AU COURANT

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RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

IN THIS ISSUE

PREFACE

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

In this edition, the current on-goings in various fields of law have been analyzed succinctly in the 'Highlights' section to provide readers with some food for thought. This includes a brief comment on the order of Delhi High Court denying the Future Group's request to terminate SIAC Arbitration Proceedings, brief comments on the case of Commissioner of Income Tax v. M/s. Mansukh Dyeing and Printing Mills adjudicated by the Supreme Court of India, a short synopsis of the revised Digital Personal Data Protection Bill, 2022 and the halting of the Alternative Investment Funds (AIFs) by Securities and Exchange Board of India.

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

The Editorial Column section contains a piece by Mr. Harshit Kapoor (Associate Editor, RFMLR) and Ms. Shivi (Copy Editor, RFMLR) titled 'Analyzing Cross Border Flow Of Data Under DPDP Bill, 2022'.

Lastly, 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. In this Edition, the comments invited by IRDAI on its draft rules on Expenses of Management (EoM) for life insurance firms are discussed.

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

HIGHLIGHTS

DELHI HC DENIES FUTURE GROUP'S REQUEST TO TERMINATE SIAC ARBITRATION PROCEEDINGS

The Delhi High Court denied Future Group's petition appealing the Singapore International Arbitration Centre's (SIAC) ruling dismissing the Indian retailer's request to stop the arbitration proceedings with Amazon Inc. on Tuesday. This allows Amazon to continue its arbitration proceedings with Future Group, which will begin on November 28. Amazon had moved the Supreme Court in the matter.

On November 17, the Supreme Court stated unambiguously that it will not allow the stalling of arbitral proceedings pending before the Singapore International Arbitration Centre (SIAC) pertaining to the ongoing legal feud between US e-commerce powerhouse Amazon and the Future Group, stating that the sanctity of such proceedings must be preserved. The US e-commerce company has also claimed damages from Future Group for its $1,400 crore investment in Future Coupons.

The Delhi High Court had previously deferred its decision on a number of petitions in the continuing legal battle between Amazon and the Future Group over Future Retail Ltd's (FRL) agreement with Reliance Retail. On June 28, SIAC denied a Future Group request to terminate arbitration proceedings relating to the US firm's interest in Future Coupons. The SIAC said in its judgement that the arbitration proceedings that began in October 2020 will be continued after Future Group proposed selling its retail, wholesale, and logistics assets to Reliance Industries for Rs. 24, 713 crores. Future Group filed an appeal with the Delhi High Court last month against the SIAC verdict.

Future Retail contended that there was no basis for the tribunal to continue with the arbitration because the Competition Commission of India had suspended clearance for the agreement on which Amazon had sought SIAC. **Read More**

by Akshata Singhvi (Digital editor)

HIGHLIGHTS

PROVISIONS OF SECTION 45(4) TRIGGER EVEN IF THE SUM CREDITED TO THE PARTNER'S A/C IS DUE TO REVALUATION OF ASSET: APEX COURT

The Supreme Court of India, in its 24 November 2022 ruling titled 'Commissioner of Income Tax v. M/s. Mansukh Dyeing and Printing Mills' has held that upon revaluation of fixed asset, the credit which is made to the Partners' capital account is liable to be taxed u/s 45(4) of the Income Tax Act and approved the decision of the Bombay High Court in the case of CIT Vs A.N. Naik Associates and Ors.

In the present case, in Tax Year 1992-93, the Taxpayer (the respondent firm) admitted four new partners who contributed small amounts of capital to the Taxpayer. In January 1993, the assets of the firm were revalued and an amount of Rs. 17.34 crores was credited to the accounts of the partners in their profit-sharing ratio. As a result of this, the newly admitted partners immediately benefited from the credit to their capital accounts of the revaluation amount. Furthermore, two of the existing partners withdrew part of their capital. The tax authority, after reopening the tax returns filed by the taxpayer for the assessment year 1993-94, invoked section 45(4) of the Indian Tax Law as it stood before substitution vide Finance Act, 2021. Old section 45(4) stated that, with effect from the tax year 1987-88, profits or gains arising from the transfer of a capital asset by way of distribution on the dissolution of a firm or otherwise shall be chargeable to tax as income of the firm.

