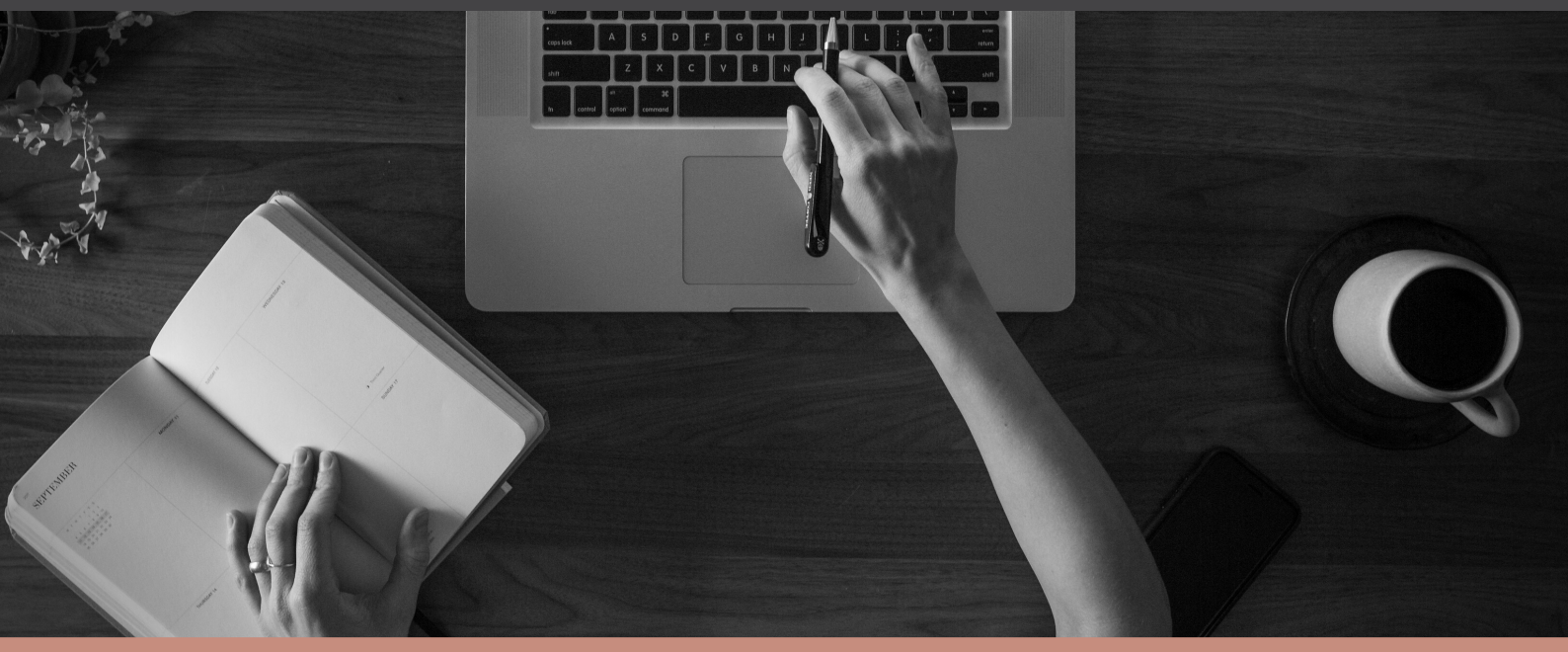
RFM
Law Review

RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

AU COURANT

DECEMBER'21-JANUARY'22

IN THIS ISSUE



PREFACE

It gives us immense joy to share with our readers, the December-January 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 some food for thought. These include brief comments on the Tightened Norms by MCA Relating to Additional Fee and Higher-Additional Fee by Amending the Companies (Registration Offices and Fees) Rules, 2014, SEBI's Recent Direction to Exchanges to Levy Fines and Take Action for Non-Compliances by Issuers of Non-Convertible Securities, CCI's Antitrust Probe Against Apple's App Store Practices and Microsoft's Acquisition of Antivision Blizzard for $68.7 Billion.

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 Editorial Column section contains a piece by Ms. Srishti Kaushal (Associate Editor, RFMLR) and Ms. Diya Vig (Assistant Editor, RFMLR) titled 'Collective Dominance: Sine Qua Non for Indian Jurisprudence'.

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 the Ministry of Electronics and Information Technology for feedback on the Draft National Blockchain Strategy (2021) and TRAI invites public views on the Consultation Paper on Data Centre Regulation.

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

MCA TIGHTENS NORMS RELATING TO ADDITIONAL FEE AND HIGHER-ADDITIONAL FEE BY AMENDING THE COMPANIES (REGISTRATION OFFICES AND FEES) RULES, 2014

On January 11, 2022, the Ministry of Corporate Affairs (MCA) notified the "Companies (Registration Offices and Fees) Amendment Rules, 2022", to effect Higher Additional Fee of up to 18 Times (as against existing 12 times) the Normal Fee for Late Filing by making amendments in "Annexure to Companies (Registration Offices and Fees) Rules, 2014" relating to Filing Fee under Section 403 of the Companies Act 2013, which deals with charges for filing any document with the Registrar and the change from a slab-based to a day-based defaulting structure for extra fees. The notification will become effective from July 1, 2022. This does not include annual filing, which is paid at Rs.100 each day with no maximum limit.

It is also stated in this notification that the above-mentioned fee (Additional and Higher Additional fee) shall be applicable on delay in filing of forms other than the following forms, namely, SH-7 (Form for increasing the Nominal Share Capital); AOC-4 (Form filed under Section 137 of the Act); MGT-7 (Form filed under Section 92 of the Act); and CHG-1, CHG-4, etc. (Charges Form). The above amendment notification is not made applicable on these forms because these forms were not covered under the preview of table B even before the issuance of this amendment notification. These forms continue to be governed by the existing additional fee rules.

Furthermore, it is also specified through notes that no additional fee is to be charged if a higher additional fee is specified, that is, one needs to pay the higher additional fee only. These amendments are introduced to encourage companies who have a tendency of delaying form files to get their things in order and focus on regulatory compliance. The MCA has also specified that if there is a delay in filing of E- form PAS-3 (Return of Allotment) and INC-22 (Shifting of the Registered Office) a higher additional fee will be charged only if there is a delay in filing of above forms i.e., forms are filed after the expiry of due date as specified in the Act, the delay is on two or more occasions, and such delay in filing form is made within 365 days from date of filing of last belated form wherein an additional/higher additional fee was payable. In order to impose the higher additional fee, all the above-mentioned conditions are to be complied with, even if one of these conditions is not fulfilled no higher additional fee will be imposed.

The MCA's amended announcement is a positive move since it will encourage good corporate governance and drive corporations to file all information on time in order to avoid substantial late costs. Read More.

By *Raghav Sehgal, Copy Editor*

HIGHLIGHTS

SEBI DIRECTS EXCHANGES TO LEVY FINES AND TAKE ACTION FOR NON-COMPLIANCES BY ISSUERS OF NON-CONVERTIBLE SECURITIES

The Securities and Exchange Board of India (SEBI) has urged stock exchanges to charge penalties and take action against issuers of listed non-convertible securities and/or commercial papers who fail to comply with continuous disclosure obligations, in the interests of investors and the securities market. In an attachment to the circular, SEBI has also specified the fines that would be imposed if there are any non-compliances. The fines realised need to be credited to the Investor Protection Fund of the concerned stock exchange. The fines will continue to accrue till the time of rectification of the non-compliance and to the satisfaction of the concerned recognised stock exchange. Non-compliant organisations must pay fines within 15 days after receiving notification. The regulator stated that every stock exchange will review the compliance status of the entities having listed their non-convertible securities and commercial paper and issue notices to the non-compliant entities within 30 days from the due date of the prescribed timeline. In case entities fail to do so, exchanges will have to issue reminder notices and at the same time, send intimation to other exchanges where the non-convertible securities or commercial paper of the non-compliant entity are listed. If the entity still fails to comply, the stock exchange and other entities allowed to act as Electronic Book Provider (EBP), shall not allow issuance of any securities by such non-compliant entity on EBP Platform and also not allow further listing of non-convertible securities or commercial papers. The requirements will take effect on or after February 1, 2022, for compliance dates that fall on or after that date.

If a non-compliant firm is listed on more than one recognised stock exchange, the concerned recognised stock exchange(s) must take uniform action in accordance with this circular after consulting with one another.

The penalties will be deposited to the "Investor Protection Fund" of the recognised stock exchange in question. Non-compliance with the terms of the SEBI LODR Regulations & circulars or recommendations issued thereunder by a company that has listed Non-Convertible Securities as per

HIGHLIGHTS

annexure will result in action by recognised stock exchanges. Non-compliance and penalties are listed in Annexure:- I: (i) A penalty of INR 5,000 per instance of non-compliance per item is levied in case of delay in providing intimation about the board meeting; (ii) In case of delay in providing intimation about the board meeting, a penalty of INR 5,000 is levied; (iii) Failure to acquire prior stock exchange permission for any structural change in non-convertible securities would result in a penalty of INR 50,000 per incident.

SEBI has instructed recognised stock exchanges to take the required steps to implement this circular and to post the action(s) taken against businesses for non-compliance(s) on their websites, including the specifics of the corresponding requirement, the amount of fine levied/action taken, and so on. Read More

By *Diya Vig, Assitant Editor*

HIGHLIGHTS

CCI ORDERS ANTITRUST PROBE AGAINST APPLE'S APP STORE PRACTICES

The Competition Commission of India ("CCI") in its order dated 31.12.2021 has launched an Antitrust probe against Apple for its App Store practices. The order has been issued upon information provided by an NGO named, Together We Fight Society ("Informant"). The Informant alleged that Apple's App Store practices pertaining to mandatory use of Apple's in-app payment solution for paid apps and in-app purchases amount to a violation of Section 4 of the Competition Act, 2002 which deals with abuse of dominant position in the market.

The Informant submitted that Apple requires app developers who wish to sell paid apps or digital in-app content to their consumers to use a single payment processing option offered by Apple, which carries a 30% commission. In contrast, payment processors such as Bill Desk, RazorPay, etc. charge significantly lower fees for similar services (usually between 1-5% of the transaction value). Further, Apple prevents iOS users from downloading apps directly from websites and pre-installs its own App Store on every iOS device it sells. This, the informant alleged amounts to abuse of dominant position by Apple. The informant also averred that the high commission increases the cost of Apple's competitors and affects their competitiveness vis-à-vis Apple's own verticals (For example, Netflix is a competitor of Apple TV on the App Store, however, the fee in respect of Apple TV, in any case, would be internalized).

Apple, in its reply to the CCI, denied all the allegations. First, it submitted that the appropriate relevant market in the present case should be the overall market of smartphones in India. In the overall market of smartphones, Apple's market share is less than 5% which categorically bars any allegation of dominant position and potential abuse of dominant position against Apple. Further, Apple said that Apple's In-App Purchase ("IAP") feature, is Apple's compensation for providing the app developers with a built-in user base and significant technical and marketing know-how. Apple has spent billions of dollars on developing and running the App Store and the commission charged is consistent with the value app developers receive from Apple.

The CCI, upon hearing both the parties first contended Apple's definition of the relevant market and said that in the present case, the relevant market has to be defined from the perspective of app developers and not from the perspective of end-users. Hence, the relevant market would be the 'market for app stores for

HIGHLIGHTS

iOS in India' in which Apple enjoys a monopoly. The Commission, then said that on the basis of material on record it was convinced that at this stage a prima facie case is made out against Apple for violation of provisions of Section 4 of the Competition Act, 2002 which merits an investigation and ordered the Director-General to conduct an investigation within 60 days. It must be noted that Apple's rival Google is also facing a similar investigation by CCI over the mandatory use of its Play Store's payment system for paid apps and in-app purchases since November 2020. Read More

By *Tarpan Soni, Assistant Editor*

HIGHLIGHTS

MICROSOFT TO ACQUIRE ACTIVISION BLIZZARD FOR $68.7 BILLION

Microsoft is buying video game publisher Activision Blizzard for almost $69 billion. This is the biggest deal ever in the technology sector this will accelerate Microsoft's gaming business, which upon closing will be the third-largest gaming company in the world after Tencent and Sony. Microsoft will acquire Activision Blizzard for $95 per share and will be adding games franchises like Warcraft, Diablo, Overwatch, Call of Duty and Candy Crush as well as eSports activities from Major League Gaming. This will be an addition to Microsoft's gaming portfolio, in addition to producing Xbox video game console now, it will own an entire gaming company with flagship games.

According to Microsoft, Bobby Kotick will continue to serve as Activision Blizzard's CEO and upon closing, he will report to Microsoft Gaming CEO Phil Spencer. Microsoft is paying Activision investors in cash and although it's not a small amount, the company can afford it. Microsoft has a valuation of $2.3 trillion, making it the second most valuable tech company after Apple. Going after a big publisher like Activision is an attempt to bolster its exclusive lineup of games designed to run on both Xbox and PCs. Other competitors of Microsoft such as Nintendo and Sony are successful because they have their own classic games and Microsoft lacked in this area, but with Activision, Microsoft will have 30 studios under it working on different games.

"Gaming is the most dynamic and exciting category in entertainment across all platforms today and will play a key role in the development of metaverse platforms", Microsoft chairman and CEO Satya Nadella, said in a press release. With the mention of Metaverse, and the probability of metaverse being the new age face of internet rise, recently Facebook also changed its name to Meta to show how important metaverse was to the company. With big players involved such as Meta and Microsoft and deals worth billions have begun to surface we look forward to the beginning of an arms race towards the metaverse. Companies heavily investing in AI, virtual reality developments and continuous minor acquisitions everyone is trying to gain strength.

This is the largest deal by Microsoft since it acquired LinkedIn in 2016 for $26.2 billion. The deal is expected to close in the fiscal year 2023, pending customary closing conditions and regulatory approval. The deal has already been approved by both boards of directors and the stock valuation of Activision is on the rise since the announcement of the deal. With this Microsoft aspires to become one of the Best game producing companies along with the finest Gaming Console producer. Read More

By *Shashwat Sharma, Assistant Editor*

NEWS UPDATES

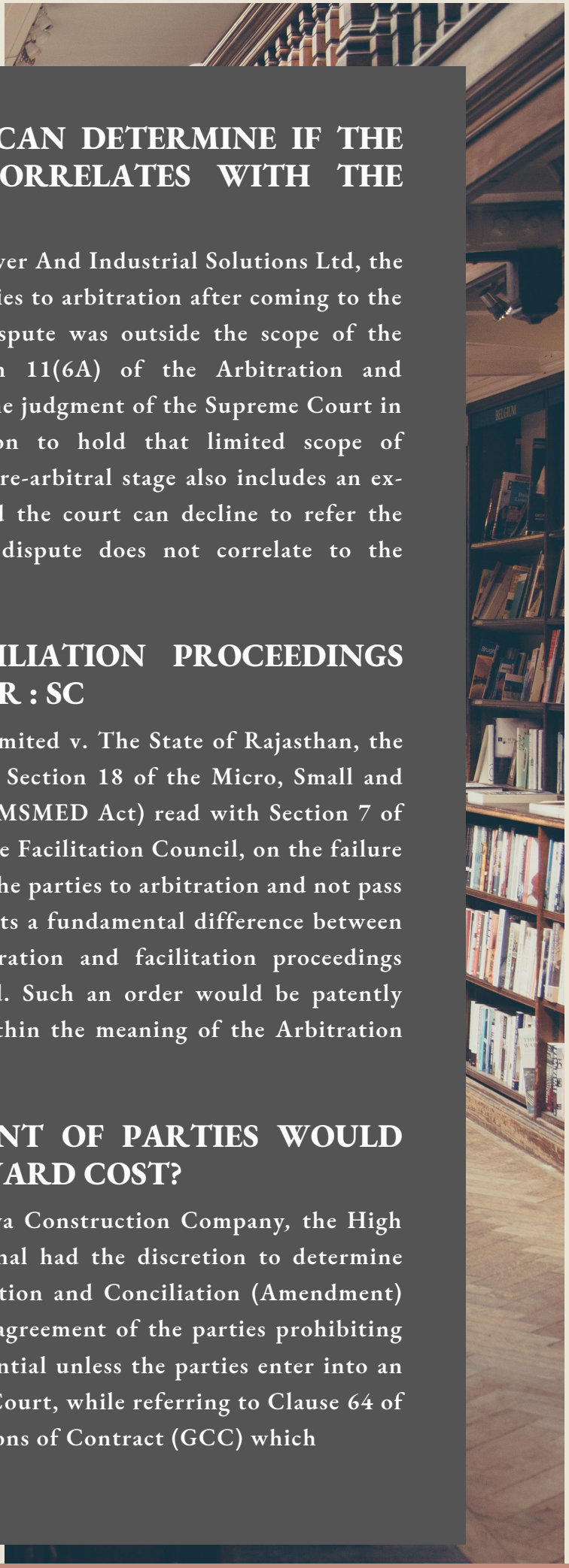
ALTERNATIVE DISPUTE RESOLUTION

1. ARBITRAL AWARD CANNOT BE OVERTURNED ON THE GROUND THAT THE ARBITRATOR FAILED TO APPRECIATE FACTS : SC

In the case of Atlanta Limited Thr. Its Managing Director v. Union of India, the Supreme Court has reiterated that the Appellate Court exercising power under Section 30 and 33 of the Arbitration Act, 1940 ought not to reassess or examine the sufficiency of the evidence and that only a patent error or misconduct of the arbitrator or the proceedings could justify the Court's interference. Stating that the arbitrator is the final arbiter of the disputes between the parties, the Court added that the arbitral award can neither be challenged on the ground that the arbitrator had drawn his conclusion or had failed to appreciate the facts nor can the Court substitute its view on the interpretation of law or facts as against those drawn by the arbitrator by re-appreciating the evidence to arrive at a different conclusion. Read more

