AU COURANT

RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

APRIL-MAY 2023

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PREFACE

It gives us immense joy to share with our readers the April-May edition of our monthly newsletter, "Au Courant". In this edition, the current on-goings in various fields of law have been analysed succinctly in the 'Highlights' section to provide readers with some food for thought. This includes a brief comment on guidelines issued by Central Board of Direct Taxes on the taxability of winnings from online games, SEBI's modified underwriting framework for public issues, and an article on Karnataka High Court judgement that sets aside interim injunction order against Blinkit Citing non-use of registered trademark by Blinkit.

Major happenings in various fields of law such as alternate dispute resolution, banking and finance, competition law, insolvency and bankruptcy, intellectual property rights law, mergers and acquisitions, securities law, taxation law, and TMT Law have been recorded in the 'News Updates' segment to keep the readers abreast of latest legal developments. 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.

Further, the 'Editorial Column' section contains two pieces titled "Adopting a 'mediated' approach to mandatory mediation & the draft bill" by Arun Raghuram Mahapatra and Jugaad Singh (Junior Editors), and "Rebutting the Arbitration-Invalidating Effect of Law of the Agreement: Anupam Mittal v Westbridge" by Srishti Kaushal and Ishani Chakraborty (Senior Editor and Assistant Editor).
Lastly, the recent on the blog section contains a blog titled "Draftsmen or Courts: The Right Node to Demarcate Confidentiality in Arbitration" written by Aditya Singh, Student of NLSIU, Bangalore.

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

HIGHLIGHTS

1. THE CENTRAL BOARD OF DIRECT TAXES ISSUES GUIDELINES REGARDING THE TAXABILITY OF WINNINGS FROM ONLINE GAMES

BY RAGHAV SEHGAL

The Central Board of Direct Taxes (CBDT) on 22 May 2023 (Monday) issued a new set of guidelines on online gaming platforms, stating that the platforms need not deduct tax at source (TDS) on winnings withdrawn by players if the amount is less than Rs 100 a month and meets certain riders. The CBDT stated that the guidelines were intended to help taxpayers who were facing difficulties regarding the taxability of winnings from online games.

As per the new guidelines issued, net winnings below ₹100 in a month will not be subject to TDS at the time of withdrawal provided the tax liability will be deducted when the net winnings withdrawn exceeds this limit in the same or the subsequent month or at the end of the fiscal year. It is pertinent to note that in order to be eligible for this concession, the tax deductor has to undertake the responsibility of paying the difference if the balance in the user account is not sufficient to meet the tax liability at the time of deduction, CBDT explained in the guidelines.

The guidelines also clarified on the bonuses and other incentives provided by the online gaming companies by stating that "the Online gaming companies offer bonuses, referral bonuses, and other incentives. These are not deposited by the user. But as bonuses and other incentives increase the balance in the user account, they are considered as taxable deposits". The monetary equivalent will be used to determine the net gains if the incentive is in the form of coins, coupons, or another type of incentive. Such deposits will be disregarded for computing net winnings if the incentive or bonus credited to the user account is purely for the purpose of playing and cannot be withdrawn or used for other purposes.

The CBDT has also clarified that the transfer of money from one user account to another will not be considered a withdrawal or deposit, provided both are maintained by the same online gaming company. This will be applicable only if the company is not considering each platform separately. For the calculation of net winnings, if each platform is considered separately, then such a transfer will be considered as a withdrawal or deposit. With respect to the computation of net winnings on multiple user accounts, the CBDT clarified that it would be mandatory for the user to include every account name registered with the online gaming intermediary, applicable to any taxable deposit, non-taxable deposit, or winnings, wherein the user is credited or is debiting the amount.

Thus, each wallet that qualifies as a user account shall be considered a user account for the purposes of computing net winnings. The deposit, withdrawal, or balance in the user account will mean the aggregate of deposits, withdrawals, or balances in all user accounts.

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2. BLINKHIT V. BLINKIT: KARNATAKA HIGH COURT SETS ASIDE INTERIM INJUNCTION ORDER AGAINST BLINKIT CITING NON-USE OF REGISTERED TRADEMARK BY BLINKHIT

BY DHIREN GUPTA

In Blink Commerce Private Limited And Blinkhit Private Limited, the Karnataka High Court overturned an interim injunction order issued by the trial court that temporarily restrained the use of the 'Blinkit' trademark, a popular online grocery delivery platform. The injunction was granted in response to allegations made by software services firm Blinkhit, which claimed that Blinkit had violated its trademark rights. However, the high court found the grounds for the injunction to be unfounded.

Blinkhit asserted that it had registered the trademarks 'BLINKHIT' and 'iBLINKHIT' back in 2016. The trial court had based its temporary injunction on the fact that Blinkhit had obtained the registered trademark before Blinkit began using the word 'BLINKIT' for its business. However, the high court examined Blinkhit's financial records, including its profit and loss account statement and balance sheet, and determined that the company had not engaged in any business activities or generated income using the trademarks.

The bench acknowledged the argument put forth by the senior counsel of Blinkit that merely obtaining a trademark registration does not necessarily prove actual usage of the mark. The court further noted that Blinkhit's alleged services were entirely different from Blinkit's business operations. Therefore, the court concluded that the mere registration of trademarks by Blinkhit, for a business/service/activity that differed substantially from Blinkit's, could not form the basis for granting a temporary injunction. Accordingly, the high court set aside the trial court's order.

The bench further emphasized that the lack of use of the registered trademarks by Blinkhit since 2016, combined with the clear distinction in the nature of services provided by the two parties, led to the conclusion that the balance of convenience favored Blinkit. Granting an injunction against Blinkit would cause irreparable injury and hardship to the appellant, while the respondents would not suffer any prejudice, loss, or hardship if the injunction was refused. Thus, the high court deemed it necessary to set aside the interim injunction order.

In its final ruling, the high court directed the trial court to expedite the disposal of the lawsuit, preferably within one year. This decision allows Blinkit to continue using its 'Blinkit' trademark while the legal proceedings move forward.

The case serves as a reminder that mere registration of a trademark does not necessarily guarantee its usage or protection. Courts carefully consider the actual business activities and the nature of services provided by the parties involved in trademark disputes. Ultimately, the court's objective is to maintain a fair balance between protecting the rights of trademark holders and preventing unwarranted restrictions on legitimate business activities.

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3. SEBI AMENDS UNDERWRITING FRAMEWORK FOR PUBLIC ISSUE

BY TARPAN SONI

The Securities Exchange Board of India (SEBI) has modified the underwriting framework for public issues pursuant to the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Second Amendment) Regulations, 2023 (the "ICDR Amendment"). On February 22, 2023, SEBI had released a consultation paper on, among other things, amendments to the underwriting framework applicable to public offerings under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("SEBI ICDR Regulations"). On March 29, 2023, changes were approved by the SEBI Board and became effective on May 23, 2023.

According to the SEBI's consultation document, there are basically two types of underwriting used in India: "soft" underwriting and "hard" underwriting. This difference was not defined explicitly in the SEBI regulations prior to the ICDR Amendment, but they have changed over time as a matter of practice. Now that the book-building offer period has ended, the SEBI ICDR Regulations expressly recognise two different types of underwriting: (i) underwriting covering demand shortfall, and (ii) underwriting covering risk of technical rejections. Additionally, the issuer has the option to choose the type of underwriting arrangement. Underwriting covering demand shortfall requires the underwriting agreement to be signed before the RHP is filed; underwriting covering the risk of technical rejections requires the underwriting agreement to be signed after pricing and before the final prospectus is filed.

The Securities and Exchange Board of India (Merchant Bankers) Regulations, 1992 and the Securities and Exchange Board of India (Stock Brokers) Regulations previously only covered the fulfilment of underwriting obligations through procurement of subscribers. The SEBI ICDR Regulations make it clear that the underwriter need not subscribe to the securities themselves and may enter into arrangements to procure subscription for offered securities to fulfil its underwriting obligation.

Investors are able to take such information into account when making investment decisions since the underwriting agreement must be signed before the RHP is filed and the commitment of the underwriters is disclosed in the RHP. Additionally, given the added risk, there may be effects on the offering's pricing that would boost demand and make it more appealing to investors. Hard underwriting has so far been the exception rather than the rule in Indian book-built public offerings. The new structure allows the issuer to select hard underwriting, which may be advantageous in sluggish market conditions. However, this might result in higher transaction costs for the issuer and greater risk for underwriters. Therefore, it is uncertain if this type of underwriting will be used more frequently in Indian book-built public offerings in the future.

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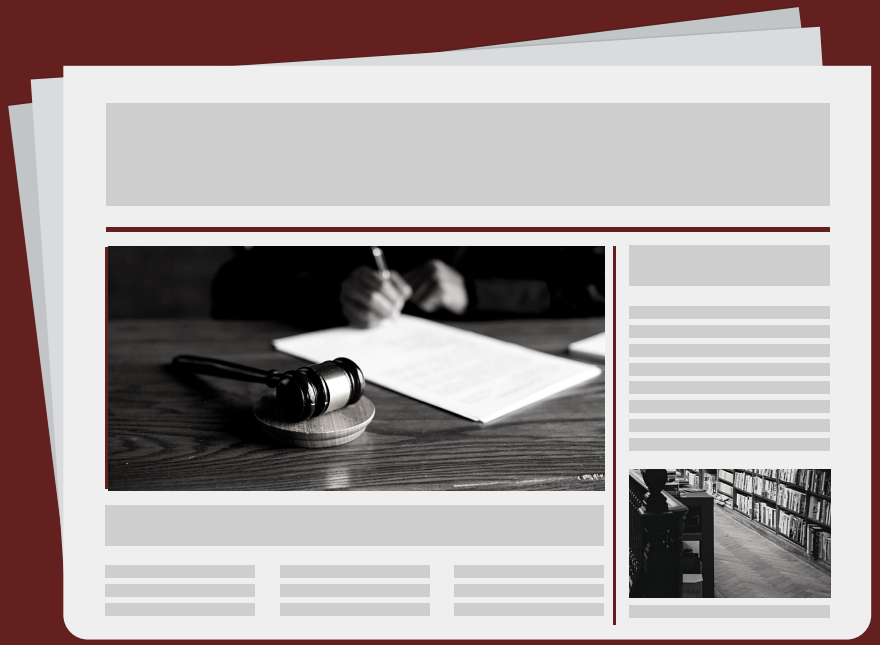

NEWS UPDATES

ALTERNATIVE DISPUTE RESOLUTION

BY ISHANI CHAKRABORTY

1. DELHI HIGH COURT REJECTS GOVERNMENT'S PLEA SEEKING ENFORCEMENT OF ARBITRAL AWARD AGAINST RELIANCE

The Delhi High Court has dismissed the government's petition seeking enforcement of a 2016 final partial award (FPA) of an arbitral tribunal, in a dispute with Reliance Industries over cost recovery provisions and reimbursement of royalties and taxes related to the Panna, Mukta and Tapti gas fields. The high court rejected the petition holding it to be "premature and not maintainable". The 2016 FPA is "not an executable arbitral award" as it does not award any amount to the government.

Reliance and Shell-owned BG Exploration & Production India had in December 2010 dragged the government to arbitration over cost recovery provisions, profit due to the government and also statutory dues including royalty payable. The companies wanted to raise the limit of cost that could be recovered from the sale of oil and gas before profits are shared with the government. However, the government raised counter claims over expenditure incurred, inflated sales, excess cost recovery, and short accounting.

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2. ARTICLE 299 OF THE CONSTITUTION DOESN'T GRANT IMMUNITY FROM STATUTORY CONDITIONS TO CONTRACTS MADE IN PRESIDENT'S NAME

An Application was filed before the Supreme Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") for the appointment of a Sole Arbitrator by Glock Asia-Pacific Ltd. The Ministry of Home Affairs (Procurement Division) initiated a tender to procure 31,756 Glock Pistols. The applicant won the bid and received a Tender of Acceptance from the respondent. As per Clause 6 of the Tender of Acceptance, the petitioner had to provide a performance bond of 10% of the contract value, amounting to USD 13,29,093/-. The applicant submitted the performance bank guarantee and fulfilled its contractual obligations. The entire supply under the contract was delivered, and the respondent accepted it, making the full payment.

During the contract period and even after its completion, the performance bank guarantee issued was extended several times until 2021, which was nine years after the delivery and final payment. The applicant notified the respondent that the performance bank guarantee would not be extended further. In response, the respondent promptly invoked the performance bank guarantee for INR 9 crores, referring to Clauses 11 and 18(c) of Schedule II of the Acceptance of Tender.

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3. DELHI HIGH COURT FRAMES GUIDELINES FOR RECORDING OF MATRIMONIAL SETTLEMENTS: HINDI TO BE USED

Issuing a slew of guidelines to be followed by the Mediators while drafting settlement agreements in matrimonial disputes, the Delhi High Court has asked to publish such agreements in Hindi as well, in addition to English. The bench observed that a common understanding of the parties on essential conditions for the enforceability of an agreement is crucial in a mediated settlement agreement and expressing intentions and commitments to the agreement through clear and concise language is critical for its effective enforcement.

The Court was of the view that there is an urgent need to ensure that the agreement drafted to settle the issues to bring an end to a future or pending lis does not itself become a matter of dispute giving rise to another lis between the parties. Since mediated settlement agreements are usually drafted in English, the court pointed out that it is important to carefully draft and ensure that the parties concerned comprehend the agreement in vernacular language as this can significantly impact its effectiveness and execution.

Perusing the facts of the case, the Court took note that the petitioner, Hanuman Motors, sent various communications to the arbitrator, taking a stand that it did not consent to the arbitration proceedings,

sufficiently demonstrating that it did, indeed, object to the arbitrator entering upon the reference. While holding that the unilateral appointment of the Sole Arbitrator completely vitiated the award, the Court allowed the petition and set aside the award.