The taxpayer contended that section 45(4) was inapplicable in the present case as there was neither a transfer by way of distribution of capital assets by the Taxpayer to the partners, nor any transfer on account of the dissolution of the Taxpayer or otherwise. The CIT(A) held that conditions of Section 45(4) are satisfied and therefore, the assets to the extent of their value distributed would be deemed as income by capital gains in the hands of the assessee firm. This was overturned by Income Tax Appellate Authority (ITAT) in its judgement as a result of an appeal preferred by the respondent firm, which held that revaluation of the assets and crediting to partners' accounts did not involve any transfer. The ITAT observed and held that the decision of the Bombay High Court in the case of A.N. Naik Associates and Ors. shall not be applicable.

HIGHLIGHTS

The High Court of Bombay upheld the decision of the ITAT and the appellant was aggrieved by the same and preferred an appeal before the Apex Court to restore the order of the Assessing Officer. The Apex Court held that, in the present case, credit of revaluation gain to partners' capital accounts can be said to be in effect distribution of the capital assets valued at their fair market value (FMV). SC held that the partners' capital accounts stood enhanced upon revaluation, which became available for withdrawal, and in fact, some of the partners had withdrawn such amounts subsequently from their capital accounts. Therefore, as per SC, such revaluation could be said to be a "transfer", falling in the category of "or otherwise", in terms of old section 45(4). Hence, the appeals were allowed and the decision of ITAT and Bombay HC was set aside. **Read More**

By Raghav Sehgal (Copy Editor)

HIGHLIGHTS

GOVERNMENT INTRODUCES THE REVISED DIGITAL PERSONAL DATA PROTECTION BILL, 2022

The Centre's significantly shortened and revised draft Bill on personal data protection proposes a hefty increase in penalty amounts up to ₹500 crore, while also easing rules on cross-border data flows, in a big relief for large tech firms. The new draft Bill, on which stakeholder comments have been invited till December 17, also narrows down the scope of the data protection regime to personal data protection, leaving out non-personal data from its ambit, a move welcomed by the industry.

The personal data protection bill has been in the works for about five years. The first draft of the Bill was presented by an expert panel headed by Justice B.N. Srikrishna in July 2018, after a year-long consultation process. That draft was revised, and a final Bill was tabled in Parliament in December 2019. However, it was soon referred to a joint parliamentary committee, which submitted its report in December 2021. The Ministry of Electronics and IT withdrew the Bill from Parliament this August, and stated that a new bill would be presented, which fit into the "comprehensive legal framework".

The Minister reiterated that the government has ensured that the start-up ecosystem and small businesses are not encumbered by huge compliance burdens. "We have tried to create a digital by design framework... The compliance framework is designed right from the beginning in a digital way so that it becomes a simple, easily accessible way for implementing the Bill," they said.

As per the draft, the Data Protection Board a new regulatory body is to be set up by the government that can impose a penalty of up to ₹500 crore if non-compliance by a person is found to be significant. The Bill proposes six types of penalties for non-compliance, including up to ₹250 crore for failure to take reasonable security safeguards, up to ₹200 crore for failure to notify the Board and affected users in the event of a personal data breach, and up to ₹200 crore for non-fulfilment of additional obligations related to children.

HIGHLIGHTS

The earlier version of the Bill provided for penalties of ₹15 crore, or 4% of the total worldwide turnover of any data collection or processing entity, for violating provisions. However, the new Bill does away with the clause for compensation to affected Data Principals (that is, those whose personal data it is). Additionally, it proposes to impose a penalty of ₹10,000 on individuals providing unverifiable or false information while applying for any document, service, proof of identity or address, or registering a false or frivolous complaint with a Data Fiduciary (who collects and processes the data) or with the Board.