2. THE DOCTRINE OF ISSUE ESTOPPEL AND RIGHT TO APPROACH TRIBUNAL UNDER SPECIAL STATUTE

In the case of M.P. Housing and Infrastructure Development Board v. K.P. Dwivedi, as per Section 19 of the Madhya Pradesh Madhyastham Adhikaran, Vindhyachal, Bhopal, 1983 Act, the Supreme Court held that a party which has participated in the arbitral proceedings and voluntarily raised an issue before the arbitrator appointed by the High Court, cannot re-agitate the same before a tribunal constituted under a Special Statute, and stated that the Revision Application to the High Court shall be maintainable only against the award passed by the learned Arbitral Tribunal. The arbitral proceedings before the arbitrator appointed by the Court would not be non-est, after the participation of the parties without any demur or objection, the doctrine of 'Issue Estoppel' would apply and the party would be precluded from raising the same issue again. Read More



3. COURT UNDER-SECTION 11 CAN DETERMINE IF THE ARBITRATION AGREEMENT CORRELATES WITH THE DISPUTE

In the case of Avantha Holdings Ltd v. CG Power And Industrial Solutions Ltd, the High Court of Delhi declined to refer the parties to arbitration after coming to the conclusion that the subject matter of the dispute was outside the scope of the arbitration agreement by virtue of Section 11(6A) of the Arbitration and Conciliation Act, 1996. The Court relied on the judgment of the Supreme Court in Vidya Drolia v. Durga Trading Corporation to hold that limited scope of examination of the arbitration agreement at pre-arbitral stage also includes an ex-facie view on the arbitrability of dispute and the court can decline to refer the parties to arbitration if it finds that the dispute does not correlate to the arbitration agreement. Read More

4. ARBITRATION AND CONCILIATION PROCEEDINGS CANNOT BE CLUBBED TOGETHER : SC

In the case of Jharkhand Urja Vikas Nigam Limited v. The State of Rajasthan, the Supreme Court held that as per provisions of Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act) read with Section 7 of the Arbitration and Conciliation Act, 1996, the Facilitation Council, on the failure of the conciliation proceedings can only refer the parties to arbitration and not pass an award. The Court reiterated that there exists a fundamental difference between conciliation and arbitration, and that arbitration and facilitation proceedings cannot be clubbed together to pass an award. Such an order would be patently illegal and would not constitute an award within the meaning of the Arbitration Act. Read More

5. WHETHER PRIOR AGREEMENT OF PARTIES WOULD LIMIT POWER OF COURT TO AWARD COST?

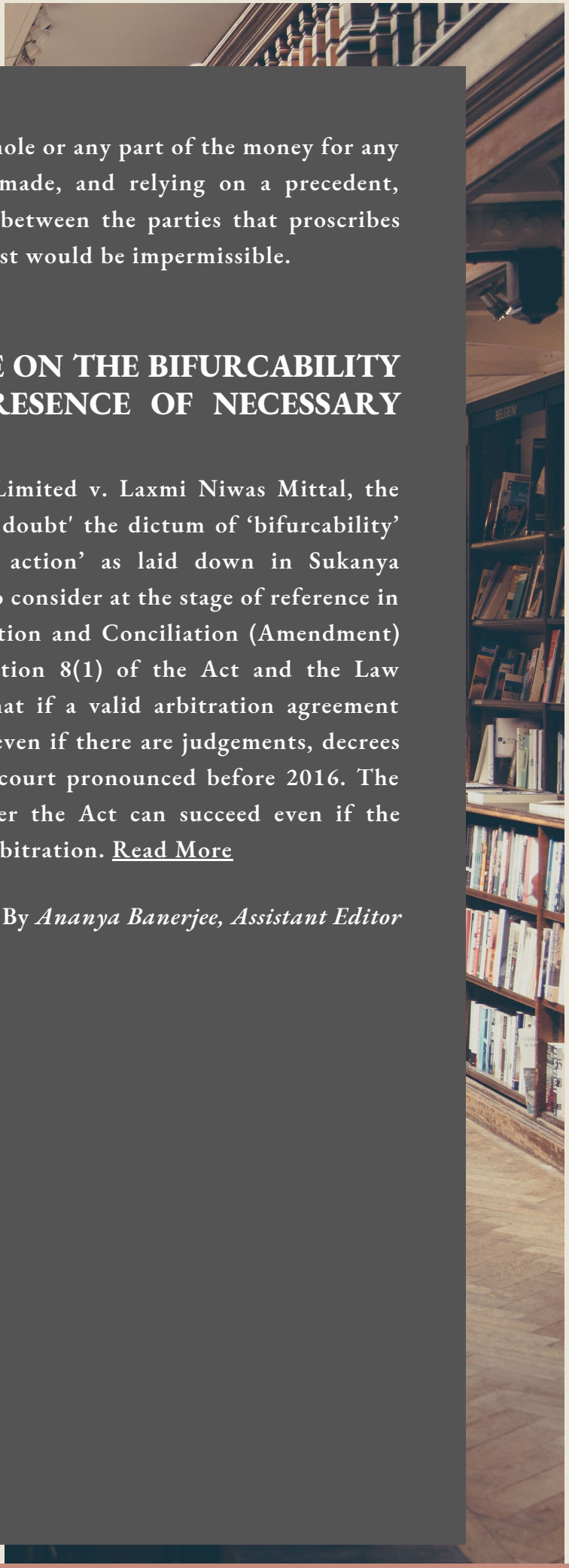
In the case of Union of India v. Om Vajrakaya Construction Company, the High Court of Delhi held that the Arbitral Tribunal had the discretion to determine costs by virtue of Section 31A of the Arbitration and Conciliation (Amendment) Act, 2015. The Court also observed that any agreement of the parties prohibiting the awarding of the cost would be inconsequential unless the parties enter into an agreement after the disputes have arisen. The Court, while referring to Clause 64 of the Indian Railways Standard General Conditions of Contract (GCC) which

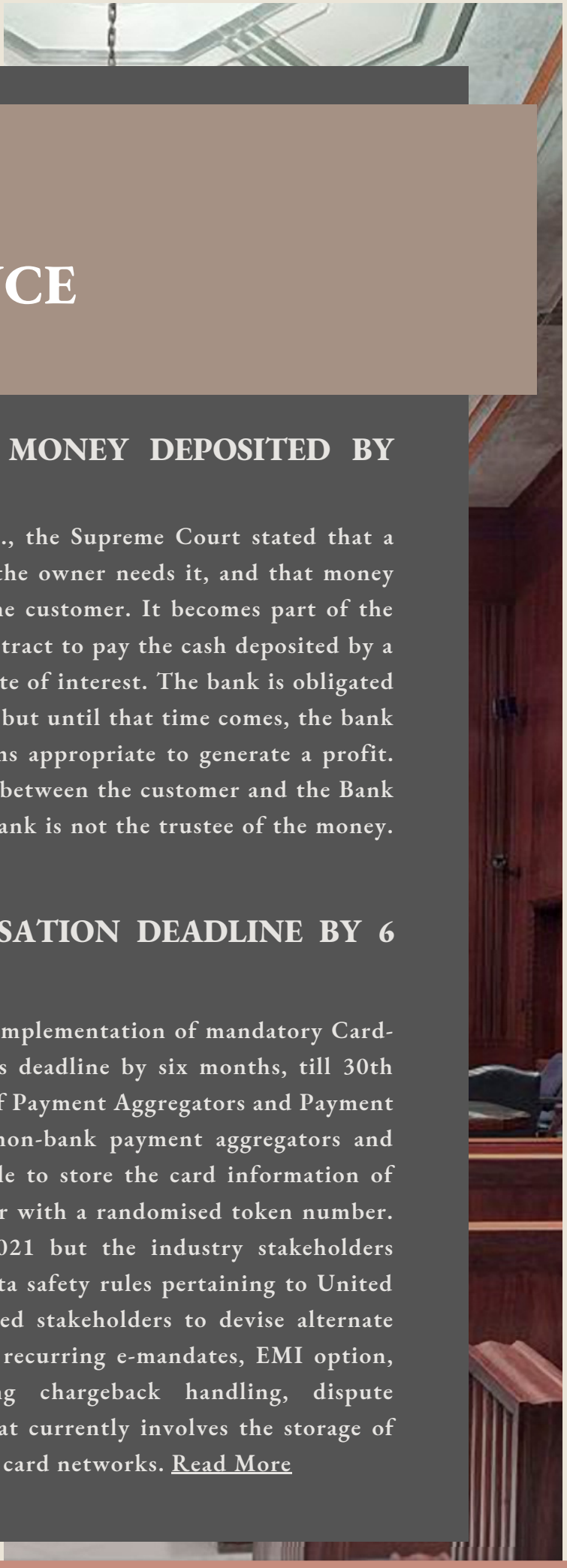
provides that no interest shall be payable on whole or any part of the money for any period till the date on which the award is made, and relying on a precedent, concluded that if there is a specific contract between the parties that proscribes award of interest, award of pre-reference interest would be impermissible.
Read More

6. COURT CANNOT ADJUDICATE ON THE BIFURCABILITY OF CAUSES OF ACTION OR PRESENCE OF NECESSARY PARTIES

In the case of Lindsay International Private Limited v. Laxmi Niwas Mittal, the High Court of Calcutta ruled that 'without a doubt' the dictum of 'bifurcability' and the clause of 'necessary parties to the action' as laid down in Sukanya Holdingsare no longer relevant for the Court to consider at the stage of reference in an application under Section 8 of the Arbitration and Conciliation (Amendment) Act, 1996. Thus, the Court referring to Section 8(1) of the Act and the Law Commission Report Number 246 observed that if a valid arbitration agreement exists, parties must be referred to arbitration even if there are judgements, decrees or orders of the Supreme Court or any other court pronounced before 2016. The Court also underscored that application under the Act can succeed even if the entire suit is not capable of being referred to arbitration. Read More

By *Ananya Banerjee, Assistant Editor*





NEWS UPDATES

BANKING & FINANCE

1. BANK NOT A TRUSTEE OF MONEY DEPOSITED BY CUSTOMERS : SC

In the case of N. Raghavender v. State of A.P., the Supreme Court stated that a banker receives money to be drawn out when the owner needs it, and that money deposited in a bank is not held on trust for the customer. It becomes part of the banker's funds, and the banker is bound by contract to pay the cash deposited by a customer to him on demand, with the agreed rate of interest. The bank is obligated to return money to customers when demanded, but until that time comes, the bank is entitled to use the funds in any way it deems appropriate to generate a profit. Hence, the Court held that such a relationship between the customer and the Bank is one of a creditor and a debtor and that the bank is not the trustee of the money. Read More

2. RBI EXTENDS CARD TOKENISATION DEADLINE BY 6 MONTHS TILL JUNE 2022

The Reserve Bank of India (RBI) deferred the implementation of mandatory Card-on-File (CoF) tokenisation of card transactions deadline by six months, till 30th June 2022, as per its guidelines on Regulation of Payment Aggregators and Payment Gateways. Post the deadline, the authorised non-bank payment aggregators and merchants on-boarded by them will not be able to store the card information of users and will have to replace each card number with a randomised token number. The previous deadline was 31st December 2021 but the industry stakeholders sought more time to comply with the latest data safety rules pertaining to United Payment Interface (UPI). The RBI also notified stakeholders to devise alternate mechanisms to handle any use case (including recurring e-mandates, EMI option, etc.) or post-transaction activity (including chargeback handling, dispute resolution, reward/loyalty programme, etc.) that currently involves the storage of CoF data by entities other than card issuers and card networks. Read More

3. GOVERNMENT APPROVES PMC-USFBL BANK AMALGAMATION PLAN : RBI

The Reserve Bank of India (RBI) notified that the Government of India (GoI) has sanctioned the scheme for the amalgamation of the Punjab and Maharashtra Co-operative Bank Ltd. (PMC Bank) with Unity Small Finance Bank Ltd. (USFBL). The amalgamation will come into force, and the branches of the PMC Bank will function as branches of USFBL with effect from January 25, 2022. The final scheme envisages the start of payouts for depositors with over Rs 5 lakh in balance within one year, as against two years in the draft scheme according to the guidelines of the Deposit Insurance and Credit Guarantee Corporation (DICGC). Additionally, the final scheme will use recoveries made from loans given to Housing Development and Infrastructure (HDIL) Group over and above the principal amount to buy back Perpetual Non-Cumulative Preference Shares (PNCPS) issued to institutional depositors.

4. AIRTEL PAYMENTS BANK RECEIVES SCHEDULED BANK STATUS FROM RBI

The Reserve Bank of India (RBI) announced the inclusion of Airtel Payments Bank Limited in the second schedule of the Reserve Bank of India Act, 1934. In a boost to its fast-growing digital banking footprint, with this, the Airtel Payments Bank, which turned profitable in the quarter ending September 2021, can now pitch for government-issued Requests for Proposals (RFPs) and primary auctions and undertake both central and state government business, besides participating in government-operated welfare schemes. The central bank also said that SBI, ICICI and HDFC banks will continue to be identified as Domestic Systemically Important Banks (D-SIBs), under the same bucketing structure as in the 2020 list of D-SIBs.
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5. INDIA'S CENTRAL BANK RECOMMENDS BASIC MODEL OF CBDC

The Reserve Bank of India (RBI), through a report titled "Trend and Progress of Banking in India 2020-21" recommended that India must initially go in for a basic model of Central Bank Digital Currency (CBDC) and use the payment system architecture as a backbone to make CBDCs available to all citizens and financial institutions. The RBI added that due to its dynamic impact on macroeconomic

policymaking, it is necessary to adopt basic versions initially and test comprehensively so that they have minimal impact on monetary policy and the banking system. The RBI further observed that CBDCs can offer greater benefits to users in terms of liquidity, scalability, acceptance, ease of transactions with anonymity, and faster settlement, in comparison with existing forms of money. However, the RBI also stated that certain crucial questions about the design elements and distribution architecture of CBDCs must be navigated before their introduction. Read More

By Ananya Banerjee, Assistant Editor

NEWS UPDATES
COMPETITION LAW

1. HYUNDAI, DAEWOO TIE-UP GETS EU ANTITRUST VETO

Hyundai Heavy Industries' proposed acquisition of rival Daewoo Shipbuilding & Marine Engineering Co Ltd. to create the world's biggest shipbuilding company was hit with a European Union (EU) veto on 13 January on concerns that the deal would hurt competition. The EU Commission said that the deal would have created a dominant position by the newly merged company and reduced competition in the worldwide market for the construction of large liquefied natural gas (LNG) carriers. The order follows an in-depth investigation by the Commission on the proposed transaction between the two of three world's largest players in the LNG carriers' market. The Commission took the decision based on the consideration that the parties enjoy a very large and increasing market share and consequent to the proposed merger, there will be very few alternatives left to the buyers. Above that, there are very high barriers to entry in the LNG carriers' market as they are highly sophisticated and extremely complex to build. This is the Commission's first merger veto since it blocked Thyssenkrupp and Tata Steel's plan to form a landmark joint venture in 2019.