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4. SUPREME COURT UPHOLDS ₹278-CRORE ARBITRAL AWARD IN FAVOUR OF RELIANCE INFRA AGAINST GOA GOVERNMENT

The Supreme Court on Wednesday upheld the ₹278-crore arbitral award Anil Ambani's Reliance Infrastructure won against the Goa government in a dispute related to non-payment of electricity dues supplied by the company. The bench set aside the Bombay High Court's judgment that partially quashed the February 2018 arbitration award.
While restoring the award in its "entirety", the SC said, "the view so taken by the tribunal cannot be said to be wholly perverse or suffering from patent illegality so as to be interfered with."
The tribunal was well within its jurisdiction to award interest at a 15% rate and there was no justification to reduce the same to 10%, it said, while rejecting the Goa government's appeal. The sole arbitrator had directed the Goa government to pay Reliance Infra ₹278 crore with interest till Oct 31, 2017, and a further 15% interest per annum till full payment.

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5. ARBITRATION CLAUSE DOESN'T BAR CONSUMER COURT FROM TAKING UP COMPLAINT

The National Consumer Dispute Redressal Commission (NCDRC) has reiterated that an Arbitration Clause in the Agreement doesn't bar the jurisdiction of the Consumer Court to entertain the Complaint. The bench cited M/s. Emaar MGF Land Ltd. Vs. Aftab Singh, 2018 Latest Caselaw 921 SC to affirm the above and accordingly dismissed the IA filed by the Opposite Party Developer seeking permission to refer the case to Arbitrator.

ALTERNATIVE DISPUTE RESOLUTION

6. ARBITRATION CLAUSE IN UNSTAMPED INSTRUMENT EXIGIBLE TO STAMP DUTY CANNOT BE INVOKED

The 5-judge Constitution Bench of Supreme Court has ruled on a significant point of law as to whether Arbitration Clause in Unstamped Instrument exigible to Stamp Duty can be invoked or not. The bench has ruled that invoking the same is not valid in law. The dissented view opined that unstamped arbitration agreements are valid at the pre-referral stage.

It was their observation that non-stamping or insufficient stamping of the substantive instrument would not render the arbitration agreement unenforceable as stamp deficiency is a curable defect and the same would not render the arbitration agreement void. The majority view was that Court at pre-referral stage under Section 11 Arbitration and Conciliation Act is bound to examine the instrument and if found to be unstamped or insufficiently stamped the instrument is to be impounded at this stage itself while the minority was of the view that the examination of the stamping and impounding may not be done at this stage. It was their opinion that deciding on the stamp duty at the threshold also stalls the process, leading to procedural complexity and delay in litigation before the Courts.

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7. GOVERNMENT REJECTS WTO ARBITRATION PANEL, TO APPEAL ICT RULING

The Government is set to appeal against a ruling by the World Trade Organization's dispute settlement panel, rejecting suggestions of using the Multi-Party Interim Appeal Arbitration Arrangement to resolve the case with the European Union, Japan & Taiwan over import duty of 7.5% to 20% on a host of information & communication technology (ICT) products, including mobile phones. The Government's decision will mean that the local industry will not face any adverse impact as the appellate body is non-functional due to the US blocking fresh appointments for years, starting with the Obama administration - a stand that has continued during the Trump and Biden regimes.

The 5-judge Constitution Bench of Supreme C The dispute panel ruled that the Government's decision to impose levies on mobile phones & components, base stations, integrated circuits & optical instruments violated the international trading norms & asked India to bring the rules in conformity with the provisions. Although the action was targeted against Chinese-made products, European, Japanese & Taiwanese companies were hit by the import duty, which was challenged by the EU in 2019, with others joining in. The amount of EU exports of such technology affected by India's violations is up to 600 million euros annually.

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8. SECTION 34(4) OF ARBITRATION & CONCILIATION ACT CANNOT BE USED TO ENABLE AN ARBITRAL TRIBUNAL TO REOPEN CONCLUSION REACHED

The respondent claimed 41,73,747/- under a debit note dated 11.08.2011/16.08.2011 and 1,87,62,502/- under another dated 07.11.2012/19.10.2012 with interest thereon before the learned arbitrator. The petitioner denied the allegations and counterclaimed 5,39,79,500/-. The petitioner filed Annexures A-1 to A-60 during proceedings before the learned arbitrator. The learned arbitrator ordered the documents recorded, subject to costs. The expert arbitrator further stated that the documents must be proven legally. Parties filed affidavits and began recording the claimant's [respondent herein] witness's statement. After a brief cross-examination, it held that the parties agreed that no oral evidence was needed, and the matter may be set for arguments.

The learned arbitrator died; thus this Court selected a substitute in 2017. The learned arbitrator considered eight issues, including whether the Respondent established that the Claimant's price undercutting and customer solicitation violated the contract. After hearing the parties, the learned arbitrator issued the impugned judgment in 2018, awarding the respondent an amount of Rs 2,29,36,249/-, with interest and costs. Regarding the non-consideration of the additional documents filed by the petitioner in Annexures A1 to A60, the learned Arbitrator held that a document that is disputed, by the other party if not proved, cannot be considered by the Arbitrator, to be on record or as a piece

of evidence. Therefore, the Respondent had not proved that the Claimant had adopted predatory pricing and poached its customers.

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9. DELHI HIGH COURT REITERATES THAT THE PURPOSE OF SECTION 29-A IS THE EXPEDITIOUS DISPOSAL OF ARBITRATION PROCEEDINGS

The bench in the case of Skylark Cagers India Pvt. Ltd. vs The Institute of Liver and Biliary Sciences reiterates the purpose of Section 29A of the Arbitration and Conciliation Act, 1996 is expeditious disposal of arbitration proceedings. This application was filed by the petitioner u/s 29A of the Arbitration and Conciliation Act, 1996 ("the Act") seeking an order extending the time for completion of arbitral proceedings and making of the arbitral award by 4 months. This Court held that the instant petition along with the captioned application for delay in filing the affidavit, had been filed by the petitioner at a very belated stage. Hence, this petition along with pending applications was dismissed being devoid of any merit.

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COMPETITION LAW

BY DHIREN GUPTA

1. KFTC FINES GOOGLE €29 MILLION FOR BLOCKING RIVAL APP STORE

South Korea's Fair Trade Commission (KFTC) has fined Alphabet's Google 42.1 billion won (~ $32 million) for blocking developers from releasing mobile video games on a Korean competitor platform called One Store. KFTC said that Google allegedly required Korean video game companies to exclusively release their new games in the Play Store from June 2016 to April 2018. That means Google banned the local game makers from releasing their content on One Store in return for offering Google's in-app exposure and further support for global expansion.

One Store, a local peer of Google's Play Store, was founded in June 2016 by South Korea's three telcos – SK Telecom, KT and LG Uplus – and internet giant Naver.Google's local market share in the mobile Android app market increased to approximately 90% to 95% in 2018, up from around 80% to 85% in 2016, while One Store's market share accounted for about 5% to 10% in 2018, which fell from 15% to 20% in 2016, per the data compiled by the KFTC.

Korea's antitrust watchdog said the move is part of an effort to ensure fair competition in the app market by preventing the U.S. tech giant from abusing its dominant position. Google Play and One Store generate more than 90% of domestic sales from selling games, according to the KFTC press release. Google's activity affected the gaming companies, from large video game makers such as NCSoft, Netmarble and Nexon to small and mid-sized game developers, the KFTC said.

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2. ACCC WILL OPPOSE QANTAS MERGER WITH ALLIANCE CITING COMPETITION CONCERNS

A proposed merger of airlines Qantas (ASX: QAN) and Alliance Aviation (ASX: AQZ) valuing the latter at $919.2 million will be opposed by the consumer watchdog after concluding the transaction would 'substantially lessen competition' in the fly-in fly-out (FIFO) transport space. The Australian Competition and Consumer Commission (ACCC) says that its investigation has concluded the transaction 'is likely to substantially lessen competition in markets for the supply of air transport services to resource industry customers in Western Australia and Queensland'.

COMPETITION LAW

The determination puts the merger up in the air, considering ACCC approval is required for the deal to go through. In response to the decision, Qantas says it will 'seek more information' from the watchdog, and has requested a meeting with the ACCC to understand its decision which the airline claims is "at odds with the increasingly competitive nature of the segment and views expressed by a competitor that the acquisition would not lessen competition".

The competitor cited by Qantas is Rex, which gave its support to the merger back in September on the condition that any purchase must come with assurances that the pair's simulators would be available for rival airlines to use. ACCC chair Gina Cass-Gottlieb said the removal of Alliance was likely to substantially lessen competition and would lead to increased airfares and reduced service quality for customers.

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3. GUCCI RAID, A PART OF THE GROWING E.U. ANTITRUST SCRUTINY OF FASHION

The unannounced inspection was the latest in a series of regulatory actions, as antitrust officials ratchet up scrutiny of the fashion industry over possible anticompetitive practices.In March 2023, the European Commission, the bloc's executive arm, carried out investigations into several beauty and fragrance companies linked to the supply of fragrance ingredients. Last year, some fashion houses were raided in connection with sustainability targets developed by the industry, including changes in sales periods and discounting strategies that regulators later deemed potential violations of competition law.

Pierre Cardin and the German clothing maker Ahlers have faced scrutiny over licensing and distribution deals that may have breached rules on cross-border sales.

The attention intensified after a period of "relative calm," Greenberg Traurig, a law firm, said in a note. The firm added that the raids underscored the European Commission's increasing focus on enforcement in the fashion sector after the coronavirus pandemic and urged companies to review business practices to "ensure they are not running afoul of E.U. antitrust and anti-competition regulations." Read More

COMPETITION LAW

4. ECJ REJECTS AMAZON'S APPEAL AGAINST EXCLUSION OF ITALY IN ABUSE OF DOMINANCE INVESTIGATION

The European Court of Justice (ECJ) has rejected Amazon's appeal against the exclusion of Italy from an abuse of dominance investigation. The case dates back to November 2020 when the European Commission initiated an investigation into Amazon's Buy Box feature, suspecting the company of favouring its own retail offers and those of sellers using its delivery services. The Commission decided to exclude Italy from the investigation as the Italian competition authority was already looking into similar conduct in the Italian market.

Amazon sought to challenge the Commission's decision to exclude Italy, but the General Court (GC) dismissed their action, stating that it did not affect Amazon's legal position and was therefore not subject to challenge. The ECJ disagreed with Amazon's argument that the exclusion of Italy resulted in a binding legal effect depriving the company of protection against parallel proceedings. The ruling confirms that Amazon can challenge the Commission's decision at the end of the investigation. However, it does not grant the right for the entire case to be handled exclusively by the Commission. The ECJ concluded that the Commission's decision to exclude Italy did not affect Amazon's legal position and therefore cannot be challenged.

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5. JCI FACES CARTEL ALLEGATIONS IN HONG KONG

Johnson Controls is to face a competition tribunal in relation to suspected cartel conduct involving the supply of over HK$3bn (US$383m) worth of air conditioning works in Hong Kong. Hong Kong's Competition Commission has commenced proceedings against Johnson Controls Hong Kong Ltd, York International (Northern Asia) Ltd and parent company Johnson Controls International plc, ATAL Building Services Engineering Ltd (ABS) and Lee Yui Ming, a former assistant service manager of Johnson Controls. In what is a second set of proceedings concerning air conditioning works, the Competition Commission alleges that Johnson Controls and ABS, had engaged in serious anti-competitive conduct involving fixed prices , shared

markets and/or rigged bids in relation to the supply of air-conditioning works in Hong Kong from 14 December 2015 to 24 June 2018.

The Commission also alleges that Lee was a person involved in the contravention. In the first proceeding last year, ABS entered into a cooperation agreement with the Commission under the Commission's Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct. Under the terms of the cooperation agreement, ABS will admit liability in both the first and second proceedings and pay a fine of HK$150m (US$19m) together with the Commission's investigation and legal costs.

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6. SUPREME COURT STAYS NOTICE OF RECOVERY OF PENALTY OF RS. 200 CRORES AGAINST AMAZON UNTIL NEXT DATE OF HEARING

In Amazon.Com NV Investment Holdings LLC v. Competition Commission of India, Section 43A, read with sections 6, 44 and 45 of the Competition Act, 2002 - Power to impose penalty for non-furnishing of information on combinations - NCLAT by impugned order upheld order of CCI imposing penalty of Rs. 200 crores on Amazon on ground that when Amazon acquired 49 per cent shareholding in FCPL.

There was deliberate design on part of Amazon to suppress actual scope and purpose of combination and misrepresentation of material facts in combination notice for its investment in FCPL, Whether in view of matter being pending in Supreme Court, no coercive steps shall be taken in relation to notice of recovery of Rs. 200 crores penalty against appellant until next date of hearing, in conclusion it was held, yes.

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7. SECTION 15 OF COMPETITION ACT ENSURES THAT ANY DEFECT/VACANCY IN CCI'S CONSTITUTION WON'T INVALIDATE PROCEEDINGS: HC

COMPETITION LAW

In, Alliance of Digital India Foundation v. Competition Commission of India, Section 15 acts as a saving clause in regard to a situation where a vacancy or a defect in constitution of CCI would arise and any such vacancy or defect in constitution would not invalidate any proceedings so far as adjudicatory powers of CCI are concerned.

Section 15 of the Competition Act, 2002 - Vacancy, etc., it states not to invalidate proceedings of Commission, now Whether section 15 act as a saving clause in regard to a situation where a vacancy or a defect in constitution of CCI would arise and any such vacancy or defect in constitution would not invalidate any proceedings so far as adjudicatory powers of CCI is concerned - Held, yes.

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INSOLVENCY LAW

BY DHIREN GUPTA

1. FINANCIAL CREDITOR'S ENTITLEMENT TO SIMPLE OR COMPOUND INTEREST NOT TO BE DECIDED AT ADMISSION : NCLAT DELHI

In Holy Heights Infrastructures Pvt. Ltd v K.V. Foundations India Ltd., The National Company Law Appellate Tribunal (NCLAT), Principal Bench, while adjudicating an appeal, held that the question as to whether the Financial Creditor is entitled to simple interest or compound interest is not to be decided at the stage of admitting Section 7 petition, when debt and default have been proved. Further, after collation of claims a Resolution Professional may form an opinion as to whether the Financial Creditor is entitled for simple or compound interest. Anyone aggrieved with the said opinion can approach NCLT for appropriate relief.

