varying nature/type of business, but the general events include initiation of CIRP, Financial Restructuring, Creditors' Voluntary Arrangements and so on.

Such belligerent clauses now increasingly demand the intervention of the tribunals as this dilemma is often discussed in light of two contrasting contemplations – first being the upholding or enforcement of the ipso facto clauses, which will make the objective of Resolution under Insolvency and Bankruptcy Code, 2016 ("IBC") redundant by allowing the counter party to terminate the contract and thus impede the statutory mandate of keeping the corporate debtor as a 'going concern'; whereas, the second contrast being the restricting of the enforcement of ipso facto clauses which will contravene the sanctity of contractual relations and reluctantly force the second party to sustain or continue an unviable contract with the Corporate Debtor.

INDIA AND IPSO FACTO: THE CASE OF "GUJARAT URJA VIKAS"

At present, there are no direct legal provisions in the domain of Indian insolvency jurisprudence that perfectly resolve the above contrasting questions and settle as to whether such contractual agreements between the parties can be or should be interrupted on account of one of the parties to the contract slipping into CIRP. Recently, this tension was manifested by the Hon'ble Supreme Court in its decision

RECENT ON THE BLOG

in Gujarat Urja Vikas Nigam Limited v. Mr. Amit Gupta & Ors. ("Gujarat Urja Vikas") on March 8, 2021, where the necessity for the legislature to deliver clarity on the status of ipso facto clauses in India was brilliantly highlighted.

The dispute in Gujarat Urja Vikas pivoted around the notice of termination issued by Gujarat Urja Vikas Nigam Limited ("Appellant") for the termination of the Power Purchase Agreement ("PPA") arrived between the Appellant and Astonfield Solar (Gujarat) Private Limited ("Corporate Debtor"), on the reason of initiation of CIRP by the Corporate Debtor. National Company Law Tribunal ("NCLT") restricted the Appellant from terminating the PPA and National Company Law Appellate Tribunal ("NCLAT") further upheld NCLT's decision and directed that theAppellant cannot terminate the PPA on the sole ground of initiation of the CIRP of the Corporate Debtor. Ultimately, the case demanded the intervention of apex court and the Hon'ble Supreme Court highlighted two major issues. First issue was with regards to the question whether NCLT has the jurisdiction under Section 60(5) of the IBC to adjudicate a contractual dispute between the Corporate Debtor and the Appellant. It was held that the NCLT and NCLAT had jurisdiction under Section 60(5) of IBC to adjudicate upon a contractual dispute that arose out of, or is related to, the CIRP.

The second issue was in relation to the validity of the termination of PPA. The Hon'ble Supreme Court while upholding the decision made it clear that it is not basing its ruling upon the general validity of ipso facto clauses under the IBC and instead delivered the judgment on the specific facts of the matter, and the importance of PPA to the business of the Corporate Debtor. It was pointed out that the PPA was the only contract of the Corporate Debtor and that the terms of the PPA prevented the Corporate Debtor from supplying electricity to the third parties. It observed that the termination of the PPA would instigate the death of the Corporate Debtor, which is in stark contradiction with the objective of the IBC. The Hon'ble Supreme Court, being aware of its ambit, addressed the issue without infringing the role of the legislature in framing the policy with respect to the said issue. In fact, the critical analysis was made regarding the need to consider the validity of ipso facto clauses by the legislature.

IPSO FACTO IN INTERNATIONAL SPACE

Different jurisdictions across the globe have either validated or invalidated the ipso facto clause. There are various jurisdictions where insolvency law overrides ipso facto clauses. For instance, Article 7 of the EU Directives, categorically states that the first party will not be permitted to terminate a contract based on the ipso facto clauses in case the defaulting party/corporate debtor is undergoing restructuring/resolution. The US Bankruptcy allows limited protection against such ipso facto clauses, only in case of lease or a contract termination but, permits swap agreements and securities agreements to be terminated based on ipso facto clauses.

The Supreme Court of UK in Belmont Park Investments Private Limited vs BNY Corporate Trustee Services Limited, held that ipso facto clauses should not help in validating contracts that did not fulfil a legitimate commercial intent and were present only to evade an illegitimate bankruptcy or insolvency law. Besides this, Amendments have been introduced by introduction of Section 233B by virtue of the

RECENT ON THE BLOG

Corporate Insolvency & Governance Act, 2020 which makes termination of a demand-supply contract unenforceable on the basis of ipso facto clauses. Furthermore, Singapore's insolvency law via Insolvency, Restructuring and Dissolution Act has settled that ipso facto clauses cannot invalidate agreements in cases of insolvency. Considering the absence of such direct nexus in India, legislature should bring the essential modifications in the IBC regarding the validity or qualified validity of such ipso facto clauses during the CIRP in harmony with multiple other jurisdictions where ipso facto clauses have already been expressly invalidated.