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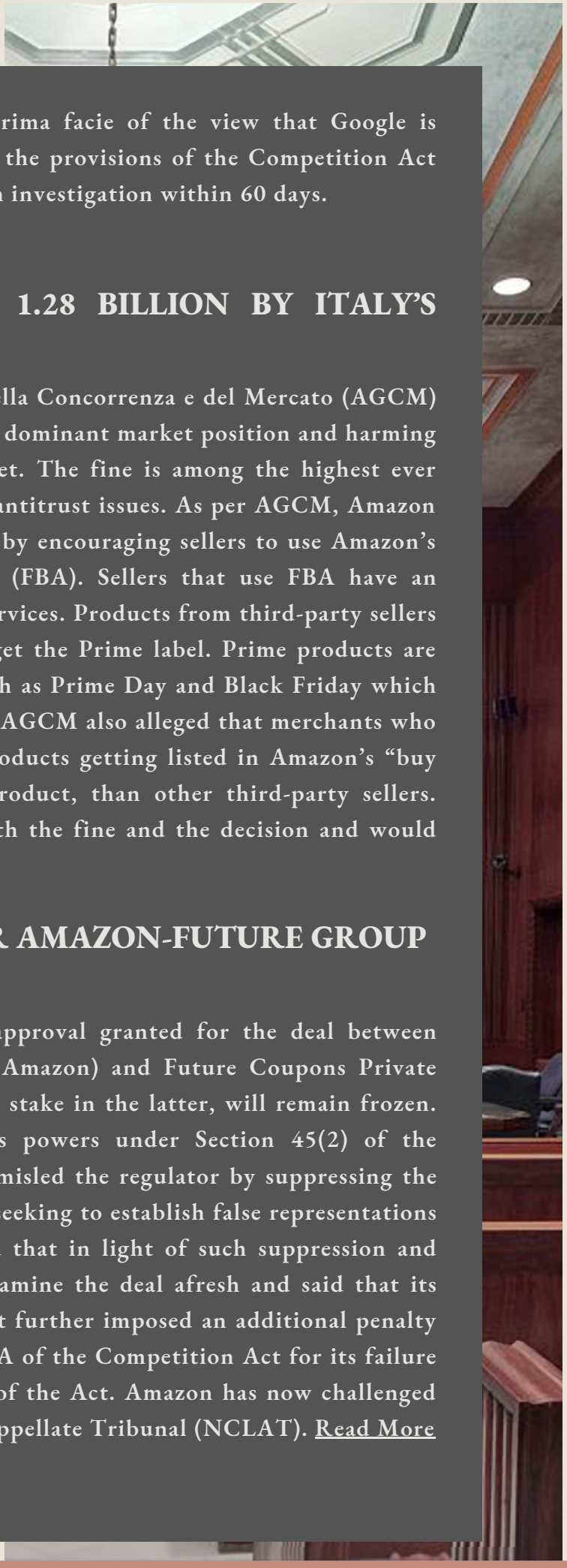
2. "UNFAIR TERMS" FOR DIGITAL NEWS PUBLISHERS: CCI TO PROBE GOOGLE

The Competition Commission of India (CCI), upon a complaint filed by Digital News Publishers Association (DNPA), has recently ordered a probe against Google for alleged abuse of its dominant position. The DNPA, a body of digital news publishers, first submitted that more than 50 percent of the traffic on news websites comes from Google, which puts Google in a position to dominate the news publishers. It then alleged that Google uses this dominant position to impose unfair conditions on them. It said that Google shares only a small portion of the revenue generated from the advertisements on the links of the news publishers on Google and that too in an arbitrary manner, without disclosing any basis for calculating such revenue. Moreover, the news publishers are not compensated for snippets of the content created by them which are displayed by Google in its search result pages.



Upon hearing the complaint, the CCI was prima facie of the view that Google is abusing its dominant position, in violation of the provisions of the Competition Act and ordered the Director-General to conduct an investigation within 60 days.
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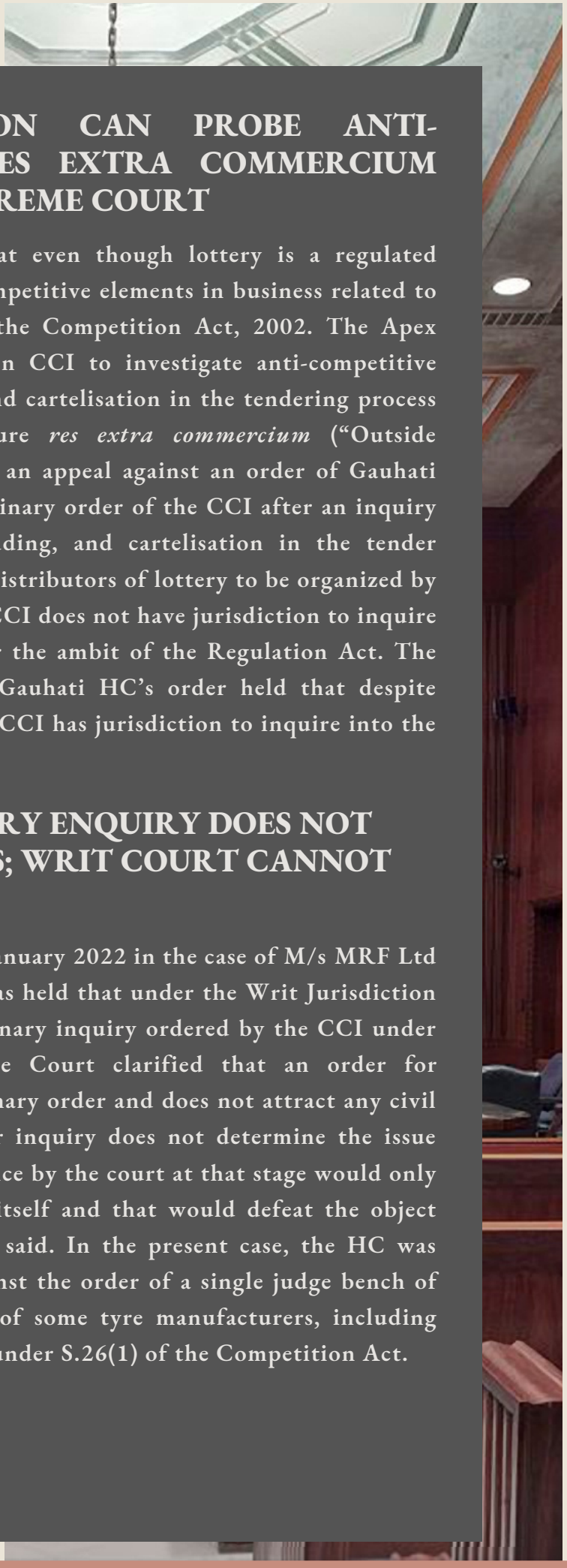
3. AMAZON FINED RECORD $ 1.28 BILLION BY ITALY'S ANTITRUST REGULATOR

Italy's antitrust regulator, Autorità Garante della Concorrenza e del Mercato (AGCM) has fined Amazon $ 1.28 billion for abusing its dominant market position and harming competitors in the e-commerce logistics market. The fine is among the highest ever imposed by a country in the EU over internet antitrust issues. As per AGCM, Amazon leveraged its dominant position in the market by encouraging sellers to use Amazon's own logistics service, Fulfilment By Amazon (FBA). Sellers that use FBA have an advantage over those who use other logistics services. Products from third-party sellers that arrive at Amazon's warehouses via FBA get the Prime label. Prime products are subsequently included in Amazon's events, such as Prime Day and Black Friday which are crucial to gain visibility and boost in sales. AGCM also alleged that merchants who use FBA have a higher probability of their products getting listed in Amazon's "buy box," or listed as the first retailer of the product, than other third-party sellers. Amazon has said that it strongly disagrees with the fine and the decision and would appeal against it. Read More

4. CCI SUSPENDS APPROVAL FOR AMAZON-FUTURE GROUP DEAL

On December 17, 2021, CCI said that the approval granted for the deal between Amazon.com NV Investment Holdings LLC (Amazon) and Future Coupons Private Limited, allowing the former to acquire a 49% stake in the latter, will remain frozen. The CCI passed this order by virtue of its powers under Section 45(2) of the Competition Act, after holding that Amazon misled the regulator by suppressing the actual purpose and particulars of the deal and seeking to establish false representations while suppressing material facts. It concluded that in light of such suppression and false representation, it would now need to examine the deal afresh and said that its approval would remain in abeyance till then. It further imposed an additional penalty of Rs. 200 crores on Amazon under Section 43A of the Competition Act for its failure to notify the combination under Section 6(2) of the Act. Amazon has now challenged the CCI order at the National Company Law Appellate Tribunal (NCLAT). Read More



5. COMPETITION COMMISSION CAN PROBE ANTI-COMPETITIVE ASPECTS OF RES EXTRA COMMERCIUM BUSINESSES LIKE LOTTERY : SUPREME COURT

The Supreme Court on 19 January held that even though lottery is a regulated commodity under the Regulation Act, anti-competitive elements in business related to lotteries would continue to be governed by the Competition Act, 2002. The Apex Court further held that there was no bar on CCI to investigate anti-competitive practices like bid-rigging, collusive bidding, and cartelisation in the tendering process for lottery business, which is in the nature *res extra commercium* ("Outside Commerce"). The Hon'ble Court was hearing an appeal against an order of Gauhati High Court (HC) which had set aside a preliminary order of the CCI after an inquiry into allegations of bid-rigging, collusive bidding, and cartelisation in the tender process for appointment of selling agents and distributors of lottery to be organized by Mizoram's government. The HC said that the CCI does not have jurisdiction to inquire into the said allegations as lotteries fall under the ambit of the Regulation Act. The Apex Court, however, disagreeing with the Gauhati HC's order held that despite lotteries falling under the Regulation Act, the CCI has jurisdiction to inquire into the same. Read More

6. CCI'S ORDER FOR PRELIMINARY ENQUIRY DOES NOT ATTRACT CIVIL CONSEQUENCES; WRIT COURT CANNOT INTERFERE: MADRAS HC

The Madras High Court in its judgment on 6 January 2022 in the case of M/s MRF Ltd v. The Ministry of Corporate Affairs (MCA) has held that under the Writ Jurisdiction there should be no interference with a preliminary inquiry ordered by the CCI under Section 26(1) of the Competition Act. The Court clarified that an order for investigation passed under S.26(1) is a preliminary order and does not attract any civil consequences. Since the preliminary order for inquiry does not determine the issue raised against the parties finally, any interference by the court at that stage would only allow the parties to escape the investigation itself and that would defeat the object sought to be achieved by the Act, the Court said. In the present case, the HC was dealing with an appeal filed by MRF Ltd against the order of a single judge bench of Madras HC which had rejected the petition of some tyre manufacturers, including MRF to quash a CCI probe ordered into them under S.26(1) of the Competition Act.
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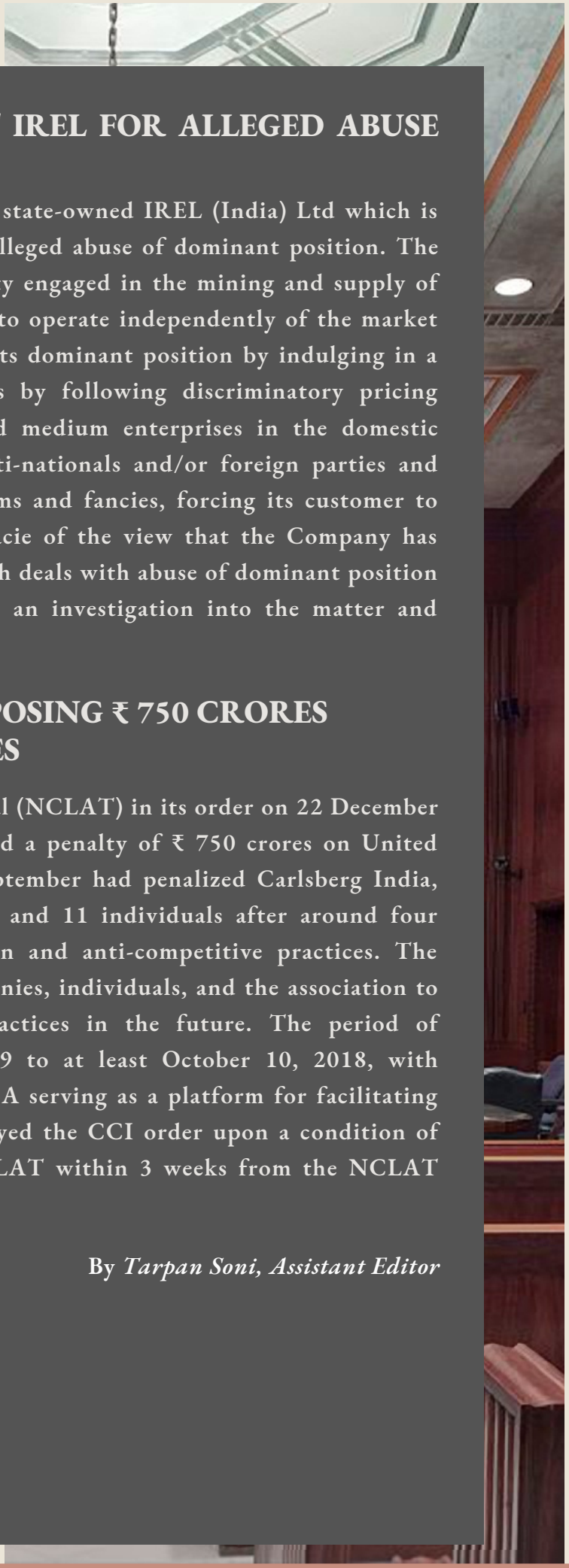


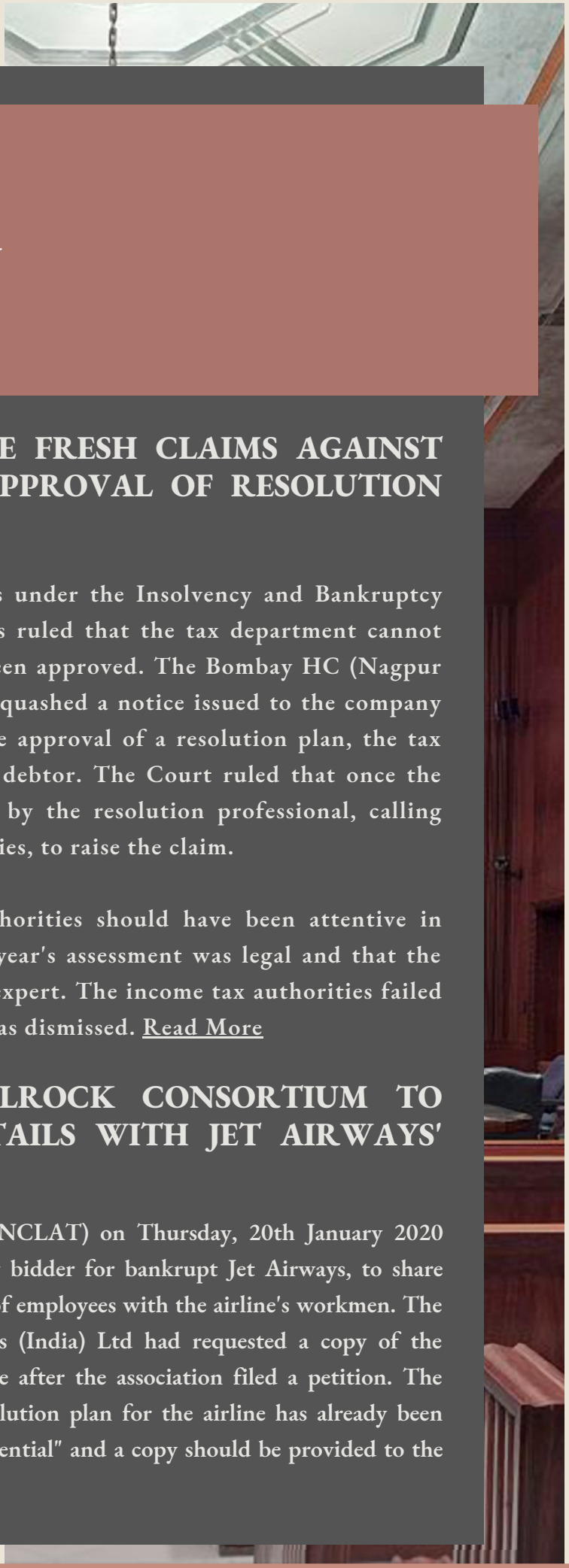
7. CCI ORDERS PROBE AGAINST IREL FOR ALLEGED ABUSE OF DOMINANT POSITION

The CCI has ordered a detailed probe against state-owned IREL (India) Ltd which is into mining and production of minerals, for alleged abuse of dominant position. The Commission noted that IREL is the only entity engaged in the mining and supply of beach sand minerals in India, which allows it to operate independently of the market forces. It was then alleged that IREL abused its dominant position by indulging in a prohibitive increase in the sillimanite prices by following discriminatory pricing against the interests of the micro, small and medium enterprises in the domestic market. Further, the Company favoured multi-nationals and/or foreign parties and fixed the supply of sillimanite as per its whims and fancies, forcing its customer to accept arbitrary quantities. CCI was prima facie of the view that the Company has violated section 4 of the Competition Act which deals with abuse of dominant position and ordered the Director-General to conduct an investigation into the matter and submit a report within sixty days. Read More

8. NCLAT STAYS CCI ORDER IMPOSING ₹ 750 CRORES PENALTY ON UNITED BREWERIES

The National Company Law Appellate Tribunal (NCLAT) in its order on 22 December 2021 stayed the CCI order which had imposed a penalty of ₹ 750 crores on United Breweries Limited (UBL). The CCI on 24 September had penalized Carlsberg India, UBL, All India Brewers' Association (AIBA), and 11 individuals after around four years of investigation for alleged cartelisation and anti-competitive practices. The antitrust regulator had also ordered the companies, individuals, and the association to "cease and desist" from anti-competitive practices in the future. The period of cartelisation was considered to be from 2009 to at least October 10, 2018, with Carlsberg India joining in from 2012 and AIBA serving as a platform for facilitating such cartelisation since 2013. NCLAT has stayed the CCI order upon a condition of pre-deposit of 10% of the penalty to the NCLAT within 3 weeks from the NCLAT order. Read More

By *Tarpan Soni, Assistant Editor*



NEWS UPDATES

INSOLVENCY LAW

1. INCOME TAX CANNOT RAISE FRESH CLAIMS AGAINST CORPORATE DEBTOR AFTER APPROVAL OF RESOLUTION PLAN: BOMBAY HIGH COURT

In what could give relief to several companies under the Insolvency and Bankruptcy Code (IBC) 2016, the Bombay High Court has ruled that the tax department cannot raise fresh claims after a resolution plan has been approved. The Bombay HC (Nagpur Bench), ruling in the case of Murli Industries, quashed a notice issued to the company for the reassessment of tax dues. Following the approval of a resolution plan, the tax department sent new notices to the corporate debtor. The Court ruled that once the public announcement is made under the IBC by the resolution professional, calling upon all concerned, including the statutory bodies, to raise the claim.