During the pendency of the appeal, the Corporate Debtor sought adjournment to take steps to settle the matter with the Financial Creditor. However, the Financial Creditor did not accept the offer made by the Corporate Debtor. The Corporate Debtor submitted before the NCLAT Bench its willingness to pay the simple interest at the rate of 12%, whereas the Financial Creditor demanded 12% compound interest. The Bench observed that the issue whether the Financial Creditor is entitled for simple interest or compound interest, shall be looked into by the Resolution Professional when the claims are collated. The said issue is not to be decided at the time of admitting the Section 7 petition at the stage when the debt and default has to be proved.

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2. A PERSON WHO COMES IN A PROJECT AS A SPECULATIVE INVESTOR IN GARB OF A LENDER CANNOT BE ACCORDED THE STATUS OF A FINANCIAL CREDITOR: NCLT NEW DELHI

The National Company Law Tribunal, New Delhi Bench, while adjudicating an application under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC, 2016) in Rohit Prasad vs M/s S and N Lifestyle Infraventures Pvt. Ltd. has held that the status of "Financial Creditor" cannot be accorded to a person who, in the garb of a lender comes in the project as a speculative investor and for mere recovery of monies files exorbitant claims.

The Tribunal observed that the Financial Creditor had not advanced a loan to the Corporate Debtor to enable the construction and commercial sale of the housing project. The agreement was a sale agreement

with settled base return and profits amounting to contingencies with a maximum ceiling. The Financial Creditor had made an investment in the housing project where he was 5% equity holder and hence had a 5% share in the profits. The Tribunal observed that the status of Financial Creditor cannot be accorded to a person who comes in the project as a speculative investor in the garb of a lender and files exorbitant claims for mere recovery of monies. With the aforesaid observations, the Tribunal dismissed the petition.

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3. CREDITOR WHO DOES NOT SUBMIT CLAIM OR RAISES ISSUES IN CIRP, HAS NO RIGHT TO CHALLENGE RESOLUTION PLAN: NCLAT DELHI

The National Company Law Appellate Tribunal ("NCLAT"), Principal Bench, while adjudicating an appeal filed in Madhya Pradesh Paschim Kshetra Vidyut Vitaran Co. Ltd. v Jagdish Kumar & Anr., has held that a creditor who neither submits its claim before the IRP/Resolution Professional, nor raises any issue during the entire CIRP period, cannot be allowed to challenge resolution plan which has already been implemented.

The Bench observed that since the electricity connection of Corporate Debtor was disconnected prior to initiation of CIRP, thus it would not form part of essential services. Further, the dues being claimed by the Electricity Department belong to pre-CIRP period. It was further held that the payment of electricity dues is to be claimed in response to public announcement of the 'IRP/RP'. The 2019 amendment to Regulation 12(1) of IBBI (Resolution Process for Corporate Persons) Regulation, 2016 substituted 'claim with proof' in place of 'proof of claim'. Therefore, a creditor is required to submit claims with proof on or before the last date mentioned in the public announcement. However, if any creditor fails to submit claim within stipulated time, then it may submit the claim with proof to IRP/RP on or before 90th days of the insolvency commencement date. Since the Electricity Department failed to fulfil these provisions, it is not entitled to relief.

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4. CORPORATE DEBTOR CANNOT TAKE ADVANTAGE OF ITS OWN DEFAULT AND SET UP A PLEA OF ABSENCE OF PERMISSION OF RBI: NCLT DELHI

INSOLVENCY LAW

The National Company Law Tribunal, New Delhi Bench, while adjudicating an application under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC, 2016) in Punjab National Bank (International) Limited vs M/s Superior Industries Limited has held that a Corporate Guarantee is not void only due to violation of The Foreign Exchange Management Act, 1999 ("FEMA, 1999") and it is the duty of the Corporate Debtor to seek necessary permissions from the Reserve Bank of India ("RBI") and other Regulators before issuing a guarantee.

The Tribunal firstly observed that the Corporate Debtor had already filed an application before the Delhi High Court for the release of FDRs. Thus the Corporate Debtor could not raise the plea that FDR was pending and can be setoff against the debt when it is had simultaneously filed an application for the release of the same. It was further observed that Punjab National Bank, which is incorporated in India, holds the FDR and not the Financial Creditor. Thus the debt cannot be setoff against the FDR. The Tribunal further observed that the Corporate Debtor had argued that the guarantee violated Regulation 5(d) of FEMA. The Tribunal however observed that the aforesaid regulation deals with external commercial borrowing, which are commercial loans raised by eligible Indian resident entities from a foreign entity.

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5. NEW CLAIMS CANNOT BE ADMITTED WHEN RESOLUTION PLAN IS APPROVED BY THE COC AND IS PENDING BEFORE THE AA FOR APPROVAL: NCLT MUMBAI REITERATES

The National Company Law Tribunal, Mumbai Bench, while adjudicating an application under Section 60(5) of Insolvency and Bankruptcy Code, 2016 (IBC, 2016) in Bank of Maharashtra vs DS Kulkarni Developers Ltd. has reiterated that new claims cannot be admitted when the resolution plan has been approved by the CoC and is pending before the Adjudicating Authority for approval.

The Tribunal observed that the Authorized Representatives of the Applicant got bail on 18.11.2022. The contention that the Applicant were not able to submit the documents to the Resolution Professional in time as their Authorized Representative and Key Personnel were in jail was not tenable. It was observed that nothing prevented the officials

INSOLVENCY LAW

The Natioof the Applicant from submitting the documents even though the Authorized Representative of the Applicant were in jail. It was further observed by the Tribunal that the resolution plan has been approved by the CoC and has been submitted before the Adjudicating Authority for its approval, which has also reserved its order. It was not desirable to entertain such claims when the resolution plan is pending for approval before the Tribunal

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6. PRINCIPLE OF COMMERCIAL WISDOM DOES NOT VALIDATE A DECISION TAKEN BY COC IN CONTRAVENTION OF LAW : SUPREME COURT

The Supreme Court has held that the principle of 'Commercial Wisdom' of the Committee of Creditors (CoC) cannot brush aside the shortcomings of the CoC in cases where decision making was done in contravention to a law which is in force for the time being. The Bench comprising, while adjudicating an appeal filed in M.K. Rajagopalan v Dr. Periasamy Palani Gounder & Anr., has upheld the NCLAT's order whereby the Successful Resolution Applicant was declared ineligible in terms of Section 88 of the Indian Trusts Act, 1882, since he had submitted two resolution plans, one in individual capacity and one in the capacity of Managing Trustee of the Trust.

On the aspect of commercial wisdom of CoC in approval of resolution plan, the Bench observed that the principles underlying the decisions of this Court respecting the commercial wisdom of CoC cannot be over-expanded to brush aside a significant shortcoming in the decision making of CoC when it had not duly taken note of the operation of any provision of law for the time being in force.

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7. PERSON WHO ONLY ADVANCES AN AMOUNT FOR SUPPLY OF GOODS & SERVICES IS NOT AN "OPERATIONAL CREDITOR": NCLT CHENNAI

The National Company Law Tribunal, Chennai Bench, comprising, while adjudicating an application under Section 9 of Insolvency and Bankruptcy Code, 2016 (IBC, 2016) in Mr.V. Umadevi vs Kumarna Gin & Pressing Pvt. Limited has held that the payment of advance amount to receive the supply of goods and services from

the Corporate Debtor does not come within the ambit of Operational Debt. It was observed by the Tribunal that it was not the Operational Creditor which was providing any goods or services to the Corporate Debtor. It was infact the Corporate Debtor supplying the goods to the Operational Creditor. Thus the Applicant was not an "Operational Creditor". Reliance was placed on the NCLAT Judgment of Kavita Anil Taneja vs ISMT Ltd wherein it was held that a person who has not supplied goods or services but has advanced an amount to receive supply of goods would not come within the ambit of "Operational Creditor." It was further observed that there was no written agreement or material record to show entitlement of interest from the Corporate Debtor. The principle amount due and payable was Rs. 91,90, 827. Thus the threshold of Rs. 1 crore was not fulfilled.

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8. ADVANCE PAID TOWARDS TRANSFER OF LEASEHOLD RIGHTS IN AN IMMOVABLE PROPERTY IS NOT AN OPERATIONAL DEBT: NCLT MUMBAI

The National Company Law Tribunal, Mumbai Bench, while adjudicating an application under Section 9 of Insolvency and Bankruptcy Code, 2016 (IBC, 2016) in RSM Infra Partners vs Siddhivinayak Skyscrapers Private Limited has held that an amount paid as advance towards an agreement of transfer of leasehold rights in an immovable property does not come within the ambit of Operational Debt.

The Tribunal observed that the amount of debt claimed in default is an amount paid as advance towards an agreement of transfer of leasehold rights in an immovable property. The debt has arisen due to failure of the Corporate Debtor to transfer the leasehold rights. Thus the agreement is for purchase of leasehold rights in an immovable property. The immovable property is neither a good, nor a service nor a claim for repayment of dues arising under any law. Thus the amount claimed does not for part of an Operational Debt.

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INTELLECTUAL PROPERTY LAW

BY DHIREN GUPTA

1 BOMBAY HIGH COURT REFUSES INTERIM RELIEF TO PHONEPE IN TRADEMARK INFRINGEMENT SUIT, SAYS CONTRADICTORY STANDS TAKEN ON MEANING OF 'PE'

The Bombay High Court refused to grant interim relief to PhonePe for alleged infringement of its trademark "PhonePe" by Resilient Innovations' trademark "postpe". The bench cited contradictions between PhonePe's stand taken before the Delhi High Court and the Bombay High Court regarding the meaning of the term "Pe". It appeared that the endeavour of the plaintiff was to claim that, 'pe' may connote 'payment' but, in its registered trademark, it refers to the colloquial Hindi term 'on', thereby further alleging that the defendant by using 'pe' has sought to come as close as possible to the registered trademark of the plaintiff. The clear contradiction in the stands taken by the plaintiff in respect of its own registered trademark in different legal proceedings, shows that it has tried to obtain interim reliefs by shifting its stands, which appear to be mutually inconsistent, is what the court opined.

The court further held that goodwill and prior use in itself is not sufficient for interim relief for passing off action, as the plaintiff failed to make out a prima facie case that the defendant has copied the central, essential, or fundamental features of its registered trademark.

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2. DELHI HIGH COURT PERMANENTLY RESTRAINS RAJASTHAN-BASED RESTAURANT FROM USING 'SADDA PIND' MARK, ASKS IT TO PAY ₹2 LAKH COSTS TO NGO

The Delhi High Court has permanently restrained a Rajasthan-based restaurant from using the mark "Sadda Pind", which is registered in favour of a famous tourist place in Punjab. The bench decreed the suit filed by JDM Heritage Lawns Heritage Private Limited after the defendant, undertook not to use "SADDA PIND" mark for his restaurant. It was the case of the plaintiff entity that it is the owner of registered trademark "Sadda Pind." The suit sought to restrain the defendant, who runs "Sadda Pind Restaurant", from the "brazen acts" of infringement, passing off, unfair competition and misuse of the "Sadda Pind" name and logo.

Observing that a defendant who behaves in such a fashion cannot be let off lightly, the court said that Chawla is not merely guilty of initial infringement but also of "continuous and obdurate insistence" on persisting with its infringing activity despite several opportunities to discontinue the same. In the process, the plaintiff has been dragged into an unnecessary litigation and precious court time has been wasted. There has also been contumacious disobedience of the injunction order dated 7th October 2022 which ought, of rights, to expose the defendant to punitive action under Order XXXIX Rule 2A of the CPC, is what the court said.

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3. ADVERTISER CAN INDULGE IN HYPERBOLE BUT CANNNOT CLAIM COMPETITOR'S PRODUCTS AS BAD OR SUBSTANDARD: DELHI HIGH COURT

The Delhi High Court has observed that an advertiser can indulge in puffery and hyperbole to reflect its product in a good light, however, it is not open for an advertiser to claim that the product of its competitor is bad, substandard or its use would be detrimental to the interest or well-being of the customers. The division said that while comparative advertisement is permissible, it cannot disparage the products of the competitors.

Observing that the balance of convenience was in favour of Reckitt and that a false advertisement campaign would cause irreparable loss to it, the court said: Given the nature of the controversy and the facts, the learned Single Judge has not interdicted HUL from broadcasting the impugned videos but merely directed that it remove all references to Rekitt's product and the bottle representing ordinary toilet cleaners as the same is identifiable with Reckitt's product – Harpic.

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4. ASSIGNMENT OF TRADEMARKS SHALL NOT TAKE EFFECT UNLESS ASSIGNEE APPLIES TO REGISTRAR U/S 42 WITHIN MAXIMUM 9 MONTHS: CALCUTTA HIGH COURT

The Calcutta High Court recently restrained an assignee to use the trademarks made under the assignment of trademarks on the ground that the assignee did not apply to the Registrar within the maximum time frame of 9months prescribed under Section 42 of the Trade Marks Act, 1999.

The Court observed that the official liquidator (respondent no. 7) wrote to the Trade Mark Registry on June 29, 2021 requesting the latter to maintain status quo with regard to the trademarks and not entertain any request for transfer of the trade marks from the erstwhile promoters of the company in liquidation. However, the Court noted that the trade marks were registered in the name of the respondent no. 6 on January 18, 2022 despite the Registry being put on notice that the Official Liquidator has stepped into the shoes of the respondent no. 3 company. Thus, the Court restrained the respondent no. 6 from using the said 7 trademarks till the matter is heard out on affidavits.

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5. DECEPTIVELY SIMILAR TO MANKIND'S MARK: DELHI HIGH COURT DIRECTS REMOVAL OF 'NIKIND' MARK FROM TRADEMARKS REGISTER

The Delhi High Court has directed removal of a registered "Nikind" mark from the register of trademarks observing that it was identical and deceptively similar to "Nimekind" mark owned by Indian pharmaceutical and healthcare products company Mankind Pharma Limited. The bench observed that the adoption and use of the trademark "Nikind" by a trading entity is very similar to the trademark "Nimekind" and is likely to create confusion in the market.