ANALYSIS OF INDIAN CONTRACT ACT, 1872

Though it is well settled that the terms of the contract shall govern the relationship between parties, however, as discussed in Gujarat Urja Vikas by the Supreme Court, the IBC has a predominantly overriding effect over other laws, each contract needs to be considered in light of the essential nature of the contract in the Corporate Debtor being run as a 'going concern' during CIRP and even post resolution. In an effort to analyse the impact of a specific clause or term in an Agreement for termination of an Agreement upon a Corporate Debtor turning insolvent, a cursory look at the Indian Contract Act, 1872 indicates that as per Section 35, such an Agreement can be termed as a Contingent contract which may become voidable on happening of an event which shall be Insolvency in this matter. However, if we move ahead in the same law, Section 37 binds the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract, hence if we consider a Corporate Debtor as an artificial/ juristic person, we can deduce that even in event of liquidation, parties may be bound to fulfil their obligations arising out of a contract, subject to any terms contrary to it in the Contract. At the same time, we cannot lose sight of the fact that cases where due to commencement of CIRP, fulfilment of obligations at the end of the Corporate Debtor are almost impossible, the other contracting party shall be deemed to be waived off from its obligations as well.

ANALYSIS OF COMPANIES ACT, 2013 & IBC VIS-À-VIS CONTRACTS

While the IBC is completely silent on impact on Agreements with third parties in the event of commencement of CIRP or liquidation of a Corporate Debtor, it does empower the Resolution Professional to enter into contracts on behalf of the Corporate Debtor or to modify the contracts which were entered into before the commencement of CIRP. However, besides Section 20 of IBC, the Code is predominantly silent on contracts with third parties. On the other hand, when we look at the Companies Act, 2013, Sections 242-243 give powers to the Tribunals to terminate, modify or set aside any agreements in events of oppression, mismanagement, etc. Surprisingly, the Companies Act mandates the Company Liquidator to include details of subsisting contracts in his report to the Tribunal within sixty days from the date of order for winding up.

CONCLUDING REMARKS

There is an urgent need for an Expert Committee to recommended the legislature for the need to invalidate the status of ipso facto clauses during insolvency proceedings to smoothen the process of

RECENT ON THE BLOG

insolvency of the Corporate Debtor and settle the position of liabilities of a Corporate Debtor in such clauses. The IBC was introduced to provide the financial relief to a Corporate Debtor and to provide the Corporate Debtor a new chapter of life. Keeping in view the objective of IBC, such termination of contracts on the grounds of initiation of CIRP through the ipso facto clauses cannot be held as legally admissible. Such alike clauses in the PPAs have always been a concern for the investors that if a debtor goes under insolvency proceedings, this clause will make things tougher. By now, the IBC has established itself as an uber law on preservation of the business and estate of a Corporate Debtor till it is given a new life by a Resolution Applicant or it meets its systematic step-wise end, thereby ensuring that the interests of all stakeholders are safeguarded till the end.

Depending on the sector, nature and scale of business, a Corporate Debtor may have entered into most of the starter agreements with its employees and travelling across the poles, it may have multi-national contracts with third parties. It may have leases and licenses such as in Gujarat Urja Vikas which may be the core for the business or on similar lines, there may be licenses such as Spectrums for Telecom companies. In such events, it is quintessential that the Resolution professional prepares a preliminary report or negotiates with the contracting third-party which may also include the Committee of Creditors or even seek an approval or direction from the Tribunal. Since we need to balance the stakes of all interested parties, preference in payment to parties which continue to perform their obligations or fair opportunity to terminate the Agreement in event of liquidation, or opportunities such as novation, assignments or negotiations are suggested to be introduced. However, all being said, since the IBC is completely aimed at maximisation of resources, each case shall have to be dealt with keeping in consideration the intent and spirit of IBC. Though the Insolvency and Bankruptcy Board of India has supplemented the role of legislature through prompt regulations and guidelines to the Resolution Professionals and other stakeholders, it is time that this void in the Indian Insolvency sphere is also addressed by the Ministry of Corporate Affairs or the Board itself.

CALL FOR COMMENTS

TRAI ISSUES CONSULTATION PAPER ON CROSS-MEDIA OWNERSHIP, VERTICAL INTEGRATION IN BROADCASTING SECTOR

The Telecom Regulatory Authority of India has released a comprehensive consultation paper on issues relating to media ownership. This comes after the Information & Broadcasting Ministry asked TRAI to re-examine its recommendations on the issue with the advent of new digital technologies. The consultation paper has sought views from stakeholders on the need, nature and levels of safeguard required in terms of media ownership especially when it comes to cross-media ownership and vertical integration in the broadcasting sector.

The regulator has raised questions regarding whether there is a need for monitoring cross-media ownership and control given the media industry has expanded beyond conventional television and print medium to portals, IP based websites, video portals among others. “Media has the capacity to influence opinion of masses, more so the news media. Should there be a common mechanism to monitor ownership of print, television, radio, or other internet-based news media?”

While SEBI and CCI regulate mergers and acquisitions, the regulator has sought views on whether additional regulatory or monitoring mechanism is required especially for news media companies. It has also sought views on whether any entity should be restrained from entering the media sector in public interest.

TRAI noted that the digital media landscape is marked by the dominance of limited number of very large players who have the ability to consolidate by acquiring smaller players “reducing media pluralism.” It also noted that lack of accuracy of some online players is a concern. It has therefore sought views on which genres or if all genres -print media,TV, radio, online media, digital media or OTT-- should be considered for the purpose of overseeing of media ownership to ensure viewpoint plurality. Last date to add comments is 10 May, 2022. The last date to counter comments will be further notified on the TRAI Press room Website. **Read More**

EDITORIAL BOARD

RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

ISSN(O): 2347-3827

www.rfmlr.com, rfmlr@rgnul.ac.in