The Court affirmed that the income tax authorities should have been attentive in ensuring that the corporate debtor's previous year's assessment was legal and that the claim was filed correctly before the resolution expert. The income tax authorities failed to do so in this case, and as a result, the claim was dismissed. Read More

2. NCLAT DIRECTS JALAN-KALROCK CONSORTIUM TO SHARE RESOLUTION PLAN DETAILS WITH JET AIRWAYS' WORKMEN

The National Company Law Appellate Tribunal (NCLAT) on Thursday, 20th January 2020 ordered the Kalrock-Jalan consortium, the winning bidder for bankrupt Jet Airways, to share portions of the resolution plan pertaining to claims of employees with the airline's workmen. The Association of Aggrieved Workmen of Jet Airways (India) Ltd had requested a copy of the approved resolution plan, and the latest order came after the association filed a petition. The NCLAT bench affirmed that the consortium's resolution plan for the airline has already been approved by the NCLT, the plan "is no more confidential" and a copy should be provided to the aggrieved person.

faced exceptional circumstances such as pendency of judicial proceedings before courts, imposition of nationwide lockdown, change of RP, calling fresh Expression of Interest and the nature of business of the corporate debtor which admittedly is spread over many parts of the country. Read More

3. IBBI ISSUES CLARIFICATION ON REQUIREMENT OF SEEKING NO OBJECTION CERTIFICATE OR NO DUES CERTIFICATE FROM INCOME TAX DEPT. DURING VOLUNTARY LIQUIDATION PROCESS UNDER IBC

The National Company Law Appellate Tribunal (NCLAT) on Thursday, 20th January 2020 ordered the Kalrock-Jalan consortium, the winning bidder for bankrupt Jet Airways, to share portions of the resolution plan pertaining to claims of employees with the airline's workmen. The Association of Aggrieved Workmen of Jet Airways (India) Ltd had requested a copy of the approved resolution plan, and the latest order came after the association filed a petition. The NCLAT bench affirmed that the consortium's resolution plan for the airline has already been approved by the NCLT, the plan "is no more confidential" and a copy should be provided to the aggrieved person.

The NCLAT further affirmed that we are not inclined to issue a directive requiring the appellant to disclose the whole resolution plan for hearing. We are, however, convinced that the appellant is entitled to the relevant portion of the resolution plan relating to the workmen's and employees' claims. Read More

4. NCLAT SETS ASIDE NCLT ORDER APPROVING SREI'S RESOLUTION PLAN FOR DECCAN CHRONICLE HOLDINGS

The National Company Law Appellate Tribunal (NCLAT) has set aside the approval of Vision India Fund-SREI Multiple Asset Investment Trust's resolution plan for debt-ridden media company Deccan Chronicle Holdings percent Ltd, citing "discrimination" in the distribution of funds among creditors. The ruling of the National Company Law Tribunal (NCLT) Hyderabad bench on June 3, 2019, allowing the bid was "not sustainable in law," according to a two-member court, and the matter was remanded to the Committee of Creditors (CoC) of Deccan Chronicle Holdings Ltd (DCHL). The NCLAT affirmed that they are of the view that there is discrimination in the allocation of resolution fund. Thus, the approval of resolution plan by the CoC and subsequently approval of the resolution plan by the Adjudicating Authority (NCLT) vide order dated June 3, 2019, is not sustainable in law. The NCLAT direction came over the petitions filed by IDBI Bank. Read More

5. SC: NCLT HAS NO AUTHORITY TO ASK CREDITORS TO SETTLE WITH DEFAULTER

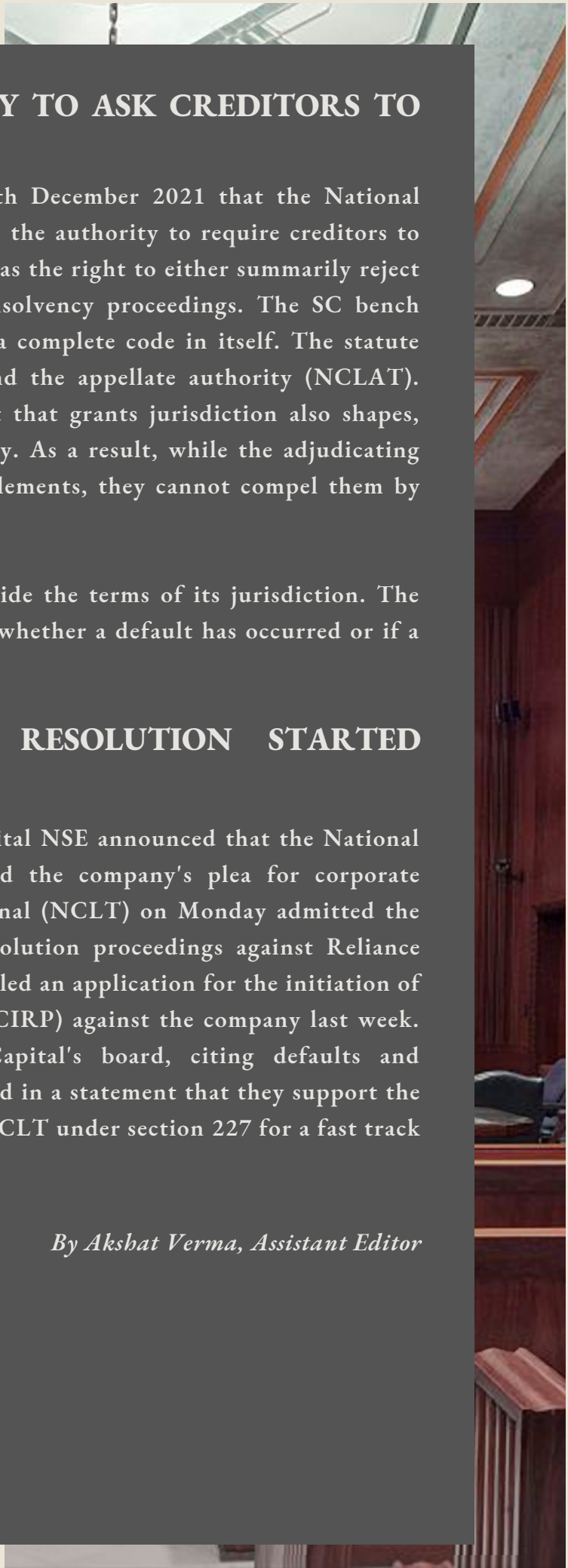
The Supreme Court declared on Tuesday, 14th December 2021 that the National Company Law Tribunal (NCLT) does not have the authority to require creditors to settle with a defaulter, despite the fact that it has the right to either summarily reject or accept applications for the initiation of insolvency proceedings. The SC bench hearing the petition affirmed that the IBC is a complete code in itself. The statute created the adjudicating authority (NCLT) and the appellate authority (NCLAT). Their authority is granted by statute. The act that grants jurisdiction also shapes, channels, and limits the scope of that authority. As a result, while the adjudicating and appellate authorities might encourage settlements, they cannot compel them by acting as equity courts.

The SC said that NCLT has clearly acted outside the terms of its jurisdiction. The bench said NCLT is empowered only to verify whether a default has occurred or if a default has not occurred. Read More

6. CORPORATE INSOLVENCY RESOLUTION STARTED AGAINST RELIANCE CAPITAL

On Tuesday 7th December 2021, Reliance Capital NSE announced that the National Company Law Tribunal (NCLT) has accepted the company's plea for corporate insolvency. The National Company Law Tribunal (NCLT) on Monday admitted the Reserve Bank's plea to initiate insolvency resolution proceedings against Reliance Capital. The Reserve Bank of India (RBI) had filed an application for the initiation of the Corporate Insolvency Resolution Process (CIRP) against the company last week. The apex bank had superseded Reliance Capital's board, citing defaults and governance issues. The company's promoters said in a statement that they support the RBI's application to refer the company to the NCLT under section 227 for a fast track resolution. Read More

By Akshat Verma, Assistant Editor



NEWS UPDATES

INTERNATIONAL TRADE LAW

1. GROUP OF 67 NATIONS IN WTO TO CUT RED TAPE SERVICES TRADE

Sixty-seven World Trade Organisation (WTO) members agreed to pare back regulations such as licensing requirements placed on service providers operating in foreign countries, a move that could save $150 Billion annual trade costs. The group of developed and some developing countries committed to transparency, legal certainty and an easier regulatory process with electronic applications and clear and reasonable fees.

The signatories, also including the United States, China and EU members, are a minority of the WTO's 164 members but represent 90% of all services trade. The organisation for Economic Cooperation and Development (OECD) has estimated that implementing looser regulations in the larger G20 countries could reduce trade costs by up to 6%. Banking, information technology, telecoms, architecture and engineering would be among the service sectors benefiting most. Read More

2. EU UNVEILS TRADE SANCTION PLAN TO COUNTER FOREIGN COERCION

The European Union (EU) set up a system of quick-fire trade sanctions that it could impose on any foreign power, like China, that it accuses of trying to coerce the 27-country bloc for economic or political gain. The EU's Executive branch manages trade with the outside world on behalf of member nations. It's seeking their permission to react without needing the endorsement of all 27 when any person, company or country tries to strong-arm the bloc.

The commission says it might be possible to use such a system in China's spat with Lithuania whose ties with Taiwan have prompted Beijing to downgrade diplomatic relations with the EU members. The EU spokesperson said "Unity and solidarity within the EU remain key to upholding our interests and our values" while also affirming,

it is ready to stand up against all types of political pressure and coercive measures applied against any member state. Read More

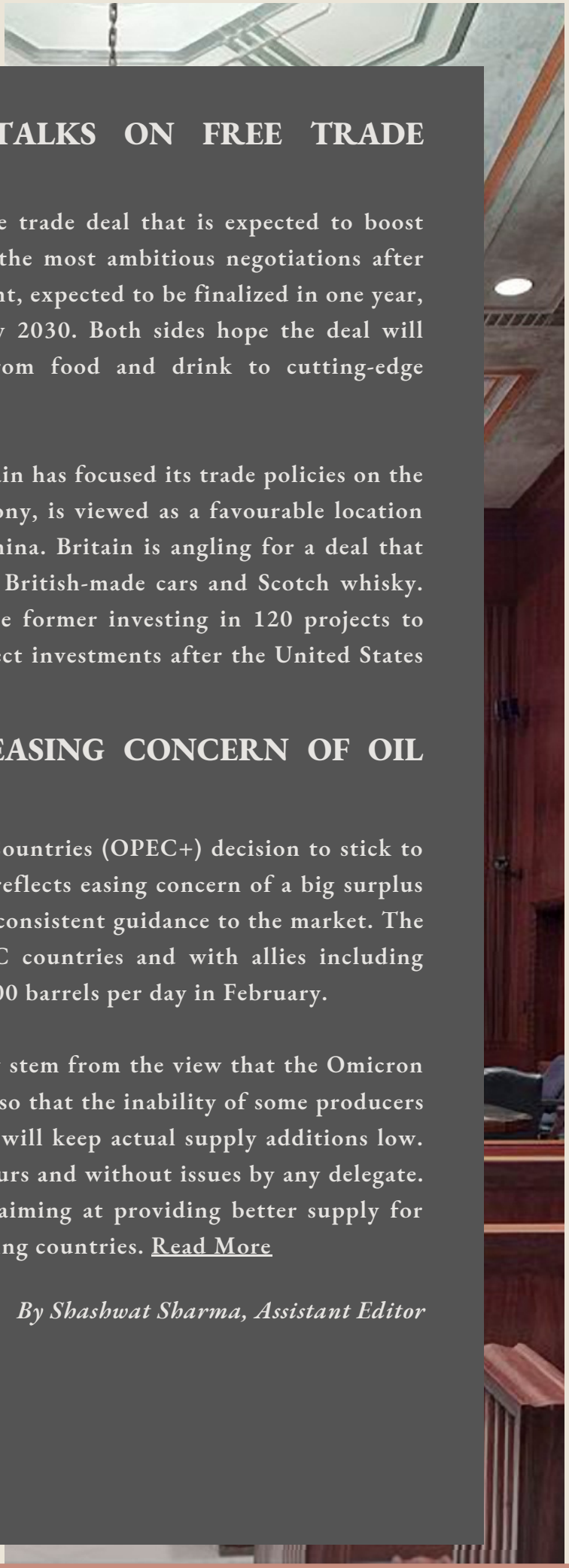
3. INDIA, RUSSIA SIGNS 28 INVESTMENT DEALS

India and Russia signed 28 investment pacts including deals on steel, shipbuilding, coal and energy. The two countries vowed to expand cooperation and coordination in dealing with major challenges like the threat of terrorism and the unfolding situation in Afghanistan. Indian Foreign Secretary Harsh Vardhan Shringla described the summit talks between PM Narendra Modi and Russian President Vladimir Putin as "highly productive". The agreements signed included government-to-government pacts on a number of key areas.

Putin held India to be a time-tested friend and that he looks forward to cooperating on the issue of Afghanistan and preventing the use of its land for sheltering, training or planning of any acts of terrorism. Currently, mutual investments stand at about $38 billion and more investments come from the Russian side, these deals hold value for a growing Indian Economy. With the world witnessing fundamental changes and different geopolitical equations and variables, this kind of cooperation strengthens the relationship between the two countries. Read More

4. INDIA APPEALS AGAINST WTO VERDICT OVER SUGAR EXPORT SUBSIDIES

India has appealed against a ruling of the World Trade Organisation's (WTO) trade dispute settlement panel which ruled that the country's domestic support measures for sugar and sugarcane are inconsistent with global trade norms. Indian officials stated that the ruling had been based on certain erroneous findings of the domestic schemes to support sugarcane producers and exports. The panel, in its ruling on 14 December 2021, recommended India to withdraw its alleged prohibited subsidies within 120 days from the adoption of this report, ruling in favour of Brazil, Australia and Guatemala in their trade dispute against India over its sugar subsidies. The panel stated that the subsidies are inconsistent with WTO trade rules. In 2019, these three countries dragged India into the WTO's dispute settlement mechanism, alleging that India's support measure for sugarcane producers exceeds the de Minimis level of 10 percent of the total value of sugarcane production, which according to them was inconsistent with the agreement on Agriculture. Read More



5. INDIA, BRITAIN LAUNCH TALKS ON FREE TRADE AGREEMENT

India and Britain have launched talks on a free trade deal that is expected to boost bilateral trade by billions of dollars in one of the most ambitious negotiations after Brexit. Piyush Goyal said the free trade agreement, expected to be finalized in one year, will double the current trade of $50 billion by 2030. Both sides hope the deal will bring huge benefits for several industries, from food and drink to cutting-edge renewable technology.

After leaving the European Union in 2016, Britain has focused its trade policies on the Indo-Pacific region. India, a former British colony, is viewed as a favourable location given uncertainties over the U.K.'s ties with China. Britain is angling for a deal that slashes barriers, including tariffs on exports of British-made cars and Scotch whisky. India and Britain have extensive links, with the former investing in 120 projects to become the second-largest source of foreign direct investments after the United States in 2019. Read More

6. OPEC+ DECISION REFLECTS EASING CONCERN OF OIL SURPLUS AMID OMICRON RISK

The Organisation of the Petroleum Exporting Countries (OPEC+) decision to stick to its planned increase in oil output for February reflects easing concern of a big surplus in the first quarter, as well as a wish to provide consistent guidance to the market. The producer group, which comprises of the OPEC countries and with allies including Russia agreed to raise its output target by 400,000 barrels per day in February.