The court opined that the Respondent has failed to rebut the contention of the petitioner that the impugned trademark was registered without any bonafide intention on the part of the registered proprietor to use the same in relation to the products covered by the registration and there has been no use of the impugned trademark in relation to the products upto a date of three months before the date of the rectification application. Hence, the mark is liable to be removed in terms of Section 47(1)(a) of the Act.

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6. BOMBAY HIGH COURT REFUSES URGENT HEARING TO REPUBLIC TV IN 100 CRORE TRADEMARK INFRINGEMENT SUIT AGAINST TELUGU CHANNEL RTV NEWS

Observing that Telangana based Rayadu Vision Media Limited was yet use a disputed logo on its channel, the

INTELLECTUAL PROPERTY LAW

Bombay High Court refused an urgent hearing to ARG Outlier Media Private Limited owner of Republic TV in a copyright infringement suit. The bench posted the suit filed by ARG to June 5, 2023 with liberty to approach the High Court during the vacation in case of an urgency. In the suit filed in March, ARG sought a perpetual injunction against Rayudu Vision Media Ltd from using the trade mark 'RTV News Network', logo 'R.', and sought Rs. 100 crore in damages. ARG claimed that it was incorporated in 2016 and was running three different channels in three languages namely, Republic TV, Republic Bharat and Republic Bangla.

However, Senior Counsel Sharan Jagtiani along with Advocate Hiren Kamod claimed that they had filed an application before the Ministry of Information and Broadcasting for permission for up-linking and down-linking, using the new logo. However, ARG has objected to the same before the said Ministry and the matter is pending. As on today, the company has not started using the logo in the context of its satellite news channel, they submitted

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7. DELHI HIGH COURT ORDERS PERMANENT INJUNCTION AGAINST USE OF 'MISS INDIA' MARK BY PLANET MEDIA GROUP IN CASE FILED BY TIMES GROUP

The Delhi High Court has restrained the use of "Miss India" by Planet Media Group in relation to the beauty pageants organized and promoted by it under the mark "MISS INDIA WORLD" and "TAJ MISS INDIA/MISS INDIA TAJ". The bench remarked that Planet Media had been dishonestly using "MISS INDIA"- the registered mark of Bennett, Coleman and Company, in the title of the beauty pageants organized by the former, including on its websites and social media accounts.

While concluding that Planet Media had infringed and passed off Bennett Coleman's marks as its own, the court decreed the suit in its favour and passed a permanent injunction restraining the infringement of its registered mark. "In view of above, Plaintiffs have established their right to permanent injunction for restraining infringement," the court said, while awarding costs to Bennett Coleman.

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MERGERS & ACQUISITIONS

BY ISHANI CHAKRAB

1. OIL MINISTRY WORKING ON PROPOSAL TO MERGE MRPL WITH HPCL

The oil ministry is drafting a proposal to combine the two publicly traded subsidiaries of Oil and Natural Gas Corp (ONGC), Mangalore Refinery and Petrochemicals Ltd (MRPL) and Hindustan Petroleum Corp Ltd (HPCL). When ONGC bought HPCL from the government five years ago, the notion of a merger between MRPL and HPCL was discussed, but little progress was achieved. According to the aforementioned sources, the ministry is currently pressing for the merger, which will probably involve a share exchange.

They claimed that there would be no financial outlay and that HPCL would most likely issue new shares to MRPL owners as part of the merger. The ONGC and HPCL are MRPL's promoters.
The public owns 11.42% of MRPL, followed by HPCL at 16.96% and ONGC at 71.63%. Through the acquisition, ONGC's present 54.9% holding in HPCL will be dramatically increased, lowering the free float. The oil ministry will probably ask the cabinet for approval of the proposed combination of HPCL and MRPL. ONGC, HPCL, MRPL, the oil ministry, and ONGC all declined to comment. The HPCL-MRPL combination might need to wait until next year, according to one individual, who argued that the rule calls for a minimum two-year buffer between any two mergers a business undertakes. Last year, MRPL completed the merger of its subsidiary, OMPL, with itself.

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2. ZEE-SONY MERGER LIKELY IN FIRST HALF OF FY24 AFTER NCLT DISMISSES IDBI BANK INSOLVENCY PLEA

Zee Entertainment's merger with Sony Pictures Networks India (SPNI) is expected in the first half of FY24 especially after National Company Law Tribunal (NCLT) dismissed IDBI Bank's insolvency plea against Zee. Analysts note that this is a positive sign for the merger as the verdict on this case was crucial for the merger. The Mumbai bench of NCLT dismissed IDBI Bank's insolvency plea on May 19. In December last year, the bank filed an insolvency resolution petition in NCLT against the entertainment company for the default of over Rs 149 crore

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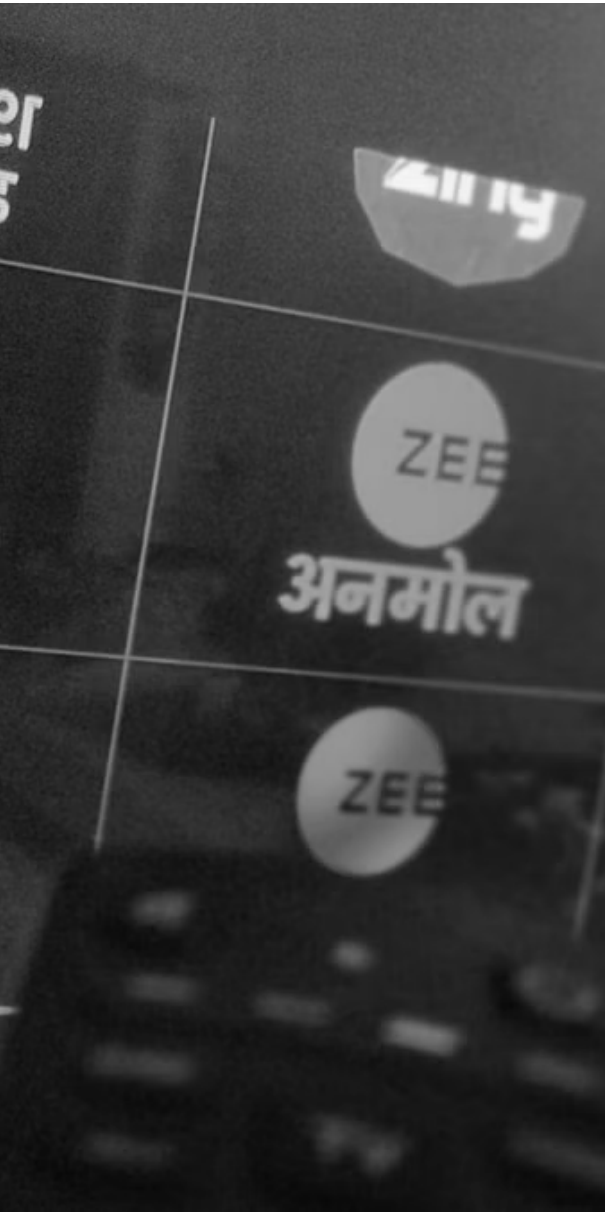
MERGERS & ACQUISITIONS



3. CCI CLEARS MERGER OF CREDIT SUISSE GROUP WITH UBS GROUP

Fair-trade regulator Competition Commission of India (CCI) on Thursday cleared the proposed merger of Credit Suisse Group AG with UBS Group AG.Both Credit Suisse Group AG (Credit Suisse) and UBS Group AG (UBS) are multinational investment banks and financial services companies founded and based in Switzerland. The transaction entails UBS' proposed acquisition of Credit Suisse by way of an absorption merger with UBS being the surviving legal entity, according to CCI.

Post transaction, all Credit Suisse's assets, liabilities, and contracts will be transferred to UBS in their entirety. The proposed transaction has been necessitated due to Credit Suisse's financial difficulties, CCI said. Deals beyond a certain threshold require approval from the regulator, which keeps a tab on unfair business practices in the marketplace.

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4. POST MERGER PVR PICTURES IS NOW PVR INOX PICTURES

PVR Pictures has been renamed as PVR INOX Pictures following the merger of PVR and Inox Leisure. The merged entity is operating 361 cinemas with 1,689 screens across 115 cities till the end of FY23 in India and Sri Lanka. PVR Pictures was the film production and distribution arm of PVR Group. According to a statement, PVR INOX Pictures intends to increase investments in content acquisition for the Indian market, and generate further opportunities for under-represented storytellers and independent creators. PVR-INOX Ltd has been created after the merger of two leading cinema brands PVR Ltd and INOX Leisure. The merger was effective from February 6, 2023.

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5. ADITYA BIRLA FASHION TO RAISE UP TO ₹800 CRORE FOR TCNS ACQUISITION

Aditya Birla Fashion & Retail (ABFRL) will raise ₹700-800 crore in debt to help fund the acquisition of TCNS Clothing, a top company official said. As part of the deal, ABFRL will make a conditional open offer to

MERGERS & ACQUISITIONS

acquire up to 29% stake at ₹503 per share from public shareholders and acquire the remaining stake from the founder promoters to reach an overall shareholding of 51% in TCNS.

Post the transaction, TCNS will be merged with ABFRL and public shareholders of TCNS will receive 11 shares of ABFRL for every six shares that they hold in TCNS. With this acquisition, ABFRL's ethnic wear portfolio is expected to reach ₹5,000 crore in the next three years with TCNS contributing about ₹2,000 crore.

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6. AIRTEL SIGNS PACT TO MERGE SRI LANKA OPERATIONS WITH DIALOG AXIATA

Telecom operator Bharti Airtel on Tuesday said Dialog Axiata Plc, Axiata Group Berhad and Bharti Airtel Limited (collectively "the parties"), have entered into a binding term sheet to combine operations of Bharti Airtel Lanka (Private) Limited, Airtel's wholly-owned subsidiary with Dialog, a subsidiary of Axiata Group Berhad. Airtel will get a stake in telecom operator Dialog under the proposed transaction that will represent the fair value of Airtel Lanka. Airtel would accordingly be issued new shares in Dialog upon completion of the transaction.The proposed transaction is subject to signing of definitive agreements and necessary closing conditions, including applicable regulatory and shareholder approvals. The parties will issue further announcements in due course should there be any material developments.

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7. GODREJ CONSUMER PRODUCTS INKS PACT TO BUY RAYMOND CONSUMER CARE'S FMCG BUSINESS FOR RS 2,825 CRORE

Godrej Consumer Products on Thursday announced that it has acquired the FMCG business of Raymond Consumer Care Limited, which includes brands like Park Avenue, Kamasutra and Premium, for Rs 2,825 crore. The deal would be completed by May 10 and the deal consideration is in cash. The deal is expected to strengthen GCPL's men grooming business and to provide the company space in the fragrance and sexual

wellness categories. GCPL currently operates in hair care, home care and personal care categories. According to a regulatory filing RCCL's reported sales for the financial year 2023 was Rs 622 crore, as against Rs 522 crore in FY22 and Rs 411 crore in FY21. Raymond, which owns 47.66 per cent stake in Raymond Consumer Care as of financial year 2022, has been looking at selling the FMCG arm for a few years.

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8. AIRWALLEX EXPANDS TO ISRAEL, SEEKS CYBER SECURITY ACQUISITIONS

Global payments firm Airwallex said on Tuesday it was opening an office in Israel this week as part of plans to expand in the Middle East and globally. Founded in Australia, the financial technology company said its Israeli operations, which will begin on Thursday, would be a first step towards expanding across Europe, the Middle East and Africa in 2023. It already serves a number of Israeli businesses. Or Liban, who will head the company's Israel operations, said the country's high-tech ecosystem, in which startups look to be global from the outset, was a main factor in expanding to Tel Aviv. Airwallex is valued at $5.5 billion and has raised $900 million from investors including Salesforce Ventures, Sequoia, Tencent, Square Peg, Lone Pine Capital and 1835i and processes more than $50 billion in transactions a year.

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BANKING & FINANCE

BY QAZI AHMAD MASOOD

1. RBI STARTS CONSIDERING PROSPECTIVE BUYERS FOR IDBI BANK

According to three sources with knowledge of the situation who spoke to Reuters, the Reserve Bank of India (RBI) has started evaluating at least five potential bidders interested in acquiring a majority stake in state-owned IDBI Bank Ltd. Two of the persons, who spoke on the condition of anonymity because the conversations are private, said that among the parties that have submitted expressions of interest are Kotak Mahindra Bank, Prem Watsa-backed CSB Bank, and Emirates NBD. Requests for comment from the IDBI, Kotak Mahindra Bank, CSB Bank, RBI, and Finance Ministry went unanswered.

An Emirates Bank representative declined to comment. As part of a larger privatisation plan, the stake sale in the lender is the first significant disposal across state-owned banks and may net the government 300 billion Indian rupees ($3.66 billion) at the current market valuation. Along with the state-owned Life Insurance Corp of India (LIC), which will sell 30.24% of its 49.24% interest in the bank, the government, which holds 45.48% of IDBI Bank, is planning to sell off a 30.48% stake in the lender. Since the government will keep a 15% share in IDBI Bank after the privatisation and LIC, a government business, will have a 19% stake, two of the persons claimed that potential investors have questioned the level of government control in the bank.

One of the individuals stated, "The government does not intend to have any management control." In the event that a written submission to that effect is required, the government will make a decision. According to business consultant Ashvin Parekh, buyers with an existing bank may eventually be obliged to consolidate the operation with IDBI due to RBI laws prohibiting the same investor from owning two banking firms.

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2. PIL SEEKING 'UNIFORM BANKING CODE' TO REGULATE FOREIGN EXCHANGE TRANSACTIONS: DELHI HIGH COURT REQUESTS RBI'S RESPONSE

The introduction of a uniform banking code for foreign exchange transactions to prevent the creation of black money and benami transactions was requested in a petition to the Delhi High Court, and the RBI was urged to answer. Attorney Ashwini Kumar Upadhyay's appeal was heard by Chief Justice Satish Chandra Sharma and Justice Subramonium Prasad, who gave RBI six weeks to respond to the petition. The appeal brought up the

subject of systemic flaws regarding the transfer of foreign funding that separatists, Naxals, Maoists, fundamentalists, and terrorists may use.