Other OPEC+ delegates said the revisions partly stem from the view that the Omicron variant will have a low impact on demand and also that the inability of some producers to boost output due to the capacity constraints will keep actual supply additions low. Formal talks were concluded in less than two hours and without issues by any delegate. OPEC+ spokesperson said “We need stability” aiming at providing better supply for consumer countries and fair price for the exporting countries. Read More

By Shashwat Sharma, Assistant Editor

NEWS UPDATES

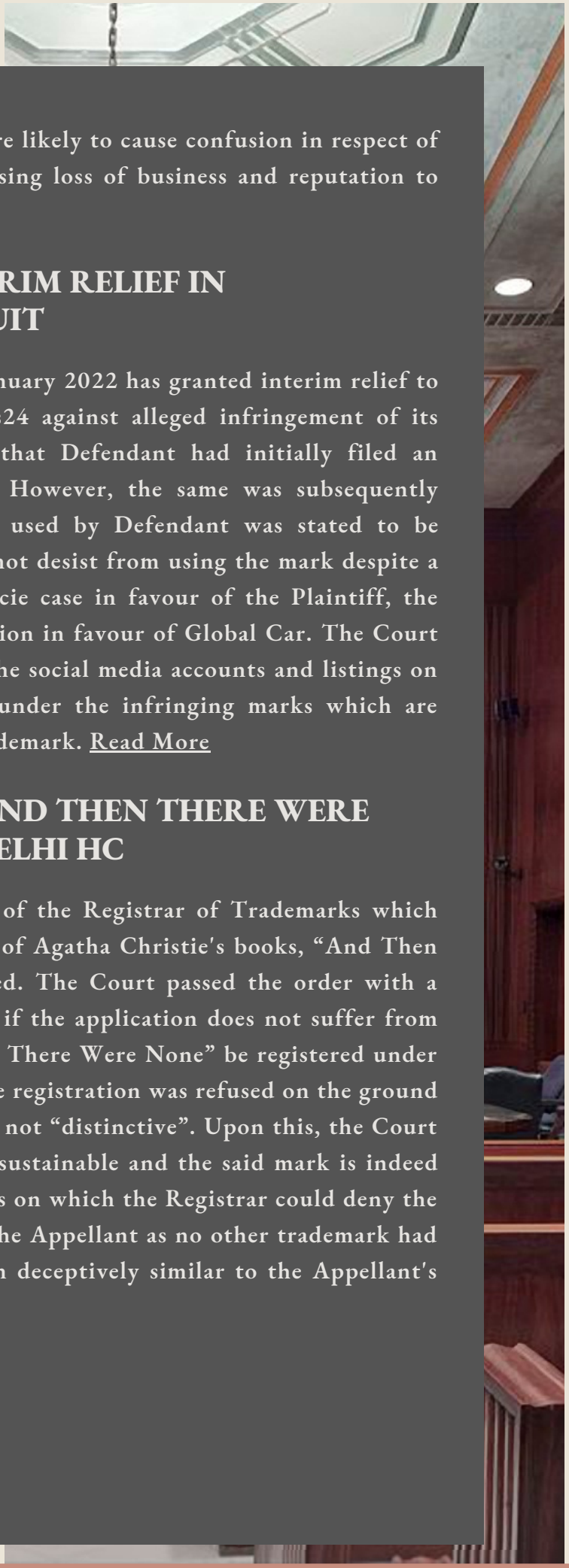
INTELLECTUAL PROPERTY RIGHTS (IPR)

1. US TRADE AGENCY RULES AGAINST GOOGLE ON SONOS PATENT FIGHT

The US International Trade Commission (USITC) on January 6 held that Google infringed on patents held by Sonos, a home audio device maker. This final ruling by the USITC closes a two-year investigation into the intellectual-property dispute between the two companies. Sonos had asked the trade commission to block imports of Google products that the company says infringe on its patents. They include Google Home smart speakers, Pixel phones and computers, and the Chromecast streaming video device. Those items are made in China and shipped to the United States. The commission determined that Google had violated the Tariff Act of 1930, which aims to prevent unfair competition through actions such as the import of products that infringe on U.S. patents, trademarks or copyrights. This decision is a big win for Sonos which has fought for years to grow its business amid competition in the Smart Speakers arena from the world's most powerful tech giants such as Google and Amazon.
Read More

2. STRIKING SIMILARITIES IN PACKAGING COLOUR, FONTS AND STYLE IS A VIOLATION OF TRADEMARK: DELHI HC

The Delhi High Court while dealing with a Trademark dispute between cigarette brands 'Total' and 'Topaz' has observed that striking similarities in packaging color, font, and style amount to a violation of Trademark. The Court was hearing an appeal to vacate the Interim Injunction granted in favour of the plaintiff, 'Total'. The plaintiff had accused the defendant, 'Topaz' of using their Trademark 'TOTAL' in their mark, 'TOPAZ'. The plaintiff alleged that the mark is deceptively similar to their mark and is created using permutations and combinations from their mark only. It further objected to the use of the essential features of their product's packaging/ trade dress again amounting to infringement of their copyrights subsisting in the packaging/ trade dress of the Trademark 'TOTAL'. The High Court, while upholding the



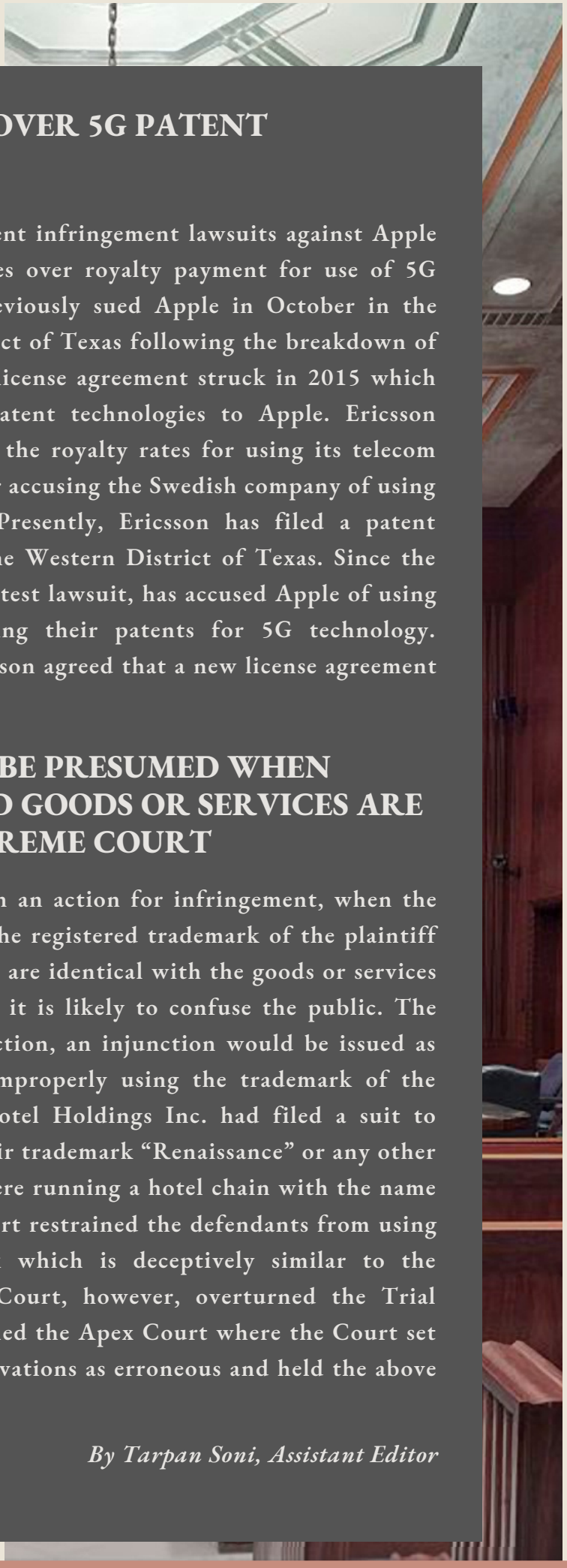
injunction said that the similar trademarks were likely to cause confusion in respect of two products of the minds of the public, causing loss of business and reputation to either side. Read More

3. OWNER OF CARS24 GETS INTERIM RELIEF IN TRADEMARK INFRINGEMENT SUIT

The Delhi High Court in its order dated 19 January 2022 has granted interim relief to Global Car Group Ltd, owner of brand Cars24 against alleged infringement of its Trademark by 'Drivers24'. Plaintiff alleged that Defendant had initially filed an application seeking registration of its mark. However, the same was subsequently abandoned. Further, the colour combination used by Defendant was stated to be identical to Plaintiff's and the Defendant did not desist from using the mark despite a 'Cease and Desist' notice. Finding a prima facie case in favour of the Plaintiff, the Court granted an Ex-Parte Ad-Interim Injunction in favour of Global Car. The Court further directed Drivers24 to remove/ delete the social media accounts and listings on third-party e-commerce websites maintained under the infringing marks which are identical or deceptively similar to Cars24's Trademark. Read More

4. AGATHA CHRISTIE'S BOOK, "AND THEN THERE WERE NONE" A DISTINCTIVE MARK: DELHI HC

The Delhi High Court has quashed an order of the Registrar of Trademarks which refused the registration of a trademark of one of Agatha Christie's books, "And Then There Were None" to Agatha Christie Limited. The Court passed the order with a direction to the Registrar of Trademarks that if the application does not suffer from any other fatal infirmity, the mark "And Then There Were None" be registered under the Schedule to the Trademark Rules 2017. The registration was refused on the ground that the trademark sought to be registered was not "distinctive". Upon this, the Court observed that this proposition was ex-facie unsustainable and the said mark is indeed distinctive. The Court stated there was no basis on which the Registrar could deny the registration of the said trademark in favor of the Appellant as no other trademark had ever been registered that was the same or even deceptively similar to the Appellant's mark. Read More



5. ERICSSON SUES APPLE AGAIN OVER 5G PATENT LICENSING

Sweden's Ericsson has filed another set of patent infringement lawsuits against Apple in the latest salvo between the two companies over royalty payment for use of 5G wireless patents in iPhones. Ericsson had previously sued Apple in October in the United States District Court for Eastern District of Texas following the breakdown of negotiations over the renewal of a seven-year license agreement struck in 2015 which dealt with licensing of Ericsson's telecom patent technologies to Apple. Ericsson alleged that Apple was unfairly trying to cut the royalty rates for using its telecom patents. Apple then filed a lawsuit in December accusing the Swedish company of using "strong-arm tactics" to renew the patents. Presently, Ericsson has filed a patent infringement suit in the District Court for the Western District of Texas. Since the 2015 agreement has expired, Ericsson, in the latest lawsuit, has accused Apple of using their technology without a license, infringing their patents for 5G technology. Demanding collection of the royalty rate, Ericsson agreed that a new license agreement should be drawn up promptly. Read More

6. CONFUSION IN PUBLIC SHALL BE PRESUMED WHEN DEFENDANT'S TRADEMARK AND GOODS OR SERVICES ARE IDENTICAL TO PLAINTIFF'S: SUPREME COURT

The Apex Court has recently observed that, in an action for infringement, when the trademark of the defendant is identical with the registered trademark of the plaintiff and that the goods or services of the defendant are identical with the goods or services of the plaintiff, the Court shall presume that it is likely to confuse the public. The Court further held that in an infringement action, an injunction would be issued as soon as it is proved that the defendant is improperly using the trademark of the plaintiff. In the present case, Renaissance Hotel Holdings Inc. had filed a suit to restrain B. Vijay Sai and Others from using their trademark "Renaissance" or any other trademark identical to that. The defendants were running a hotel chain with the name "Sai Renaissance" in Bengaluru. The Trial Court restrained the defendants from using the said trademark or any other trademark which is deceptively similar to the plaintiff's trademark. The Karnataka High Court, however, overturned the Trial Court's Judgment. The plaintiff then approached the Apex Court where the Court set aside the High Court's ruling, stating its observations as erroneous and held the above finding.

By Tarpan Soni, Assistant Editor

NEWS UPDATES

MERGERS AND ACQUISITIONS

1. SONY PICTURES NETWORKS INDIA AND ZEE LIMITED SIGN MERGER DEAL

Sony Pictures Networks India Private Limited ('SPNI') and Zee Entertainment Enterprises Ltd ('ZEEL') have announced that they have inked formal agreements to merge ZEEL with and into SPNI, combining their linear networks, digital assets, production operations, and programme libraries. The agreements come after a period of exclusive negotiations in which ZEEL and SPNI completed reciprocal due diligence. The newly merged business will be listed on the Indian stock exchange when it closes. The deal is subject to regulatory, shareholder, and third-party approvals, as well as other normal closing conditions. SPNI will control 50.86 percent of the combined company, while Zee's founders would own 3.99 percent. As part of the formal deal, the remaining 45.15 percent will go to public shareholders. Read More

2. CCI APPROVES ACQUISITION OF SHARES IN AIR INDIA BY TATA SONS

The Competition Commission of India ('CCI') authorized Talace Private Limited, a wholly-owned subsidiary of Tata Sons, to buy a stake in Air India on Monday. Talace Private Limited would acquire 100% of the equity share capital of Air India Limited ('Air India') and Air India Express Limited ('AIXL'), as well as 50% of the equity share capital of Air India SATS Airport Services Private Limited ('AISATS'). Along with the acquisition of shares in Air India, the regulator authorized Talace's acquisition of stakes in Air India Express and Air India SATS Airport Services. The government inked a share purchase deal with Tata Sons for the divestiture of Air India, which it owns completely. Read More

3. TECH MAHINDRA ACQUIRES CTC FOR 310 MILLION EUROS

Tech Mahindra, an Indian IT services business, said on Monday that it will pay €310 million (approx. Rs. 2620 crore) for a 100 percent investment in Com Tec Co IT Ltd ('CTC'), an IT solutions and service provider with development facilities in Latvia and Belarus. The CTC purchase is part of Tech Mahindra's ongoing attempts to grow and strengthen its offshore operations. In less than a year, the business has acquired around ten capability-driven acquisitions. The deal, which includes earnouts and synergy-linked payouts, will allow it to broaden its offerings to include high-end digital engineering services for some of the world's largest insurance, reinsurance, and financial services companies, while also scaling some of its offshoring efforts near India. Read More

4. GOOGLE ACQUIRES SIEMPLIFY FOR $500 MILLION

Google's cloud division announced the acquisition of Israeli cybersecurity firm Siemplify on Tuesday, as the tech giant increases its security solutions in the face of escalating cyber threats. The agreement was reached after Google pledged to US President Joe Biden in August to invest $10 billion on cybersecurity over the next five years, citing an increase in cyber assaults and data breaches. As it was in the midst of obtaining a fresh round of private money, Siemplify piqued the buyer's attention with a relationship with Google Cloud. Google stated that Siemplify's platform will be incorporated into its cloud and would serve as the foundation for future possibilities.
Read More

5. ZOOM ACQUIRES LIMINAL'S SOFTWARE ASSETS TO ENHANCE VIRTUAL EVENTS OFFERINGS

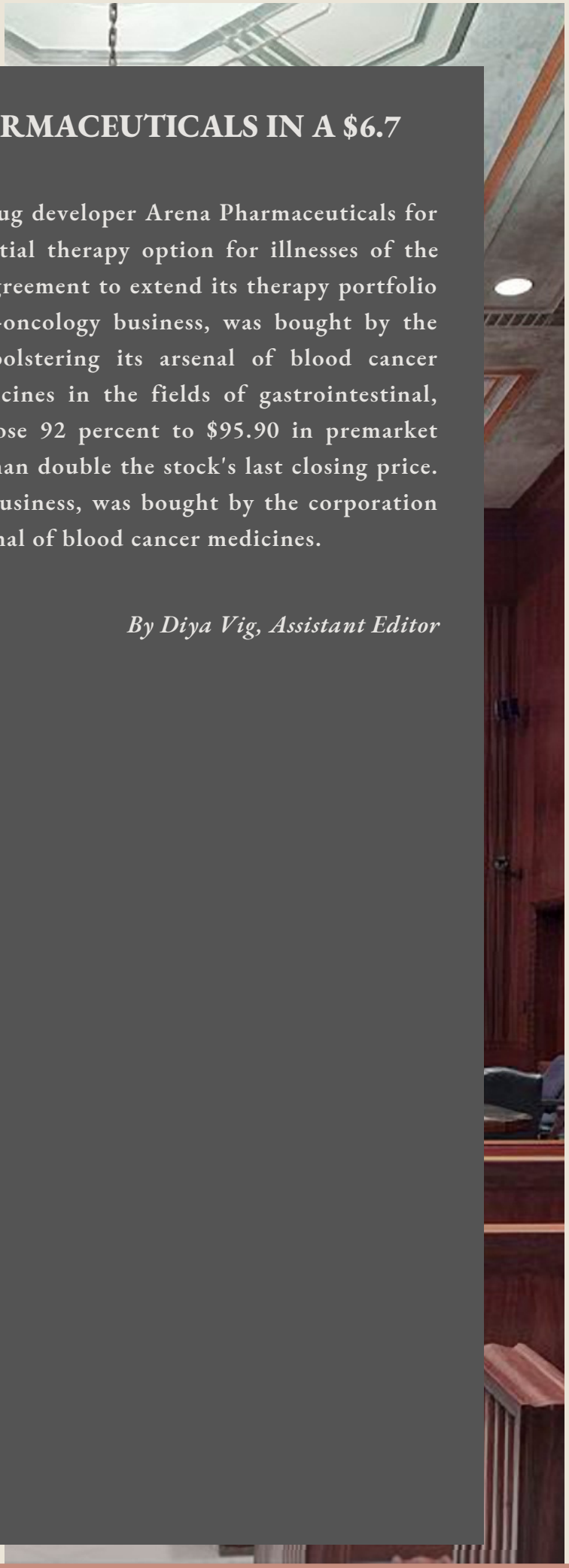
IZoom acquired "certain assets" from 'Liminal', a startup offering event production solutions, to enhance its virtual events offerings. Andy Carluccio and Jonathan Kokotajlo, two of the company's co-founders, will also join Zoom, according to the company. ZoomOSC and ZoomISO, two software solutions based on Zoom's software development kit, will help the platform bridge the gap between traditional and new event control applications and hardware, assisting theatres, broadcast studios, and other creative organizations. Using the Open Sound Control standard, the ZoomOSC attachment allows users to enhance professional meetings and events by combining Zoom with third-party applications, media servers, and hardware controllers.
Read More