In order to prevent foreign currency from being deposited in Indian banks via the Real Time Gross Settlement (RTGS), National Electronic Funds Transfer (NEFT), and Instant Money Payment System (IMPS), Mr. Upadhyay has asked for guidance. He claimed that it was also being used to pay extreme organisations, fundamentalists, terrorists, Naxals, Maoists, traitors, conversion mafias, and separatists, as well as hurting India's foreign exchange reserves. According to the petition, all deposits into Indian banks, including those made at foreign bank branches, must follow the same format, regardless of whether they are payments for exports made via current accounts, salaries made via savings accounts, donations made via current accounts for charities, or service fees paid via accounts of YouTube stars. The format ought to be the same whether it is converted by Western Union, National Bank, or a foreign bank with offices in India, according to the argument.

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3. PIL CONTESTING NOTIFICATIONS ALLOWING EXCHANGE OF 2000-DOLLAR NOTES WITHOUT ID PROOFDISMISSED BY THE DELHI HIGH COURT

A complaint against notices allowing the exchange of Rs 2,000 notes without a demand slip and identification was dismissed by the Delhi High Court. The appeal, which questioned the RBI and SBI notices authorising the exchange of Rs 2,000 banknotes without a request slip and identification verification, was denied by a panel consisting of Chief Justice Satish Kumar Sharma and Justice Subramonium Prasad. According to petitioner and attorney Ashwini Kumar Upadhyay, a sizable sum of money has either ended up in a person's locker or has been stored away by separatists, terrorists, Maoists, drug smugglers, mining mafias, and corrupt individuals. The argument put out was that the notifications violated Article 14 of the Constitution and were arbitrary and illogical. The Reserve Bank of India (RBI) defended its notification before the high court, claiming that it was a statutory procedure rather than demonetisation.

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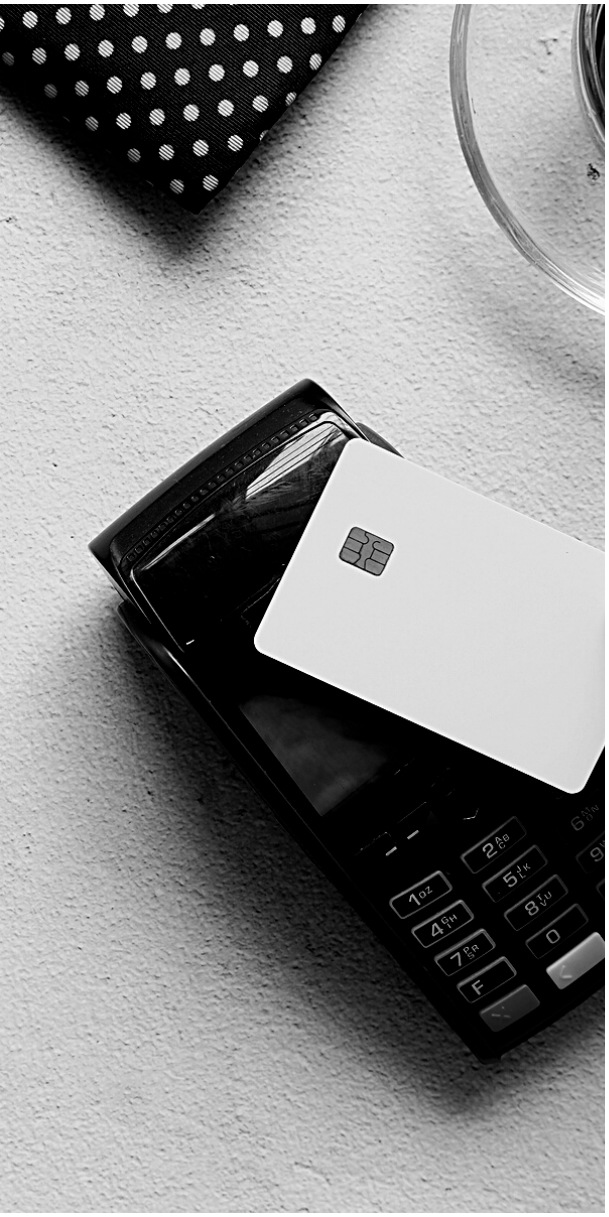
BANKING & FINANCE



4. RBI REQUESTS THAT BANKS ENSURE A FULL TRANSITION AWAY FROM LIBOR BY JULY.

Banks and other regulated organisations were instructed by the Reserve Bank of India (RBI) to facilitate a seamless transition away from the London Interbank Offered Rate (LIBOR) as of July 1. According to RBI, Friday's full shift from LIBOR is a big event in the world's financial markets that needs ongoing attention from all stakeholders to reduce operational risks and ensure a smooth transition. The central bank recommended banks and other financial institutions against entering into new financial arrangements that were related to either the Mumbai Interbank Forward Outright Rate (MIFOR) or the LIBOR.

Since December 2021, banks in India have been urged to conduct transactions using widely used alternative reference rates (ARR). The RBI stated that it will keep track of banks' and financial institutions' efforts to ensure a seamless transition away from LIBOR. After June 30, The Financial Benchmarks India Pvt. Ltd. will stop publishing MIFOR. In 2021, LIBOR settings will no longer be used, according to a UK financial watchdog's announcement. This decision was made in response to several claims of fraud.

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5. AFTER BEING TAKEN OVER BY AUTHORITIES, FIRST REPUBLIC BANK TO BE PURCHASED BY JPMORGAN

First Republic Bank will be acquired by PMorgan Chase & Co. after regulators took control of the ailing regional banking, making it the third significant U.S. institution to fail since March of this year. According to a statement from the California Department of Financial Protection and Innovation, JPMorgan would "assume all deposits, including all uninsured deposits, and substantially all assets" of First Republic. The US Federal Deposit Insurance Corporation had been named as the bank's receiver by the California regulatory body. "Subject to applicable limits," the DFPI stated in its statement, "Deposits are federally insured by the FDIC."

This occurs after regulators reduced the likelihood of saving the San Francisco-based company and after efforts by the private sector failed to produce a transaction. Banks have previously been hesitant to provide funds to the distressed regional institution, but some were reportedly interested in making proposals if it went up for auction. In March, a group of 11 banks made a $30 billion deposit into First Republic to buy it some time to find a solution. According to the California regulator, First Republic Bank had roughly $229.1 billion in total assets as of April 13, 2023, and $103.9 billion in total deposits.

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SECURITIES RIGHTS

BY QAZI AHMAD MASOOD

1. REGISTERED FPIS GRANTED DIRECT MARKET ACCESS BY SEBI IN EXCHANGE FR TAKING PART IN ETCDS.

The market regulator Securities and Exchange Board of India (SEBI) approved on Wednesday extending direct market access to registered Foreign Portfolio Investors (FPIs) with immediate effect in order to enhance institutional involvement in Exchange Traded Commodity Derivatives (ETCDs). Without the need for manual broker intervention, Direct Market Access (DMA) enables a broker's clients to place orders by directly accessing the exchange trading system through the infrastructure of the broker. Additionally, DMA offers brokers benefits like direct control over orders, quicker order execution, less risk of errors from manual order entry, secrecy, lower impact costs for large orders, and easier implementation of hedging and arbitrage techniques. "It has been decided to allow stock exchanges to extend DMA facility to FPIs for participation in ETCDs," the market regulator stated. "Based on representations received for enabling DMA facility to FPIs in ETCDs and deliberations by Commodity Derivatives Advisory Committee (CDAC) of SEBI."

This authority is subject to a number of requirements, including risk management, operational standards, client authorization, broker-client agreements, and the DMA application process. The SEBI continued, "The provisions of circular issued on September 29, 2022 permitting FPIs to participate in ETCDs shall remain applicable." To boost market depth and liquidity, SEBI permitted FPIs to engage in ETCDs beginning in September 2022. The regulator initially gave FPIs permission to take part in derivative contracts and indexes containing non-agricultural commodity with cash settlement. The regulatory body had already permitted institutional investors to engage in the ETCD market, including Category III Alternative Investment Funds (AIFs), Portfolio Management Services, and Mutual Funds.

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2. SEBI WANTS TO SHORTEN THE IPO LISTING PERIOD TO 3 DAYS.

The time it takes for shares to be listed on stock exchanges after initial public offers (IPOs) close should be shortened from six days to three days, according to a proposal made by the capital markets regulator SEBI. According to SEBI's consultation document, "Issuers will have quicker access to the capital raised, improving the

ease of doing business, and investors will have the opportunity to have early credit and liquidity of their investment." The markets regulator developed Unified Payment Interface (UPI) in November 2018 as a new payment channel for retail investors with Application Supported by Blocked Amount (ASBA) and mandated listing within six days of the closure of the IPO (T 6). The time period from the date of issue closing to the date of listing of shares through initial public offerings would be shortened from six to three days, according to a proposal made by SEBI in its consultation record (T 3). A R Ramachandran, Co-Founder & Trainer-Tips2trades, commented on the news by saying, "The plan to cut the listing duration to 3 from 6 days is a welcome indicator for investors. It shortens the wait for an improved listing, which lessens speculation about GMP (grey market premium) prices.

Additionally, it makes it possible for investors who weren't given shares to purchase the stock earlier than anticipated. A standard total expense ratio (TER) for all mutual funds (MFs) has been SEBI in the interim. The consultation record, according to SEBI, will serve as the foundation for final recommendations following the receipt of input from stakeholders by June 1.

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3. MADHABI PURI BUCH, CALLS ON FUND COMPANIES TO SELF-REGULATE

Madhabi Puri Buch, the SEBI chairman, urged the mutual fund sector to self-regulate and take action against wrongdoing by individuals. According to her, the regulator will "no choice but to come down as a hammer" if SEBI discovers that specific misdeeds by fund firms have gone unpunished. This might have an effect on the entire business. Individual misconduct is the largest threat to the expansion of the mutual fund business, according to Buch. "Do the right thing. The SEBI chief told those in charge of the fund industry, "Not what is easy. She was speaking at the opening of Amfi's new office, which represents the mutual fund industry. She urged the fund industry to self-regulate or SEBI would have to become involved.

Buch emphasised, however, that the fund industry was secure and that a few recent regulatory adjustments had equipped it to grow upon that superstructure. The industry presently oversees approximately Rs 41 lakh crore in investor funds, and she predicted that it wouldn't be long before it managed Rs 100 lakh crore in AUM. The recent regulatory ban on Viresh Joshi, the former dealer for Axis MF, served as the backdrop for

the SEBI chief's harsh criticism of the fund industry. Joshi was front-running the fund's trades during the epidemic, when people from all industries were working from home, to generate unauthorised profits for himself and his family. Joshi has been fired by Axis MF, but some industry observers believe the move was made too late. Chandresh Nigam, the MD of Axis MF, was also required to depart the fund firm in March. SEBI stated in its report on Joshi that it was looking into numerous other people in connection with the same matter.

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4. THE REGULATORY FRAMEWORK FOR FVCIS REGISTRATION IS BEING PROPOSED FOR REVISION BY SEBI.

SEBI, a regulator of the capital markets, recommended to simplify the legal requirements for foreign venture capital investors' (FVCIs') registration. According to the guidelines established for FPIs (Foreign Portfolio Investors), SEBI has proposed in its consultation paper that the procedure for granting registration to FVCIs and handling additional post-registration references may be assigned to designated depository participants (DDPs). A DDP should be contacted by a candidate seeking registration as an FVCI in order to take advantage of its services and receive a registration certificate. SEBI is currently responsible for handling registration applications for FVCIs and any associated due diligence.

The regulator has also advised that the qualifying requirements for FVCIs be reduced to match those set forth for FPIs. Additionally, it was suggested that FVCIs keep their investments in demat form. SEBI, the Securities and Exchange Board of India, has extended the deadline for public comments on the plans to May 31. FVCI is a foreign-based investor with offices in both India and other countries. It specialises in unlisted securities of venture capital funds and venture capital undertakings. There are 269 FVCIs registered with SEBI as of March 2023. Additionally, during the time, FVCIs directly invested a total of Rs 48,286 crore in investee companies.

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5. SEBI INTRODUCES A TRAIL MODEL FOR DISTRIBUTION COMMISSION

The market regulator SEBI has requested alternative investment funds (AIFs) to offer an option of "direct plan"

for investors and implemented a trail model for distribution commission in order to increase transparency in costs and stop misselling. Additionally, the regulator released instructions for excluding an investor from an AIF investment. The regulator had earlier found inconsistencies and inadequate information in the Private Placement Memorandum (PPM) about specific business practises. SEBI stated in two separate circulars that the new guidelines are intended to give investors options when investing in AIFs, bring transparency to expenses, and reduce misselling.

The framework for direct plans will take effect on May 1; however, the provisions for excluding an investor from an AIF investment will take effect right away. In regards to AIFs, SEBI stated that "schemes of AIFs shall have an option of 'Direct Plan' for investors" and that through such direct plans, investors will have the choice to join in an AIF without paying a distribution fee or placement charge. AIFs must make sure that any investors who contact them through a registered intermediary, who is separately billing them for services such advisory fees or portfolio management fees, are only accepted into the programme through direct plans.

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6. NEW SEBI REGULATION PROHIBITS STOCK BROKERS FROM MAKING BANK GUARANTEES USING CUSTOMER FUNDS

According to a new circular released by market regulator SEBI, stock brokers and clearing members won't be permitted to provide bank guarantees using clients' funds as of May 1, 2023. By September 30, 2023, any bank guarantees that have already been established using customer cash must be terminated, according to the Securities and Exchange Board of India. The action tries to prevent the exploitation of investment funds. "At the moment, stock brokers and clearing members promise their clients' money with banks, who then offer bank guarantees to clearing organisations for larger sums. According to SEBI, this implied leverage puts the market and particularly the client's funds at risk.

The proprietary funds of stock brokers and clearing members in any segment, as well as the proprietary funds of stock brokers deposited with clearing members in the role of a customer, will not be subject to the new set of restrictions, nonetheless. Additionally, the market watchdog has instructed stock exchanges and clearing corporations to assess the current status of bank guarantees issued with client funds by brokers and clearing

members and to keep an eye on the winding down process to ensure that the framework is implemented without interfering with client services. Read More

7. SEBI APPROVES ASBA-LIKE MECHANISM TO SAFEGUARD INVESTORS AND BOOST PROFITS

Investor protection features are included in the proposed facility, which is a secondary market version of the Application Supported by Blocked Amount (ASBA). The primary market now operates with money trapped in investor accounts generating interest until initial public offerings (IPO) issuers accept subscriptions. The quantity of parties and variety of transactions involved make it more difficult to replicate this for the secondary market. In the secondary market, investors place a variety of orders for various securities with or without leverage over various time horizons. For a system like ABSA, incorporating all these variables requires escrow agreements between counterparties in a dynamic setting. Although the technological difficulty may be great, it is not insurmountable. In trying to offer such a framework to investors, the Securities and Exchange Board of India (SEBI) is on the correct track.

Money used for trading can be transmitted directly to clearing companies through the Unified Payments Interface (UPI), who can subsequently settle with brokers. The possibility of abuse is reduced, and the consequences of broker default are contained thanks to the flushing out of money sitting with brokers. Additionally, it provides a mechanism for direct settlement, eschewing intermediary pool accounts. Thus, SEBI has carried out its regulatory mandate to safeguard both the cash and securities of investors. Brokerages that stand to lose float income as a result of upstreaming client funds to clearing firms have been given relief by SEBI. Brokerages are permitted to upstream customer funds in the form of mutual fund units or fixed deposit liens.

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TAXATION LAW

BY ARNAV MAHAJAN

1. POWER TO COLLECT ENTERTAINMENT TAX NO LONGER VEST IN THE STATE AFTER 101ST AMENDMENT: PATNA HIGH COURT

The Patna High Court in the case of M/s DEN Networks Limited v. the State of Bihar has held that the power to collect entertainment tax would no longer vest in the state after the 101st Amendment. The Hon'ble Court further observed that the 101st Constitution Amendment Act substituted Entry 62 of List II to the extent that the power to levy and collect entertainment tax was bestowed only upon local self-government institutions and not the state.

Earlier the petitioner was before the Court when an assessment order was passed, based on the number of set-top boxes recorded in the register of the petitioner. The Court found that the Assessing Officer has resorted to a short cut method to extract money from the petitioner by resorting to a special mode of recovery without even identifying the subscribers for the purpose of such levy. The bench held that the tax as it was levied on entertainments under the Bihar Entertainment Tax Act, 1948 cannot survive after the 101st Amendment since it is not levied and collected by a local self-government institution.

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2. CBDT NOTIFIES THE PROCEDURE TO COMPUTE 'NET WINNINGS' FROM ONLINE GAMES

The Central Board of Direct Taxes (CBDT) has notified the Income Tax (Fifth Amendment) Rules, 2023. The Board has notified a new Rule 133, which prescribes a manner for computing "net winnings" from online games under sections 115 BBJ and 194BA of the Income Tax Act, 1961.

It was clarified that whenever there is payment to the user in kind or in cash, or partly in kind and partly in cash, which is not from the user account, the provisions of this rule shall apply to calculate net winnings by deeming that the money equivalent to payment has been deposited as a taxable deposit in the user account. Whenever there are multiple user accounts of the same user, each user account shall be considered for the purposes of calculating net winnings, and the deposit, withdrawal, or balance in the user account shall mean the aggregate of the deposit, withdrawal, or balance in all user accounts.

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TAXATION LAW

3. KARNATAKA HIGH COURT QUASHES GST INTIMATION NOTICE DEMANDING RS. 21,000 CRORES AGAINST GAMESKRAFT

The Karnataka High Court has quashed the GST Intimation Notice to the tune of Rs 21,000 crore and held that online/electronic/digital Rummy games and other Online/Electronic/Digital games played on Gameskraft's platforms are not taxable as "betting" and "gambling". The court further observed that online, electronic, and digital games, which are also substantially and preponderantly games of skill and not of chance, are also not gambling.

The petitioner, Gameskraft Technologies Pvt. Ltd. (GTPL), is an online intermediary company incorporated in June 2017 that runs technology platforms that allow users to play skill-based online games against each other. The department issued an Intimation Notice under Section 74(5) of the CGST Act, calling upon GTPL to deposit a sum of Rs. 2,09,89,31,31,501 along with interest and penalty. The court held that the terms "betting" and "gambling" under Entry 6 of Schedule III of the CGST Act must be given the same interpretation given to them by the courts, in the context of Entry 34 of List II of the Seventh Schedule to the Constitution and the Public Gambling Act, 1867

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4. PAYMENT OF COMPENSATION TO CSA UNDER TERMINATION AGREEMENT IS NOT TAXABLE UNDER INDIA-SOUTH AFRICA DTAA, BCCI NOT LIABLE TO DEDUCT TDS: ITAT

The Mumbai bench of the Income Tax Appellate Tribunal (ITAT) has held that payment of compensation to Cricket South Africa (CSA) under the Termination Agreement is not taxable under the provisions of the India-South Africa DTAA. The Bench further observed that since the payment is not chargeable to tax in India in the hands of CSA, there is no obligation on the assessee to deduct tax at source under Section 195.

The assessee derives substantial income from the conduct of cricket tournaments and matches and is regularly assessed tax in India. The entire CLT20 Tournament was conducted by the assessee, and all the agreements, including the media/broadcasting rights agreement, in this regard were entered into by the assessee. The assessee paid annual participation fees to CSA and deducted the TDS. The tribunal held that the payment of compensation to CSA is for the termination of the arrangement, which was a profit-making apparatus, and thus

is in the nature of a capital receipt and hence not taxable. Read More

5. BOMBAY HIGH COURT UPHOLDS THE VALIDITY OF GOA TAX ON ENTRY OF GOODS ACT, 2000

The Bombay High Court in the case of M/s Bharti Telemedia Ltd. v. State of Goa has upheld the validity of the Goa Tax on Entry of Goods Act, 2000. The court dismissed the petition and vacated the interim order. The rule in both of these petitions is discharged.

The petitioners/assessee challenged the constitutional validity of the Goa Tax on Entry of Goods Act, 2000, for want of legislative competence and, in any case, for contravening Articles 14, 19(1)(g), 265, 301, and 304(a) of the Constitution of India. The petitioner sought the consequential relief of a refund of entry tax recovered by the state from the petitioners. The petitioners urged that the entry tax be related to the levy of import duties under Entry 41, read with Entry 83 of List I of the Seventh Schedule to the Constitution.

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6. INCOME TAX ACT- AO CAN'T MAKE ADDITIONS TO COMPLETED ASSESSMENTS IN ABSENCE OF INCRIMINATING MATERIALS: SUPREME COURT

The Supreme Court has ruled that no additions can be made by the Assessing Officer (AO) under Section 153A of the Income Tax Act, 1961 in the absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132 A, in respect of completed /unabated assessments.
The assessee argued that if no assessment proceeding is pending on the date of initiation of the search, the AO may consider only the incriminating material found during the search and he is precluded from considering any other material derived from any other source. Per contra, the revenue department pleaded that the AO is competent to consider all the material that is available on record, including any incriminating material found during the search. The court thus upheld that no addition can be made in respect of the completed assessments in absence of any incriminating material found during the search/ requisition.

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TMT LAW

BY ARNAV MAHAJAN

1. GOVT NOTIFIES AMENDED IT RULES RELATED TO OPEN, SAFE AND ACCOUNTABLE INTERNET

The Union Government has notified amendment to the Information Technology (Intermediary Guidelines and Digital Media Ethics code) rules, 2021 related to online gaming and spread of false and misleading information regarding government business. These rules address the twin challenges of catalyzing and expanding online gaming innovation and at the same time protecting citizens from illegal betting and wagering online.

As per the amended rules, it has been made obligatory on the part of intermediaries to make reasonable effort to not host, publish or share any online game that can cause the user harm, or that has not been verified as a permissible online game by an online gaming self-regulatory body/bodies designated by the Central Government. Further, the amended rules now also make it obligatory on the intermediaries to not to publish, share or host fake, false or misleading information in respect of any business of the Central Government. These fake, false or misleading information will be identified by the notified Fact Check Unit of the Central Government.

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2. RELIEF FOR OLA, UBER, RAPIDO AS DELHI HC LIFTS CURBS ON BIKE TAXIS

The Delhi High Court on Friday stayed the public notice and show cause notice issued by the Delhi Transport Department against ride-sharing platforms, such as Uber, and Rapido. The Hon'ble HC directed the transport department not to take any coercive steps against the bike taxi operators till such time that a policy is notified by the state government.

In February 2023, the Delhi Transport Department issued a public notice to stop plying their bike taxi services effective immediately. The app-based aggregators were prevented from plying bike taxis on the road without commercial permits. The transport department had warned that any violation will result in penal action under Motor Vehicle Act, 1988. Terming their services a violation of Motor Vehicle Act, 1988, the Delhi government had warned a punishment for the first offence up to Rs. 5000, and for a second or subsequent offence with imprisonment which may extend to one year with a fine up to Rs. 10,000 beside impounding of the vehicle.

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3. EL SALVADOR PARTNERSHIP TO BUILD $1 BILLION BITCOIN MINING FARM

Volcano Energy, an El Salvador-based public-private partnership, will invest $1 billion in the development of one of the world's largest bitcoin mining farms. The project will start with an initial $250 million, backed by "key Bitcoin industry leaders" in collaboration with renewable energy developers.

A significant portion of the funds will be channelled towards establishing a 241 MW power generation park in the north-western municipality of Metapan. The park, which will use solar and wind energy, will be the power source for the ambitious bitcoin mining operation. The El Salvador government will have "a preferred participation equivalent to 23% of the revenues" in the project, Volcano Energy said, with private investors holding 27%. The remaining 50% will be reinvested back into infrastructure. Bitcoin mining uses high-power computers hooked up to a global network, sucking up massive amounts of electricity in the process. The energy-intensive practice has come under fire from environmentalists who are concerned that it would exacerbate forest loss and climate change.

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4. EGYPT SELLS $121.6 MILLION STAKE IN STATE-CONTROLLED TELECOM EGYPT

Egypt's government sold a 9.5% stake in state-controlled Telecom Egypt for 3.75 billion Egyptian pounds ($121.6 million), breathing life into a privatisation programme that had seemingly stalled. Telecom Egypt's is the second sale of state assets since Prime Minister Mostafa Madbouly promised on April 29 to press ahead with the sales programme and sell assets worth $2 billion by the end of June.
Under a $3 billion, 46-month financial support package signed in December, Egypt promised the International Monetary Fund it would roll back the state's involvement in the economy and allow private companies a much greater role. The two-part sale will reduce the government's stake in Telecom Egypt to 70% from the previous 80%, with the other 20% floating on the Egyptian Exchange. Two local investment banks, CI Capital and Ahly Pharos, were managing the sale. the sale of 162.2 million shares of Telecom

Egypt had been executed for a total 3.75 billion pounds. Read More

4. DOT TO TRAI: WON'T REGULATE CLOUD SERVICE PROVIDERS, BEST REGULATED BY MEITY

The department of telecommunication (DoT) has rejected a proposal by Telecom regulatory Authority of India (TRAI) for DoT to regulate cloud services (CSPs) like Amazon Web Services, Google Cloud, Microsoft Azure, Salesforce and Zoho. Earlier, the Telecom Regulatory Authority of India (Trai) had sent the DoT a proposal to bring such service providers under its regulatory apparatus.

Previously, the firms engaged in the cloud services industry as well as technology and telecom players had expressed their concerns against Trai's recommendations. They had written to the DoT explaining that the services were not in the category of telecommunications. Given the opposition from telecom operators as well as the CSPs, the DoT decided to go against Trai's recommendations. The decision entails that no new policy or regulations for CSPs will be introduced and the existing framework will continue. Also, a number of industry associations had also said that creating an additional regulatory framework will be harmful to investments in the cloud sector.

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ADOPTING A 'MEDIATED' APPROACH TO MANDATORY MEDIATION & THE DRAFT BILL

BY - ARUN RAGHURAM MAHAPATRA & JUGAAD SINGH

INTRODUCTION

In the course of any trade or commercial activity, one is bound to run in to several conflicts. The courts and civil litigation have been the mode of dispute resolution for ages. While bringing such a conflict before the court does have its advantages, in today's day and age, we find that most entities and individuals engaged in commerce are more prone towards amicable, alternative means of dispute resolution which save the parties both time, money and ensure peace of mind. It also allows commercial entities to maintain a good relationship with contracting parties despite commercial disputes. One such process is that of Mediation, which has been a distinct feature of dispute resolution in India, the roots of which can be traced back to introduction of panchayats in our ancient societies. As of March 2022, CJI U.U Lalit said that the Indian judiciary currently faces a backlog of up to 4.70 crore cases, awaiting litigation in courts across India. In order to reduce this burden and take on this daunting task, reference of cases to mediation in hopes of an expedited resolution seems like an extremely viable solution. The addition of Section 89 to the Civil Procedure Code by way of the 1999 amendment act provided recognition to mediation in order to achieve a simple, expeditious and party centric means of dispute resolution. However, recent developments apropos mandatory pre-litigation mediation, which may relieve our overburdened courts, has also led many legal professionals to question the very basics of mediation and the consequences of such legislative actions.

RECENT RULINGS & LEGISLATIONS ON MANDATORY PRE-LITIGATION MEDIATION

The focus of mediation has always been on being voluntary and self-determinative. However, with the introduction of Section 12A of the Commercial Courts Amendment Act of 2018, we have observed that a mandatory status has been conferred upon pre-litigation mediation. This would require all parties in a commercial dispute to initiate mediation proceedings for at least 3 months. The operative word in the provision was "shall" which the court in the case of Patil Automation Pvt. Ltd. V. Rakheja Engineers Pvt. Ltd. construed to be mandatory in nature, thus giving

the amendment "teeth" to ensure that more cases be resolved through the process of mediation.