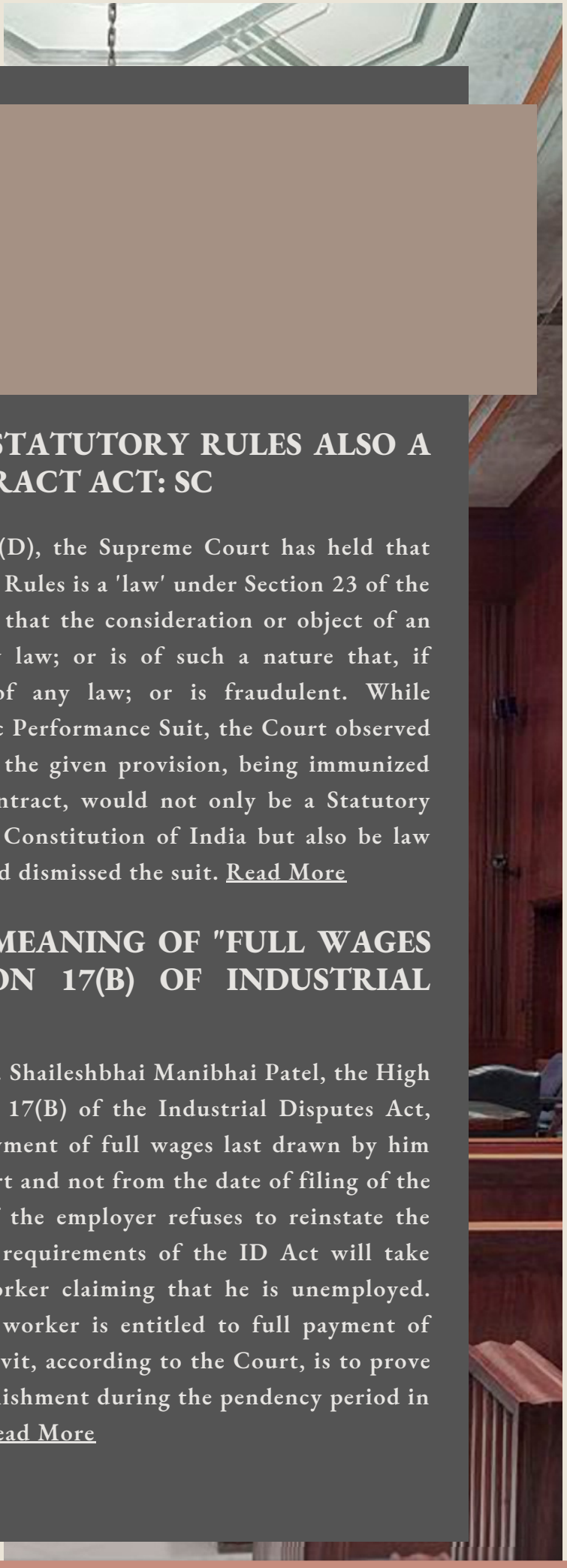
6. PFIZER ACQUIRES ARENA PHARMACEUTICALS IN A $6.7 BILLION DEAL

Pfizer said on Monday that it will purchase drug developer Arena Pharmaceuticals for $6.7 billion in cash to gain access to a potential therapy option for illnesses of the stomach and intestine. This is Pfizer's latest agreement to extend its therapy portfolio this year. Trillium Therapeutics, an immuno-oncology business, was bought by the corporation last month for $2.22 billion, bolstering its arsenal of blood cancer medicines. Arena is working on several medicines in the fields of gastrointestinal, dermatology, and cardiology. Arena's stock rose 92 percent to $95.90 in premarket trade, making the $100 per share offer more than double the stock's last closing price. Trillium Therapeutics, an immuno-oncology business, was bought by the corporation last month for $2.22 billion, bolstering its arsenal of blood cancer medicines.

Read More

By Diya Vig, Assistant Editor





NEWS UPDATES

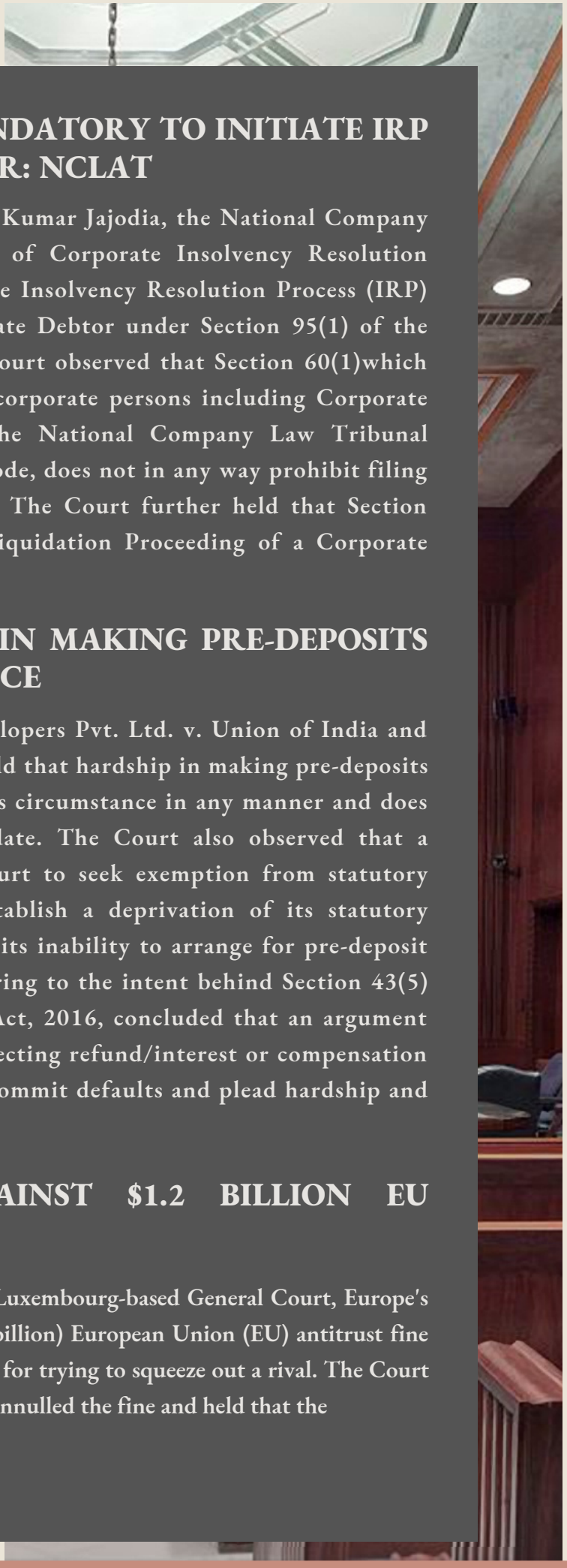
MISCELLANEOUS

1. SUBORDINATE LEGISLATION/STATUTORY RULES ALSO A 'LAW' UNDER SECTION 23 CONTRACT ACT: SC

In the case of G.T. Girish Vs Y. Subba Raju (D), the Supreme Court has held that subordinate legislation in the form of Statutory Rules is a 'law' under Section 23 of the Indian Contract Act, 1872 (ICA) which states that the consideration or object of an agreement is lawful unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent. While considering an appeal that arose from a Specific Performance Suit, the Court observed that law, in all its forms, contemplated under the given provision, being immunized from encroachment and infringement by a contract, would not only be a Statutory Rule within the meaning of Article 13 of the Constitution of India but also be law under the ICA and hence, allowed the appeal and dismissed the suit. Read More

2. GUJARAT HC EXPLAINS THE MEANING OF "FULL WAGES LAST DRAWN" UNDER SECTION 17(B) OF INDUSTRIAL DISPUTES ACT

In the case of Ineos Stryolution India Limited v. Shaileshbhai Manibhai Patel, the High Court of Gujarat affirmed that under Section 17(B) of the Industrial Disputes Act, 1947 (ID Act), the workman is entitled to payment of full wages last drawn by him during the pendency of proceedings in the Court and not from the date of filing of the affidavit. The Court further explained that if the employer refuses to reinstate the worker after the award of reinstatement, the requirements of the ID Act will take effect on the filing of an affidavit by the worker claiming that he is unemployed. Unless the employer can show otherwise, the worker is entitled to full payment of wages. The aim of the workman filing an affidavit, according to the Court, is to prove that the workman was not engaged in any establishment during the pendency period in either the High Court or the Supreme Court. Read More



3. INITIATION OF CIRP NOT MANDATORY TO INITIATE IRP AGAINST PERSONAL GUARANTOR: NCLAT

In the case of State Bank of India v. Mahendra Kumar Jajodia, the National Company Law Tribunal (NCLAT) held that initiation of Corporate Insolvency Resolution Process (CIRP) is not a pre-requisite to initiate Insolvency Resolution Process (IRP) against the Personal Guarantor of the Corporate Debtor under Section 95(1) of the Insolvency and Bankruptcy Code, 2016. The Court observed that Section 60(1)which provides that Adjudicating Authority for the corporate persons including Corporate Debtors and Personal Guarantors shall be the National Company Law Tribunal (NCLT) when read with Section 60(2) of the Code, does not in any way prohibit filing of proceedings under Section 95 of the Code. The Court further held that Section 60(2) was applicable only when a CIRP or Liquidation Proceeding of a Corporate Debtor is pending before NCLT. Read More

4. RERA ACT- INCONVENIENCE IN MAKING PRE-DEPOSITS NOT AN ONEROUS CIRCUMSTANCE

In the case of Ramprastha Promoters and Developers Pvt. Ltd. v. Union of India and Ors., the High Court of Punjab and Haryana held that hardship in making pre-deposits which include diverting funds is not an arduous circumstance in any manner and does not necessitate waiver of any statutory mandate. The Court also observed that a petitioner seeking the indulgence of Writ Court to seek exemption from statutory mandate must establish strong reasons to establish a deprivation of its statutory remedy of appeal by demonstrating the Court, its inability to arrange for pre-deposit despite all reasonable efforts. The Court, referring to the intent behind Section 43(5) of Real Estate Regulatory Authority (RERA) Act, 2016, concluded that an argument stating that cumulative impact of all orders directing refund/interest or compensation shall be onerous may prompt the developer to commit defaults and plead hardship and hence, cannot be accepted. Read more

5. INTEL WINS APPEAL AGAINST $1.2 BILLION EU ANTITRUST FINE

In the case of Intel Corporation v Commission, the Luxembourg-based General Court, Europe's second-top court rejected a 1.06 billion Euros ($1.2 billion) European Union (EU) antitrust fine handed down to US chipmaker Intel twelve years ago for trying to squeeze out a rival. The Court criticised the EU competition enforcer's analysis and annulled the fine and held that the

European Commission's analysis was incomplete and did not make it possible to establish to the requisite legal standard that the rebates at issue were capable of having, or likely to have anticompetitive effects. However, the ruling, which is likely to provide cheer to Alphabet unit Google fighting against a trio of hefty EU antitrust fines, can be appealed to the Court of Justice of the European Union (CJEU). Read More

By Ananya Banerjee, Assistant Editor

NEWS UPDATES

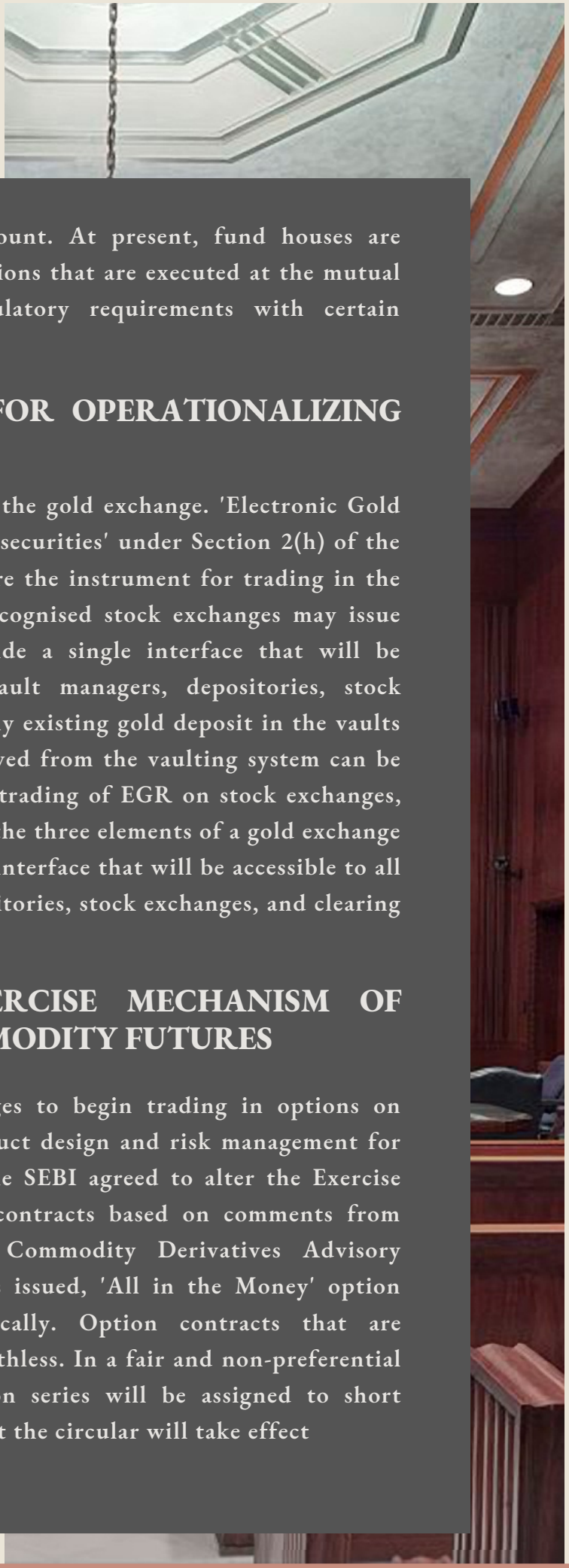
SECURITIES RIGHTS

1. SEBI DIRECTS PORTFOLIO MANAGEMENT SERVICES TO UNDERTAKE 10% OF TOTAL TRANSACTIONS IN CORPORATE BONDS

Securities and Exchange Board of India (SEBI) has decided that Portfolio Management Services (PMS) shall undertake at least 10% of their total secondary market trades by value in Corporate Bonds (CBs) in that month by placing quotes through one-to-one (OTO) or one-to-many (OTM) mode on Request for Quote platform of stock exchanges (RFQ), on a monthly basis, in order to enhance transparency about debt investments by PMS in Corporate Bonds (CBs) and to increase liquidity on the exchange platform. To ensure compliance with the requirement, PMS will have to consider the trades executed by value through OTO or OTM mode of RFQ for the total secondary market trades in corporate bonds, during the current month and immediately preceding two months on a rolling basis. SEBI further stated that all corporate bond transactions including PMS on both sides of the deal must be completed via RFQ in OTO mode. However, any corporate bond transaction entered by a PMS in OTM mode and executed by another PMS would be counted in OTM mode. The new framework will take effect on April 1, 2022. Read More

2. SEBI ISSUES GUIDELINES ON USAGE OF POOL FUNDS BY MUTUAL FUNDS

The Securities and Exchange Board of India (SEBI) on Friday clarified on usage of pool funds by mutual funds. The regulator said these asset managers should have internal policies approved by its board and trustees to ensure that adequate operational processes and internal controls are in place to segregate and ring-fence the assets and liabilities of each scheme along with segregation and ring-fencing of securities and bank accounts. The pool accounts for both securities and funds should have nil balance at end of the day. Also, if the funds lying in the pool bank account of the mutual fund are not identified, due to the reasons beyond the control of the AMC, the same should



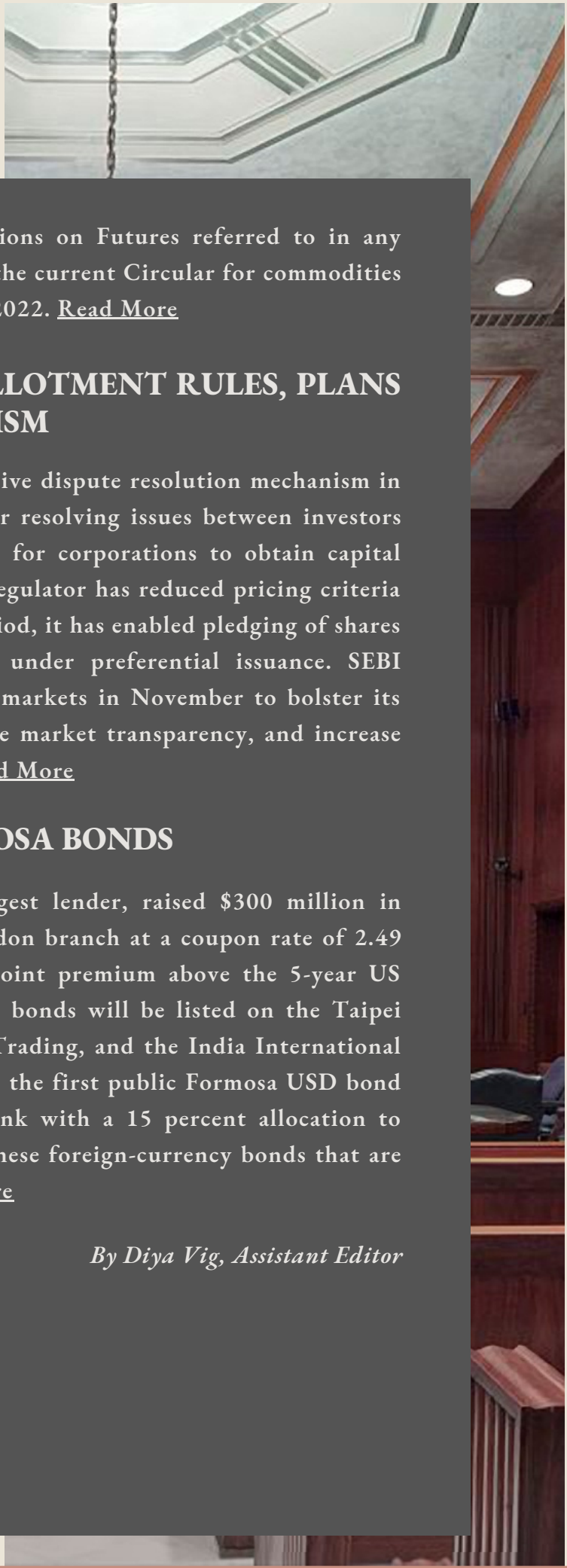
be transferred to the respective scheme account. At present, fund houses are allowed to use pool accounts only for transactions that are executed at the mutual fund level owing to operational and regulatory requirements with certain conditions. Read More

3. SEBI ISSUES FRAMEWORK FOR OPERATIONALIZING GOLD EXCHANGES IN INDIA

SEBI issued a framework for operationalizing the gold exchange. 'Electronic Gold Receipts' (EGR), which have been notified as 'securities' under Section 2(h) of the Securities Contracts (Regulation) Act 1956, are the instrument for trading in the Gold Exchange/Segment. New and current recognised stock exchanges may issue and exchange EGRs. Depositories will provide a single interface that will be accessible to all organisations, including vault managers, depositories, stock exchanges, and clearing firms. Furthermore, any existing gold deposit in the vaults that fits the criteria and has never been removed from the vaulting system can be converted into EGR.The production of EGR, trading of EGR on stock exchanges, and conversion of EGR into Physical Gold are the three elements of a gold exchange transaction. Depositories will provide a single interface that will be accessible to all organisations, including vault managers, depositories, stock exchanges, and clearing firms. Read More

4. SEBI MODIFIES THE EXERCISE MECHANISM OF OPTIONS CONTRACTS ON COMMODITY FUTURES

SEBI allowed commodity derivatives exchanges to begin trading in options on commodity futures and set out rules for product design and risk management for trading in options on commodity futures. The SEBI agreed to alter the Exercise Mechanism of commodities futures options contracts based on comments from stock exchanges and proposals from the Commodity Derivatives Advisory Committee. Unless a 'contrary instruction' is issued, 'All in the Money' option contracts will now be exercised automatically. Option contracts that are "completely out of the money" will expire worthless. In a fair and non-preferential way, all exercised contracts within an option series will be assigned to short positions in that series. SEBI further stated that the circular will take effect



immediately. The exercise procedure for Options on Futures referred to in any other SEBI recommendations should be as per the current Circular for commodities derivatives introduced on or after February 1, 2022. Read More

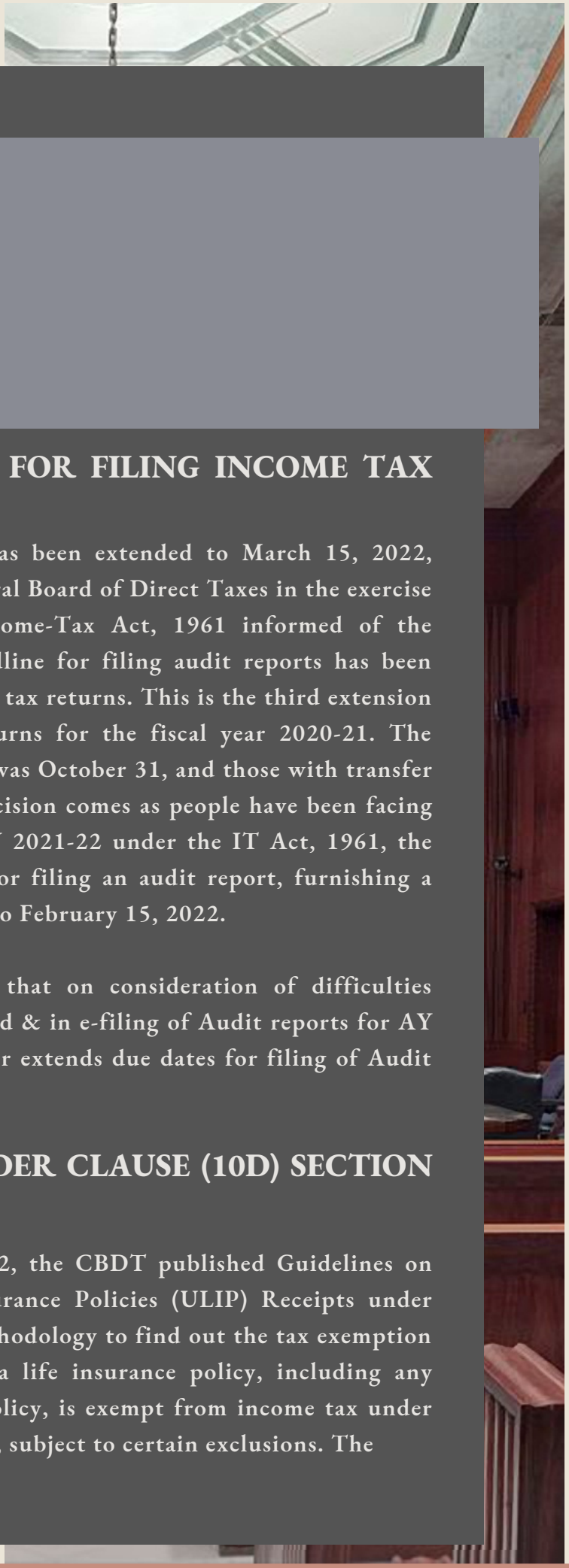
5. SEBI EASES PREFERENTIAL ALLOTMENT RULES, PLANS DISPUTE RESOLUTION MECHANISM

SEBI, is looking into implementing an alternative dispute resolution mechanism in order to provide a more efficient approach for resolving issues between investors and regulated businesses. To make it simpler for corporations to obtain capital through preferential allotment of shares, the regulator has reduced pricing criteria and lock-in obligations. During the lock-in period, it has enabled pledging of shares issued to the promoter or promoter group under preferential issuance. SEBI launched the 'Investor Charter' for securities markets in November to bolster its efforts to safeguard investor interests, improve market transparency, and increase investor knowledge, trust, and confidence. Read More

6. SBI RAISES $300 MN VIA FORMOSA BONDS

State Bank of India (SBI), the country's largest lender, raised $300 million in 'Regulation S' Formosa notes through its London branch at a coupon rate of 2.49 percent. The bond is valued at a 100-basis point premium above the 5-year US Treasury note it is benchmarked against. The bonds will be listed on the Taipei Exchange, the Singapore Exchange Securities Trading, and the India International Exchange IFSC, among other exchanges. this is the first public Formosa USD bond issued by an Indian scheduled commercial bank with a 15 percent allocation to Taiwanese investors. Formosa notes are Taiwanese foreign-currency bonds that are typically listed on the Taipei market. Read More

By Diya Vig, Assistant Editor



NEWS UPDATES

TAXATION LAW

1. CENTRE EXTENDS DEADLINE FOR FILING INCOME TAX RETURNS TO MARCH 15

The deadline for filing income tax returns has been extended to March 15, 2022, according to the central government. The Central Board of Direct Taxes in the exercise of its powers under section 119 of the Income-Tax Act, 1961 informed of the development on 11th January 2022. The deadline for filing audit reports has been extended in tandem with the deadline for filing tax returns. This is the third extension for corporations to file their income tax returns for the fiscal year 2020-21. The original deadline for filing ITR for corporates was October 31, and those with transfer pricing transactions was November 30. The decision comes as people have been facing difficulties in e-filing of Audit reports for AY 2021-22 under the IT Act, 1961, the Income Tax department said. The due dates for filing an audit report, furnishing a report from an accountant have been extended to February 15, 2022.

In this regard, the I-T department tweeted that on consideration of difficulties reported by taxpayers/stakeholders due to Covid & in e-filing of Audit reports for AY 2021-22 under the IT Act, 1961, CBDT further extends due dates for filing of Audit reports & ITRs for AY 21-22. Read More

2. CBDT ISSUED GUIDELINES UNDER CLAUSE (10D) SECTION 10 OF IT ACT, 1961

In a Circular 2/2022 dated 19th January 2022, the CBDT published Guidelines on Income Tax Exemption for Unit Linked Insurance Policies (ULIP) Receipts under Section 10(10D). This circular explains the methodology to find out the tax exemption status of ULIPs. The money received under a life insurance policy, including any payment allocated by way of bonus on such policy, is exempt from income tax under Section 10(10D) of the Income Tax Act of 1961, subject to certain exclusions. The

current article summarises the Income Tax Act's Section 10(10D) Guidelines. CBDT clarified that receipts from ULIPs, on maturity/ withdrawal including towards bonus, shall be subject to capital gains tax in the case of policies with an annual premium above Rs. 250,000. Read More

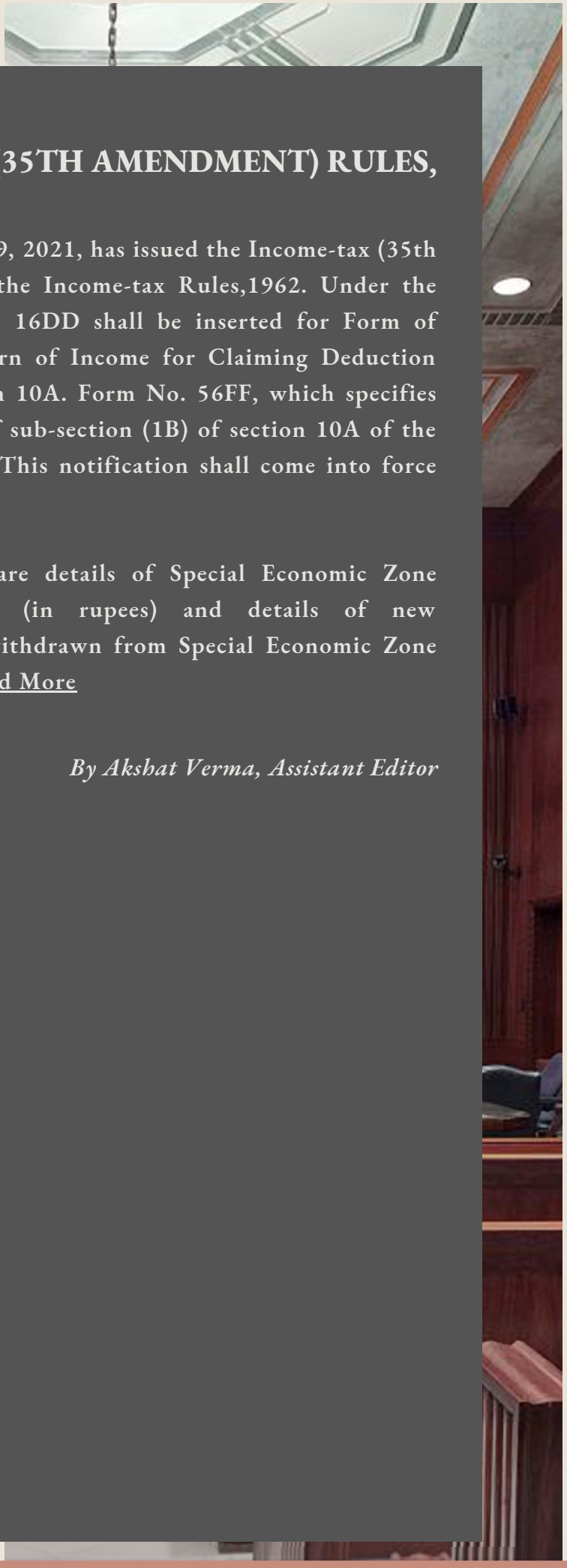
3. CBDT AMENDS SECURITIES TRANSACTION TAX RULES TO INCLUDE INSURANCE COMPANIES

The Finance Act, 2021 has amended the Finance (No 2) Act, 2004 to make security transaction tax (STT) applicable on maturity or partial withdrawal of a unit-linked insurance policy issued by an insurance company on or after February 1, 2021, to which the exemption under section 10(10D) does not apply due to the applicability of the fourth and fifth proviso. Consequent to amendment, the Central Government has notified the Securities Transaction Tax (1st Amendment), Rules, 2022 to amend the Securities Transaction Tax (STT) Rules, 2004. In the case of the Insurance Company, a new Rule 5A has been added to specify that the managing director or a whole-time director is responsible for collecting and paying STT. In addition, the government has made Form 2A available for filing returns of taxable securities transactions by insurance companies. Further, the return in Form No. 2A shall be furnished by the managing director or a whole-time director, duly authorised by the Board of Directors of such company on this behalf. Read More

4. CBDT NOTIFIES E-ADVANCE RULINGS SCHEME

The Central Board of Direct Taxes (CBDT) in the exercise of the powers conferred by sub-sections (9) and (10) of section 245R and sub-sections (2) and (3) of section 245W of the Income-tax Act, 1961 (43 of 1961) has notified e-advance rulings Scheme, 2022 applicable with effect from 18-01-2022. The Scheme shall apply to the applications of advance rulings made to the Board for Advance Ruling or applications of advance rulings transferred to such Board. Through an automated allocation mechanism, the CBDT shall devise a process for randomly allocating or transferring advance ruling applications to the Board for Advance Rulings. The Scheme establishes the method for filing and processing the application.

The applicant shall not be required to appear either personally or through an authorised representative before the Board for Advance Rulings or before the Secretary, ministerial staff, executive or consultant posted with the Board for Advance Rulings. Read More

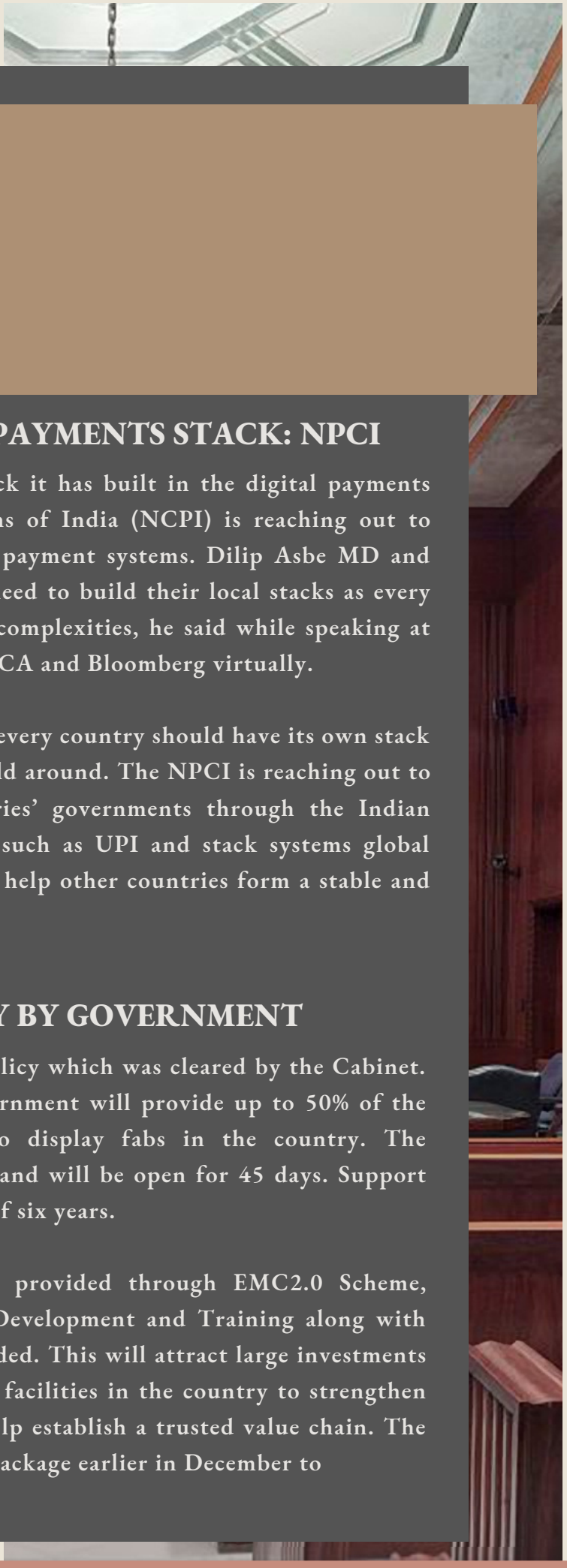


5. CBDT NOTIFIES INCOME-TAX (35TH AMENDMENT) RULES, 2021

The Ministry of Finance (MoF) on December 29, 2021, has issued the Income-tax (35th Amendment) Rules, 2021 to further amend the Income-tax Rules,1962. Under the amended rules, after Rule 16D, a New Rule 16DD shall be inserted for Form of Particulars to be Furnished along with Return of Income for Claiming Deduction under clause (b) of sub-section (1B) of section 10A. Form No. 56FF, which specifies Particulars to be furnished under clause (b) of sub-section (1B) of section 10A of the Income-tax Act, 1961 has also been inserted. This notification shall come into force from July 29, 2021.