The SC has relied upon the judicial precedence established in Sharif-ud-Din v. Abdul Ghani Lonein order to determine whether section 12A is mandatory. It was observed that, if, by virtue of non-compliance with the provision, the object of the law is defeated, then in order to remedy the same, it would be regarded as mandatory.

In order to preserve the objective of the Amendment Act, it was necessary to comply with pre-litigation mediation. Therefore, the Court held that the provision of pre-litigation mediation under Section 12A of the Commercial Courts Amendment Act is mandatory in nature.
Apart from the Commercial Courts Act, even the Consumer Protection Act (Sec. 37), the Companies Act (Sec. 442), and the Civil Procedure Code (Sec. 89) have provisions in relation to mediation, although not mandatory. Lastly, as if to take the pro-mediation stance to the apex, the government has come up with a provision of participating in at least 2 mandatory pre-litigation mediation sessions under the Draft Mediation Bill of 2021 (which will be discussed in greater detail below in the upcoming sections).

VOLUNTARY V/S MANDATORY MEDIATION: WHAT IS THE CORRECT WAY FORWARD?

The mandatory mediation framework vis-à-vis the Commercial Courts Act (and Draft Mediation Bill), although does not compel the parties to reach a settlement and only undergo the process of mediation, puts forth certain 'mandatory' criteria to be satisfied before instituting court proceedings. This may feel cumbersome to unwilling parties.

While this method has found some success in other nations, many lawyers are not in favour of referring cases to mediation by courts as it may end up being anti-thetical to the idea of alternative dispute resolution as an unwilling party, whose access to the courts is being curtailed or delayed by such provisions, may consider these mediation sessions to be a mere formality or hurdle before commencing with litigation. The plaintiffs seem to hold a similar view. In most cases they consider it to be giving ground to the opposing parties, which may affect their interests, and hence treat such a process with apprehension if not entered into willingly. Mediators have also reported that in many a case, lawyers do not bother with preparing for the mediation due to their perception of mediation as a necessary obstacle, making such an imposed process of no use to either party. The biggest drawback of mandating mediation lies in further delaying the process of dispute resolution, especially in commercial disputes where time is of the essence, and the resulting additional costs.

However, studies have conclusively demonstrated that requiring litigants to make a serious and reasonable initial effort at mediation is the greatest strategy, if not the only one, to considerably increase the number of mediated disputes. For example, in the European Union (EU), it was found in a study that despite the Mediation Directive, mediation was being employed in less than 1% of the total disputes in the EU. The

study found the main cause of the same to be the retention of a voluntary approach to mediation in almost all of the EU Members. Similarly, in the United States, although there is no national unified policy on mediation, many courts and federal agencies have adopted mandatory mediation programmes after realising that the purely voluntary route was of little use.

Furthermore, the most important point to be noted is that, countries which have mandated mediation have witnessed encouraging results. For example, retail tenancy disputes in Australia, which are required by law to be mediated before they can be heard, depict a settlement rate of more than 80%. Similarly, in 2015, Italy had a settlement success rate of 44% in the cases which required mandatory mediation. These numbers show that despite mandatory mediation resulting in greater time taken for commercial disputes in certain cases, overall, it eases the judicial backlog due to its high success rate.

Hence, the authors have positive outlook towards the current developments in India vis-à-vis mediation and agree that mandatory mediation is indeed the correct way forward. However, at the same time they do share some reservation on the Draft Mediation Bill as it currently stands, and will critique the same in the next section.

MEDIATION BILL 2021 - A HALF-BAKED STEP IN THE RIGHT DIRECTION

In light of the foregoing discussion, the Draft Mediation Bill, 2021 ("Bill") which was introduced in the Rajya Sabha on December 20, 2021, is definitely a step in the right direction. Some of its defining features are the mandatory requirement for pre-litigation mediation (at least two sessions) in civil or commercial disputes, the establishment of the Mediation Council of India ("Council"), conferring the status judgments/decrees to mediated settlements, community mediation, and other pertinent rules related to the mediation process. However, the Bill is also half-baked at the same due to some inherent issues, which are as follows:-

- Unless the parties agree otherwise, the Bill mandates that mediators conducting pre-litigation mediation must be registered with the Council, a recognized mediation service provider, a Legal Services Authority, and empanelled by a court-annexed mediation centre. It is not obvious why it is necessary for such mediators to meet all four conditions. This provision would lead to many practicing mediators needing to go through these bureaucratic processes of empanelment in order to be a valid mediator under the new framework. This would cause a shortage in mediators due to the stringent and unnecessary requirements, further impeding and stalling the mediation environment as a whole without contributing anything to it.

EDITORIAL COLUMN

- The Bill has limited applicability to international mediation, as although it allows enforceability of international mediation conducted in India, its ambit does not extend to international mediation settlements conducted outside India. Additionally, the Bill recognizes the former type of 'domestic' international mediation as a decree of a court, thus precluding the Singapore Convention on Mediation which does not apply to settlements having decree status. As a result, the majority of the perks of cross-border mediation, including worldwide enforceability, cannot be taken advantage of due to the short-sightedness of the Bill.

- The Bill does not require the Council to have a practicing mediator. Generally, regulatory bodies for professionals necessarily comprise persons having considerable experience or practicing in the relevant field (see for examples, The Advocates Act, 1961, The Chartered Accountants Act, 1949, etc.). While the Bill requires full-time members to possess knowledge or experience pertaining to mediation or ADR laws, they might not always be practicing mediators with significant industry experience, and hence may be unsuited to carry out tasks like establishing mediators' professional conduct guidelines.

- Additionally, the Council will discharge most of its functions by issuing regulations. However, before doing so, the Council requires the assent of the central government and this might result in a conflict of interest as the central government (or institutions, corporations, etc. owned or controlled by it) may also be party to mediations under the Bill.

As per the authors, some suggestions to alleviate the above loopholes and to improve the efficacy of the Bill would be:-

- Streamlining and reducing the registration requirements for mediators to a single institution instead of the proposed four institutions. This would in no way affect the efficacy or the object of the provision since even any one of the four registrations should be more than enough to guarantee the credentials of a mediator.
- Amending the applicability of the Bill to include the enforceability of the mediations conducted outside India as well and make the Bill more in line and consonance with the Singapore Convention.
- Introduction of additional full-time member slots to the Council which must comprise of practicing mediators having the requisite experience in the field.
- Guarantee independence to the Council in issuing its guidelines, in similar lines of the National Medical Commission and the Bar Council of India.
- Additionally, the Bill could take inspiration for the Italian model to improve its efficacy. Under the Italian, there is an easier 'opt-out' model, wherein the parties can stop the mediation proceedings in the first session itself, a departure from the mandatory 2 sessions under the Bill. Furthermore, the Italian government incentivizes the mediation process by providing tax credits for the first €500 of fees, should the parties continue to proceed further with mediation. Under this system, Italy registers more than 150,000 mediations each year.

- Lastly, the Bill could also make use of the restrictive Italian approach to mandatory mediation as starting test case before going on for the current scheme. In Italy, around 8% of commercial and civil proceedings require mandatory mediation while rest still use the voluntary approach. The said 8% of disputes consists of cases relating to property and inheritance matters, family agreements, loans, compensation for medical liability, defamation cases, banking and insurance contracts, and financial contracts.[1] In similar lines, the Bill for the time being could restrict its ambit to the afore-mentioned cases, and check the success of the regime, before proceeding to the blanket coverage as it currently proposes.

CONCLUSION

The authors are of the view that sometimes it takes a mandatory process to convince an unwilling adversary about the advantages that can flow from mediation. Even if the parties are reluctant to participate in the process, it should still cause the parties to realistically assess their case at a preliminary stage and could make conditions more suitable for an amicable settlement in the future. While certain professionals harbor their concerns about mandatory mediation, we need to realize that such a process barely infringes upon the "voluntariness" of the process and in no way binds any parties. It only asks of them to give mediation a shot. The success of bringing about such a drastic change in the way disputes in our country are resolved is contingent on the active participation of the legal community. However, the situation is not as favorable as it may appear. As previously mentioned, India lacks a conducive environment to facilitate successful mediation. Spreading knowledge among litigants, legal professionals, academics, and the general public is crucial. In order to ride the wave created by the introduction of the Mediation Bill, India will need access to qualified mediators and attorneys who are prepared to practice mediation. Advocates need to see mediation as a unifying rather than a divisive process. At this juncture, a mental shift toward mediation rather than litigation is crucial, and it will need the concerted efforts of all parties involved.

In order to lessen the load on our court system and boost its efficiency, we should embrace mandatory mediation during the pre-litigation stage with certain caveats as mentioned above. Mandatory mediation has without a doubt changed the game internationally, especially in the United States, Italy, Australia, and New Zealand. This should be a wake-up call for India, giving the country the information, it needs to improve its mediation laws.

REBUTTING THE ARBITRATION-INVALIDATING EFFECT OF LAW OF THE AGREEMENT: ANUPAM MITTAL V. WESTBRIDGE

BY - SRISHTI KAUSHAL & ISHANI CHAKRABORTY

INTRODUCTION

The Arbitration Agreement is distinct from the main contract and both of them can be governed by distinct laws. Such arbitration agreement may be determined by the law of the seat of arbitration or by the governing law of the contract itself. It becomes important to understand which law is applicable to the Arbitration Agreement to determine if a particular dispute is arbitrable or if traditional litigation should follow.

In Anupam Mittal v. Westbridge Ventures II Investment Holdings (Westbridge), the Singapore Court of Appeal (SGCA) highlighted the varying considerations in deciding the arbitrability of the subject matter in a foreign seated arbitration and formulated a composite approach for the same. In this article, we will critically analyse the decision given by the SGCA and determine its impact on Indian entities.

COMPOSITE APPROACH INTRODUCED BY THE SGCA IN THE CASE

People Interactive (India) Pvt Ltd. was founded by Anupam Mittal, who along with his cousins held 30.26% shares in it. Westbridge held 44.38% of the same and entered into a Shareholders Agreement (SHA) with Anupam Mittal and his cousins. The SHA provided that it would be governed by and be construed in accordance with the laws of India. It further stated that all disputes would be referred to arbitration and the place of arbitration would be Singapore. The SHA also provided that in case an Initial Public Offering (IPO) of the company was not completed within 5 years from the closing date, Westbridge would redeem all its shares and might even "drag along" other shareholders. Accordingly, upon the failure of completion of the IPO, Westbridge sought to redeem all its shares and refused to reappoint Anupam Mittal as the director of the company. Anupam Mittal thereby filed an application before the National Company Law Tribunal (NCLT) seeking an injunction to prevent Westbridge

from interfering in the management of the Company. In opposition, Westbridge obtained an order for an anti-suit injunction in the Singapore High Court contending that arbitration in Singapore should follow.

Anupam Mittal accordingly filed an appeal before the SGCA against the same, contending that subject-matter arbitrability is determined in accordance with the law of the Arbitration Agreement, which was the Indian law in the present case, by virtue of which issues of corporate oppression and mismanagement were non-arbitrable. Westbridge, however, contended that the law of the seat, i.e., the Singapore law was the law governing the subject-matter arbitrability according to which such disputes are arbitrable.

The SGCA adopted a composite approach. It noted that States may bar certain types of disputes from the ambit of arbitration in line with the public interest. As such, the Singapore courts must consider public policy considerations of both India and Singapore for determining subject-matter arbitrability. However, it also highlighted that the arbitration agreement determines what disputes are to be arbitrated and how the same is to be done. Once the award is rendered, the law of the seat comes into the picture. The enforceability of the award is thus determined in line with the law of the seat. It held that a three-step procedure will be followed to strike a balance between the two considerations. Firstly, where the parties have expressly chosen the governing law of the arbitration agreement, the subject matter arbitrability would be determined in accordance with the same. Where the parties have impliedly chosen such a law, the same would apply. However, where there is no implied or express choice, the legal system having the closest and the most real connection with the arbitration agreement would apply.

The SGCA held that the parties had not chosen Indian law explicitly. It further stated that the same was not done impliedly either, as the parties of Indian nationality knowing such disputes to be non-arbitrable, specifically opted for Singapore-seated arbitration, which allowed the same. Finally, it noted that Singapore being the seat of arbitration, the law of Singapore had the most real connection with the Arbitration Agreement. It accordingly held that subject matter arbitrability would be determined according to the law of Singapore, which allowed such disputes to be arbitrated. It thereby imposed an anti-suit injunction against the NCLT proceedings initiated by Anupam Mittal in this regard.

DIFFERENT JURISDICTIONS SETTING CONFLICTING PRECEDENTS

The past decade has witnessed a number of proceedings before Indian courts and tribunals. However, parties expressly stating a choice of law governing the arbitration agreement is still not a part of common practice. Different courts have dealt with this situation differently in deciding the applicable law.

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In the case of Reliance Industries v. Union of India, which came up as a sequel to the 2014 case with the same parties, two Production Sharing Contracts for the Tapti and Panna Mukta Fields were executed between Reliance Industries Limited, the Union of India, Enron Oil and Gas India Limited and the ONGC.

The contract was to be governed by the laws of India, and the venue of arbitration proceedings would be London. A petition was filed in the Delhi High Court, the decision of which was overturned by the Supreme Court. The final judgment read that the substantive law of the contract is of utmost importance in the process of determination of the issue of arbitrability, instead of the law of the seat or that of the arbitration agreement.

However, the court took a differing stance in the cases of Sumitomo Heavy Industries Ltd. v. ONGC Ltd. & Ors.
The appellant and the first respondent entered into a contract, whereunder the appellant agreed to install and commission on a turnkey basis an oil platform at Bombay High. The contract was to be governed by the laws of India, and the venue of arbitration proceedings was provided as London. Disputes arose subsequent to the completion of the work under the contract and the appellant served notice of arbitration on the first respondent, post which the appellant applied to the Queens Bench Division, Commercial Court in London seeking an order to confirm that the arbitrators had the power to proceed with the arbitration in default of defence having been served by the first respondent. It was heard and decided in favour of the appellant.