The particulars mandated to be furnished are details of Special Economic Zone Reinvestment Allowance Reserve Account (in rupees) and details of new plant/machinery purchased out of amounts withdrawn from Special Economic Zone Reinvestment Allowance Reserve Account. Read More

By Akshat Verma, Assistant Editor



NEWS UPDATES

TMT LAW

1. INDIA TO LEVERAGE DIGITAL PAYMENTS STACK: NPCI

India is looking forward to leveraging the stack it has built in the digital payments space and the National Payments Corporations of India (NCPI) is reaching out to many countries to help them build their own payment systems. Dilip Asbe MD and CEO of NPCI added that different countries need to build their local stacks as every country has its own local diversity, plans and complexities, he said while speaking at the Infinity Forum 2021 being organised by IFSCA and Bloomberg virtually.

He also added that NPCI strongly believes that every country should have its own stack and that India is looking at supporting the world around. The NPCI is reaching out to as many as 50-60 regulators of other countries' governments through the Indian missions. With this NPCI plans to take tech such as UPI and stack systems global which will add value to India Tech sectors and help other countries form a stable and better payment ecosystem. Read More

2. NEW SEMICONDUCTOR POLICY BY GOVERNMENT

The Government notified the semiconductor policy which was cleared by the Cabinet. According to the gazette notification, the government will provide up to 50% of the Project cost for two semiconductor and two display fabs in the country. The application windows will start from January 1 and will be open for 45 days. Support under the scheme will be provided for a period of six years.

Additional support of infrastructure will be provided through EMC2.0 Scheme, demand aggregation, support for R&D, Skill Development and Training along with support offered by the State Government if needed. This will attract large investments for setting up semiconductor wafer fabrication facilities in the country to strengthen the electronics manufacturing ecosystem and help establish a trusted value chain. The government also announced a Rs. 76,000 crore package earlier in December to

incentivize companies to set up chip manufacturing and design facilities in India. This move comes amid rising disruptions of trade chains due to global shortages of semiconductor chips. The Government aims to establish a stable network of these chips within the country itself.
Read More

3. UIDAI WORKING WITH WORLD BANK, UN TO TAKE AADHAAR TECH OVERSEAS

The Unique Identification Authority of India (UIDAI) is working with the Word Bank and the United Nations (UN) to replicate the Aadhaar architecture in other countries. UIDAI CEO Saurabh Garg also said the authority is forming an advisory board for different sectors for enrolments, authentication, and customer relationship management, among others. Mr Garg speaking at a virtual conference organised by the Payments Council of India added that UIDAI is looking forward to having more partners from India who can help it in taking the Aadhaar technology overseas. For the promotion of the Aadhaar ecosystem, it needs to partner outside the UIDAI internal system and for this, he said they are forming an advisory board for different sectors for enrolments, updates authentication, customer relationship management and Website design. Read More

4. GOOGLE TO INVEST UP TO $1 BILLION IN AIRTEL, TO CREATE INDIA-SPECIFIC 5G USE CASES

Airtel and Google are entering into a “long-term, multiyear agreement” to accelerate the growth of India’s digital ecosystem. As part of this partnership, Google intends to invest up to a billion-dollar, as part of its Google for India Digitization Fund, which includes equity investment as well as a corpus for potential commercial agreements, to be identified and agreed on mutually agreeable terms over the course of the next five years.

The investment includes a $700 million equity investment in Bharati Airtel at a price per share of Rs 734 to acquire 1.28% ownership in the Sunil Mittal led telecom operator. Up to $300 million will go towards implementing commercial agreements, which includes investments in scaling Airtel’s offerings that cover a range of devices to consumers via innovative affordability programs as well as other offerings aimed at accelerating access and digital inclusion across India’s digital ecosystem. Both organizations have agreed to jointly explore and invest across a wide spectrum of areas to create digital solutions that uniquely serve India’s requirements. Read more

5. TRAI TO REVIEW AUCTION PAYMENT TERMS OF 5G SPECTRUM

The Telecom Regulatory Authority of India (TRAI) had earlier released a consultation paper on the Auction of Spectrum in frequency bands identified for IMT/5g. Through this consultation paper, TRAI wanted to review the auction payment terms, decide the moratorium period, and upfront payment by various organisations. After TRAI receives both comments and counter comments on the same, which will be by 10th and 24th January respectively, it will review the duration periods of payment of spectrum dues by way of deferred payments. It will also make a decision on the process of surrendering spectrum, as well as the conditions and fee for such a surrender. The reassessment of auction payment terms is critical because it will determine which telecom company leads the way through the 5G shift. Read More

6. US BANS TELECOM GIANT CHINA UNICOM OVER SPYING CONCERNS

The Federal Communications Commission (FCC) said it had voted unanimously to revoke authorisation for the company's American unit to operate in the US. The firm must stop providing telecoms services in America within 60 days. The announcement has come after larger rival China Telecom had its licence to operate in the US revoked in October. FCC chairman said, "there had been mounting evidence and a growing concern that Chinese state-owned carriers pose a real threat to the security of the nation".

Whereas the company has responded that they had a good record of complying with the relevant US laws and regulations and providing telecommunications services as a reliable partner of its customer in the past two decades. Chinese technology and telecom firms have been targeted in recent years by US authorities over national security concerns. In November last year, President Joe Biden signed a legislation that stopped companies from receiving new telecoms equipment licenses which have been judged as a threat to the nation. Read More

By Shashwat Sharma, Assistant Editor

CALL FOR COMMENTS

1. CALL FOR INPUTS: MEITY INVITES FEEDBACK ON THE DRAFT NATIONAL BLOCKCHAIN STRATEGY (2021)

The Ministry of Electronics and Information Technology (MeitY) has released a Draft National Blockchain Strategy for public consultation. Feedback may be provided directly through the MyGov portal before February 16, 2022. NASSCOM has been working closely with MeitY towards shaping the Blockchain Strategy. To continue its engagement, NASSCOM would like to invite comments from the industry on the National Blockchain Strategy document's contents. This Draft document provides an insight on the strategies for metamorphosing Indian Blockchain ecosystem to make India as one of the leading countries in terms of harnessing the benefits of this emerging technology by focusing on Technological and Administrative Aspects and proposes to integrate Blockchain Technology with other emerging technology areas such as AI in order to achieve the vision of becoming global leader in these technologies.

In January 2022, the Ministry of Electronics and Information Technology (MeitY) released a draft National Strategy on Blockchain. The draft strategy identifies the potential for the adoption of blockchain in India and envisages the creation of a 'National Level Blockchain Framework'. Read More

CALL FOR COMMENTS

2. TRAI PUBLISHES CONSULTATION PAPER ON DATA CENTRE REGULATION FOR PUBLIC COMMENTS

The Telecom Regulatory Authority of India (TRAI), released a consultation paper on regulatory framework for promoting data economy through establishment of data centres, content delivery networks, and interconnect exchanges in India and sought comments from stakeholders to understand growth prospects for data centres in India. It has raised some issues including the economic/financial/infrastructure/other challenges being faced in setting-up a data centre business in the country, what measures are required for accelerating growth of data centres in India, and how data centre operators and global players can be incentivised for attracting potential investments in India.

TRAI has also sought comments on issues such as if there are any specific aspects of the disaster recovery standard in respect of data centres that needs to be addressed, whether trusted source procurement should be mandated for data centre equipment and whether they should be mandated to have security certifications based on third-party audits.

The authority has requested for comments from the stakeholders by February 3, 2022 and counter-comments, if any by February 17

Consultation paper - Method of sending in comments

EDITORIAL COLUMN

COLLECTIVE DOMINANCE: SINE QUA NON FOR INDIAN JURISPRUDENCE

By Srishti Kaushal (Associate Editor at RFMLR) and Diya Vig (Assistant Editor at RFMLR)

I. Introduction

Collective dominance refers to a situation wherein two or more enterprises jointly hold the position of dominance in the recognised market. Abuse of such collective dominance is observed when such multiple undertakings, who may individually hold minimal market share, form such common conduct or relationships that they act together in a way that there is no effective competition between them, at the expense of other competitors. This concept is not recognised by the Competition Commission of India ("CCI"). This article seeks to examine the Indian jurisprudential position with regards to collective dominance along with the international approach, to argue that there is a need for recognition of the concept in India to avoid harmful ramifications in the development of Indian Competition Law.

II. Indian Competition Law and Collective Dominance

The status quo of the recognition of dominance as a whole is divided as of now. The present legal scenario recognises dominance by a single entity only and does not recognise dominance in a market by two or more entities. Section 4 of the Competition Act, 2002 ("the Act") prohibits abuse of dominance by an enterprise or an entity that holds a dominant or a position of importance in that particular market. The term 'dominant position', as defined in explanation (a) to Section 4, refers to, "a position of strength which enables an enterprise in the relevant market to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour." As per the inference that can be drawn from this particular section, dominance in a market can be held by one enterprise only. Hence, the absence of recognition of the concept of collective dominance, by cartelization or other groups can be pointed out and ruled by this section.

There are various legal occurrences, where appropriate and needful action against a group of entities has been denied due to the loophole and void in the law. The CCI dismissed allegations of abuse of power by some non-banking financial institutions and banks in the practice of collecting uniform penalties on prepayments of home loans in Niraj Malhotra v. Deutsche Post Bank Home Finance in 2009.

EDITORIAL COLUMN

Section 4 was deemed irrelevant since none of the banks or financial institutions 'individually or single-handedly' possessed a dominating position. The following case highlighted the lacuna in the law and the need for the Act to acknowledge collective dominance.

Further, in Delhi Vyapar Mahasangh v Flipkart International Private Limited and Amazon Sellers Services Private Limited as well, the CCI noted that the Act does not recognise joint/collective dominance. It thereby dismissed the allegations against Amazon and Flipkart under Section 4 of the Act, disagreeing to carry out the assessment required to find if the entities were abusing their market power. Instances like these highlight the free hand with which the big players of the market engage in unfair practices and go unpunished.

Recently, in the case of Ashok Kumar Vallabhaneni v. Geetha SP Entertainment LLP, the CCI observed that the Act in the Indian legal system does not recognise the alleged concept of "collective dominance". Here, the defendants, functioning in Andhra Pradesh and Telangana, were engaged in the production and distribution of movies. Plaintiff, in the following case, was denied a sufficient number of screens, for his movie "Petta" by the defendant, while other such movies were provided with more screenings in theatres, that too without proper justification or interference. Plaintiff contended that the conduct of the defendants affected the competition in the field adversely and also negatively impacted viewership. The plaintiff contended that the alleged conduct by the defendants violated Section 3(3)(b) of the Act, dealing with anti-competitive agreements/practices that limit or control production. Thus, it was alleged by the plaintiff that the conduct and actions of the defendants violated Section 4 of the Act, by restricting the Telugu film industry and abusing their dominant position in the industry. The plaintiff further argued that the defendants indulged in monopolizing the market against the entry of new players, which in turn led to the incurring of huge losses by the plaintiff. The CCI, in the following case, ruled that "what the Act under Section 4 contemplates is the abuse of dominant position by an enterprise or a group rather than abuse of a dominant position of collective dominance by more than one entity." The commission also observed that there was no evidence relating to cartelization in the following case and the case precluding to collective dominance had to be ruled out due to the non-recognition of the concept in the Indian legal system. The CCI in the conclusion of the case at hand observed that there was no violation of Section 3 and 4 by the defendants. After yet another case of collective dominance, the need for legislation against abuse of collective dominance was felt.

In order to put a restriction and end to this lacuna in the law, The Competition (Amendment) Bill, 2012 ("the Bill") was introduced and aimed to expand the scope of Section 4. By inserting the terms "jointly or singly" directly after the words "or group" in Section 4(1) of the Act, the Bill aimed to address circumstances when parties are collectively dominant in the market. Regrettably, the Bill did not succeed in becoming a law due to strong opposition in the parliament. Thus, the position as of now remains stringent that the Act does not recognise Collective Dominance.

EDITORIAL COLUMN

III. International Recognition of the Concept

The concept of Collective Dominance is perhaps most widely acknowledged in the European Union (EU). The Treaty on the Functioning of the European Union (TFEU) provides for the concept of abuse of dominance under Article 102, where such abuse can be done by "one or more undertakings". This concept was first recognised in the Italian Flat Glass Case, the Court that "there is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators in the same market". While the Court of justice held that collective dominance can't be established solely by the existence of economic links, the concept was understood to be within the purview of Article 82 of the Treaty (now Article 102). Since then, this concept has found vast usage in the EU. The same has later also been recognised in several cases, including Compagnie Maritime Belge Transports a.o. v Commission and Atlantic Container Line and Others v. Commission.

This concept has also been recognised with respect to merger control in cases including, Bertelsmann and Sony Corporation of America v Impala and Airtours PLC v the Commission. In both these cases, the Court observed that the concept of collective dominance is included with Article 2 of European Union Merger Regulations.

The concept is also recognised in Canada. This is evident by the Enforcement Guidelines, which provides that in assessing if one or more persons control a class or species of business to establish dominance, 'one or more persons' would be interpreted to include the position of joint dominance. Similar provisions can also be found in other jurisdictions, like China and Russia.

IV. Analysis

Collective abuse of dominance must not go unpunished, especially in a developing country like India. This lacuna in law has horrendous repercussions. As some firms gain a collective dominance position, they are able to impose restrictive conditions in the market, as a result of which the smaller players are not able to effectively compete with them. As these players adopt similar pricing and non-pricing strategies, consumers are left with very low bargaining power such that they have no other option other than accepting the goods or services on the terms and conditions which are prescribed by the dominant players. The presence of such dominant players may also create barriers to entry because these close-knit firms tacitly collude with each-other, restricting resources amongst themselves and imposing unfavourable conditions that make the market unfavourable for new players.

While some people compare such a situation to that of entities forming a cartel or entering into horizontal agreements (which are already penalized by the Act under Section 3), to restrict such behaviour under these a written contract between the parties is required. Thus, owing to the lack of restriction to abuse of collective dominance, situations have such effects which are de facto similar to that of having non-competitive agreements or cartels go unpunished.

EDITORIAL COLUMN

Moreover, it may also be noted that Section 5 of the Act, which provides for the regulation of combinations, while defining control to prevent a combination that may have anti-competitive effects in the future provides that such control can be acquired by one or more companies either jointly or singly over another enterprise. Thereby an entity is said to have control if it already has direct or indirect control over another enterprise engaged in producing, distributing, or engaging with a substitutable good/service. This is not allowed under the Act as in such circumstances, the controlling entity has the ability to adopt a common policy on the market and act independently of the competitors and consumers. Thus, through this, the Act prevents tacit collusion and possible abuse of collective dominance of two or more enterprises that are united by economic links. It makes little sense to not allow combinations to prevent possible abuse of collective dominance and yet not punish it when it happens by way of multiple entities abusing their collectively dominant position in the market.

By not recognising the concept, individually non-dominant firms evade liability, simply because they do not have the market share to attract the provisions of the Act. However, it should be recognised that market power, as opposed to market share, is at the core of fair competition, which is one of the primary aims of the Competition Commission of India.

V. Conclusion

The concept of collective dominance, which is still in the initial stages of recognition in the Indian law, is yet another pillar of the legal regime, that shall ensure fair competition amongst the forces of the market. Incorporating "individually or collectively" in Section 4 of the Act and making the provision in consonance with the European counterpart would equip the Indian competition authority with another instrument to monitor market competition from a new perspective. To protect the interests of the players in the market, and those of the consumers, it is very crucial to ensure that the forces involved are at peace in cohabitation and that there is equal chance and fair competition in the field.

In this approach, the market's essence is preserved while apparent artificiality is constantly weeded out. Instead of dismissing the claims as being outside the scope of the law, the best course of action today is to address the concerns and find an acceptable solution. By ignoring the concerns of the impacted parties and eventually departing from the law, these loopholes would only spawn anti-competitiveness.

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