The arbitrators had different opinions and the second respondent entered upon the reference and made his award. The first respondent then filed a petition in the High Court at Bombay praying that the second respondent be directed to file the award in that court under Section 14 of the Indian Arbitration Act, 1940 submitting that the award was invalid, unenforceable and liable to be set aside under the provisions of the said Act. It was ultimately held that the arbitrability of the subject matter is decided by the law of the arbitration agreement.

CONCLUSION

It can be derived that India is still open to discussion over this issue and that the law has not reached a settlement. Upon analysis of precedents, it can be said that Indian courts now have four alternatives using which they can take a stance, wherein they can:
a) maintain the decision held in the Reliance Industries v. Union of India case,
b) apply the law of the seat to determine arbitrability,
c) apply the law of the lex fori to determine arbitrability, or
d) follow the "composite approach" taken by the SGCA in the present case.

EDITORIAL COLUMN

The judgment of the SGCA in the case at hand lays down new pathways by taking a "composite approach" and deviating from the precedents set by national courts before. When contracting parties choose arbitration, it indicates their inclination towards resolving their dispute outside of litigation, and so, it is imperative for them to choose a "pro-arbitration" jurisdiction when choosing the law which will govern the arbitration agreement. This case put the application of the law of seat at the pre-award stage to determine arbitrability to test and created possibilities for applying foreign non-arbitrability rules at the pre-award stage, along with advocating for potential application of two sets of laws to determine arbitrability. The law of the arbitration agreement now not only governs issues of validity of the arbitration agreement but also the arbitrability of the dispute.

Anupam Mittal v. Westbridge has established two elements that Indian parties agreeing on a Singapore seat should carefully consider while negotiating an arbitration clause. Firstly, the parties should expressly stipulate the law applicable to the arbitration agreement, in order to prevent any uncertainty from arising with respect to what the court may determine it to be. Secondly, it is important for the parties to ensure that any anticipated dispute that could arise out of the agreement pertains to a subject, arbitrable under the law applicable to the agreement as well as the law of the seat. This process shall aid the parties and the court in saving time and expenditure on applications and satellite litigation dealing with arbitrability of claims, and suitable selection of appropriate forum for arbitration.

RECENT BLOGS

DRAFTSMEN OR COURTS: THE RIGHT NODE TO DEMARCATE CONFIDENTIALITY IN ARBITRATION

THIS POST IS AUTHORED BY ADITYA SINGH, A SECOND-YEAR B.A. LL. B (HONS.) STUDENT AT THE NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BANGALORE

1. INTRODUCTION

As the Arbitration Act, 1996 ('the Act') completes 25 years of its enforcement, the law commission of England & Wales ('Commission'), after various prompts by stakeholders, came forth with a consultation paper comprising a general review of the Act. The consultation paper identifies key areas such as confidentiality, disclosure and declaration, review on point of law, etc. This blog in particular will be critiquing the commission's recommendation on the point of confidentiality in arbitration.

The commission, while acknowledging that there is some merit in codifying a mandatory rule of confidentiality in arbitration, finally concluded that the same is better left for the courts to develop on a case-to-case basis. There were multiple points raised by the commission. This paper will address the fault in the point of why confidentiality cannot be a presumption in every arbitration, and list the various merits of codification despite the provisions possessing the scope for generality.

To elaborate upon the same, this paper will firstly, dwell on how confidentiality as the default should remain the norm in all types of arbitrations as it is a right in personam. To that end, the paper will also analyze the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('transparency rules') as the consultation paper states investor-state arbitration as a repeat example to argue against a presumption of confidentiality. Stemming from this, the paper secondly, will elucidate why codification is necessary to enable efficient enforcement of confidentiality and govern its various facets while also shedding some light on the insufficiency of case laws to fulfil the same.

2. CONFIDENTIALITY – A DEFAULT NORM?

The commission in para 2.40 opined that there cannot be a presumption of confidentiality in all types of arbitrations and stated the examples of investor-state and family arbitrations. The pertinent point to be raised here is that arbitration essentially is a private mode of dispute resolution. The courts in India have effectively construed confidentiality as a right in personam as interests are enforceable against select parties. While there may be other parties whose rights and interests may be at crossroads, their locus standi in the matter is essentially indirect if the dispute is arbitrable in the first place. For example, the Supreme Court of India in cases such as Booz Allen & Hamilton Inc. v. SBI Home Finance and Vidya Drolia v. Durga Trading Corpn has held disputes with direct erga omnes effect to be non-arbitrable. This is because the arbitral award cannot bind/ decide the fate of non-signatories to the arbitral agreement.

The above-stated points should also apply to investor-state arbitrations i.e. if the parties hold the capacity to settle the dispute through arbitration, it is essentially a right in personam. Hence, confidentiality should be the norm. The author at no point disagrees that despite this, certain disclosures will still be necessary but that, in itself, is not sufficient to denote that confidentiality is not the norm and that a framework can sideline the interest of the arbitrating parties. There cannot be a better way to illustrate this than gauging the transparency rules. The rules across all of its provisions establish the arbitral tribunal as the authority to adjudicate on submissions of disclosures to ensure the secrecy of the process and require the adjudication to be in consultation with the parties. Pertinent aspects of transparency, such as publications of documents and hearings, are subject to Article 7 which lays down the exceptions to transparency. Strengthening the provision, an exhaustive list of confidential information including confidential business information, ones protected by a treaty, laws or disclosure that would impede law enforcement, etc have been provided. Even if one were to look at the comments that had been made by IISD and CIEL on draft rules, they agreed that Article 7 does offer important protection, however, they had suggested that the list in present Article 7(2) should be shortened. The above point can also be buttressed by using the commission's observation in para 2.12 wherein it states confidentiality is also a product of legitimate expectation formed by the circumstance in which certain information was received. And arbitration due to its private nature does qualify as a circumstance giving rise to a legitimate expectation of confidentiality.

3. THE MERITS OF CODIFICATION

Another major point that can be deduced by examining the transparency rules is the insufficiency of common law in filling the necessary facets of confidentiality in arbitration. For example, the transparency rules, where applicable, denote the authority of the tribunal, stakeholders to be consulted at various points, etc. However, the common law is not laid out in sufficient detail to govern such procedural nuances, hence, leading to potential uncertainty and an inability to evolve the jurisprudence in line with globally desired standards. One needs codified provisions to address such details as will be described below. This section will list the various merits of codifying the law on confidentiality.

A. Delegation of Authority

To begin with, the very purpose for which this review was undertaken was to polish the English arbitration regime and maintain its gold standards (para 1.5). By codification, the law can firstly, allocate enforcement authority to the tribunal as confidentiality would remain of little significance otherwise and secondly, it can most importantly selectively allocate adjudicatory authority to the arbitral tribunal to determine disclosures.

To elaborate, the commission while holding Emmott v. Wilson (para 2.32) to be the leading case on exceptions to confidentiality (para 2.17), prepared their possible list of exceptions from its judgement. Of those, items such as the authority to determine whether the consent was free in case disclosure is by consent; whether the interests of the parties are legitimate and can only be served by disclosure, and whether the legal duties cannot be fulfilled without disclosure can be delegated to the tribunal itself. While the authority to adjudicate on items such as to determine whether the disclosure is required in 'public interest' can be reserved to the courts if the commission believes there may be considerable opposition and uneasiness with the tribunal adjudicating on this. For example, in jurisdictions with developed administrative laws framework such as France, awards of public-private arbitration can be reviewed by administrative courts for their compliance with mandatory rules of public law because of their public character. Apart from this, delegating authority to the tribunal would also have its utility if the commission were to consider adding a customary exception, as the tribunal would possess specialized knowledge of the various nuances involved. For example, it was observed in Halliburton v. Chubb that it is common in the Bermuda form of arbitration for arbitrators to disclose if the party in the instant arbitration is common without disclosing the details of the opposite party.

The adoption and codification of the above-described model of delegation of adjudication have obvious benefits such as; 1) it will ensure swifter disposal of disclosure applications and reduce the burdens of the courts; 2) the tribunal at places will be pre-acquainted with the facts and circumstances while having the specialized knowledge about the modalities involved in that mode/type of arbitration. These cumulatively reduce the courts' intervention in arbitration and with the other outlined benefits altogether bolster England's attractiveness as a seat.

B. Cementing the Parameters & Contours

Addressing the other point on items in the list, the commission opined that while there was hesitancy to include the public interest exception in Emmott v. Wilson, they believe that there should be one (para 2.34). To take a closer look at Emmott v. Wilson, the definition of public interest, as stated in London and Leeds Estates Ltd v Paribas Ltd (No 2) was referred, wherein Mance J, defined it as circumstances

wherein the production of certain documents is necessary for "fair resolution and proceedings". Post which Potter LJ's ruling in Ali Shipping Corporation v. Shipyard Trogir was referred to look at the definition of 'public interest'. Potter LJ stated that the basis behind this is to ensure the courts reach their verdicts based on accurate evidence and hence this should be categorized as 'interests of justice' as opposed to 'public interest'. This was to prevent its widening as seen in Esso Australia Resources v The Honourable Sidney James Plowman. Since Emmott relied on Ali Shipping as well, there is a lack of clarity on the nature of the 'public interest' exception that exists. The same can be addressed by codifying both exceptions, hence creating room for an interpretation that the public interest exception exists and the legislative intent is to construe them as two separate exceptions. As an add-on, the meanings of the two could also be elaborated upon. Further guidance can be issued by codification as also done u/s 23(F)(1)(a) of the Australian International Arbitration Act, 1974. The same allows the court to prohibit disclosure if the public interests do not outweigh the interests of the disputing parties.

While it has been stated by the courts in snippets, the principle of 'purpose limitation' can be cemented with codification along with the proposed exceptions. This will provide the necessary guidance to the adjudicating authority and assurity to the parties that even in the event of disclosures, the authorities are to ensure there is no disclosure beyond what is necessary to serve the purpose for which disclosure is sought. A good example of this would again be the Australian International Arbitration Act which restates this principle at various exceptions and has also empowered the courts to prohibit disclosure on the breach of this ground in S 23(F)(1)(b).

4. CONCLUSION

Although there is room for discretion left in the confidentiality provisions of common law countries, a detailed provision as elucidated still has the ability to lay down the contours of development in the desired direction of international best practices and community expectations. The Australian Law's guidance on public interest considerations as mentioned above is a great manifestation of it. Even the courts in Singapore, for instance, have decisive guidelines in International Arbitration Act, of 1994 to refer to for publication of awards as opposed to digressing into LCIA rules, IBA guidelines, etc like courts in England have had to. While stating the need for codification, although the New Zealand Law Commission limited the observation of the absence of detailed arbitration clauses with proper confidentiality provisions, etc to domestic arbitration, this may also be the case in international arbitration, In such a situation, a detailed provision touching upon various facets is of great assistance. While Singapore is already a major hub, Australia and New Zealand's legislative reforms on this have also been well received. The fact that a default rule aids in meeting the differences cannot be discounted. All of this cumulatively increases the certainty for the disputing parties and a seat's popularity as an arbitration destination. Hence the provision should be codified to set the contours while also leaving room for jurisprudential development in that direction.

CALL FOR COMMENTS

CALL FOR COMMENTS

THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA INVITES COMMENTS FROM THE PUBLIC ON THE REGULATIONS NOTIFIED UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Section 240 of the Insolvency and Bankruptcy Code, 2016 grants the Insolvency and Bankruptcy Board of India (IBBI) the authority to create regulations. The IBBI has established a transparent and consultative process to ensure effective engagement with stakeholders in the regulation-making process. The aim is to develop regulations that are robust, precise, and relevant to the current market needs, while taking into account the ground realities.

In light of the above, the IBBI is inviting public comments on the regulations that have been already notified under the Code. The comment period extends from May 4, 2023, to December 31, 2023. All comments received during this period will be reviewed, and necessary modifications will be made to the regulations through a due process. The IBBI aims to finalize the modified regulations by March 31, 2024, and implement them on April 1, 2024
By seeking public input and considering stakeholders' perspectives, the IBBI aims to enhance the effectiveness of the regulatory framework governing insolvency and bankruptcy in India. This collaborative approach recognizes the importance of collective decision-making and aims to address the practical challenges and concerns faced by stakeholders in the evolving regulatory landscape. Ultimately, the goal is to create a regulatory framework that better serves the needs of the market and facilitates smooth transactions in the insolvency and bankruptcy domain.

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- Write your comments in the box “Write Comment”;
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CALL FOR COMMENTS

CONSULTATION PAPER ON FRAMEWORKFOR MANDATING ADDITIONAL DISCLOSURESFROM FOREIGN PORTFOLIO INVESTORS (FPIS) THAT FULFIL CERTAIN OBJECTIVE CRITERIA, TO 1) GUARD AGAINST POSSIBLE CIRCUMVENTION OF MINIMUM PUBLIC SHAREHOLDING ("MPS"), AND 2) TO GUARD AGAINST POSSIBLE MISUSE OF THE FPI ROUTE TO CIRCUMVENT THE REQUIREMENTS OF PRESS NOTE 3 ("PN3")

To enhance trust in the Indian securities markets by mandating additional granular disclosures around ownership of, economic interest in, and control of objectively identified high-risk Foreign Portfolio Investors (FPIs) that have either concentrated single group exposures and/ or significant overall holdings in their India equity investment portfolio.

For greater investor protection, and for fostering greater trust and transparency in the Indian securities market ecosystem, there is a felt need for additional disclosures from certain types of Foreign Portfolio Investors (FPIs). On the surface, any enhanced disclosure requirements may appear to detract from ease-of-doing investments. However, there can be no sustained capital formation without transparency and trust. Overall, to minimize any inconvenience to the FPI ecosystem, only a limited number of objectively identified high-risk FPIs with either concentrated single group equity exposures or significant equity holdings will be mandated to provide additional granular disclosures around the ownership of, economic interest in, and control of such funds.

- Format of submission and further information can be accessed here
- Last Date – 20th June, 2023

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(i)Preferably by email to afdconsultation@SEBI.gov.in, with a copy to Mr. Arpit Anand, AssistantGeneral Manager (arpit_anand@SEBI.gov.in)and Ms. Chitra M, Manager (chitram@SEBI.gov.in).
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