The new Bill provides for significant concessions on cross-border data flows. It proposes that the Central government will notify countries or territories outside India to which a Data Fiduciary may transfer personal data, "in accordance with such terms and conditions as may be specified". The government, which is hopeful of introducing the Bill in the Budget session of Parliament in February 2023, has introduced the concept of 'Consent Managers' in the Bill. Pointing out that it is not always possible to keep track of the instances in which one has given consent to the processing of personal data, the government said that a consent manager platform will enable an individual to have a comprehensive view of her interactions with Data Fiduciaries and the consent given to them.

The Data Principal shall have the right to withdraw her consent at any time, the Bill stated. Data Fiduciaries collecting personal data from individuals will need to provide "itemised notice" in clear and plain language containing a description of personal data sought and the purpose of processing of such personal data. The Bill also gives the power to the government to offer exemption from its provisions "in the interests of sovereignty and integrity of India" and to maintain public order. While the earlier version of the draft Bill had recommended that a Data Protection Authority be set up to prevent misuse of personal information, the revised Bill has proposed a Data Protection Board of India which will be notified by the Central government. **Read More**
Digital Personal Data Protection Bill, 2022

By Shashwat Sharma (Junior Editor)

SEBI CURBS AIF SCHEMES WITH PRIORITY DISTRIBUTION MODEL

The Securities Exchange Board of India (SEBI) in its circular dated 23-11-2022 has halted Alternative Investment Funds (AIFs) with a priority distribution model from accepting fresh commitments. The regulator has also prohibited such schemes from investing in a new company. Some AIFs offer select limited partners, or investors, in AIFs a priority pay-out, whereby they get their principal investment back before other investors. SEBI has noted that schemes of AIFs have been allowing a waterfall distribution in such a way that a set of investors "share loss more than pro rata to their holding" in comparison to other investors as the latter is allowed to exit the AIF earlier than the former. This may especially happen in the case of distressed funds, where there may be greater investment risks.

While this is not a violation of the SEBI AIF regulations according to the current regime, it is unfair and unethical as it allows losses to be passed on to others in a disproportionate manner if some other investors within the AIF had been allowed to exit on priority. It is seen that sometimes one class of investors have better bargaining power than another, and hence they can secure better rights through waterfall mechanisms. This is generally not asked for by the former class to provide undue advantage to the latter class but to ensure that their investments are protected. However, eventually, it may become disadvantageous to one class.

According to the SEBI circular, while regulations prohibit the disproportionate sharing of losses between sponsors and other investors, there is no explicit restriction on such differentiation between different classes of investors. SEBI is currently examining the aforesaid matter in consultation with the Alternative Investment Policy Advisory Committee, AIF industry associations and other stakeholders. Meanwhile, it has been decided that schemes of AIFs which have adopted the aforesaid priority distribution model, shall not accept any fresh commitment or make investments

It also needs to be noted that SEBI is also currently probing as many as 20 AIFs for a series of violations, including dividend stripping, inadequate diversification, abrupt change in control at AIFs, non-adherence to stated investment mandate, conflicts of interest, valuation policies, priority pay-outs, and outsourcing management (of investments) to other entities. **Read More**

By Tarpan Soni (Junior Editor)

NEWS UPDATES

ALTERNATIVE DISPUTE RESOLUTION

1. A CLAUSE EMPLOYING THE WORD 'MEDIATION' CAN BE CONSTRUED AS AN 'ARBITRATION CLAUSE'

The Delhi High Court has opined that the substance of the agreement is relevant over the nomenclature used and hence when a clause uses the word "Mediation" but has features resembling the Arbitration clause, the clause would be considered an arbitration clause. The Delhi High Court further expounded that using the word "Mediation" does not devoid the clause of being the Arbitration clause, especially when some of the features of the clause are inconsistent with the principles of mediation such as recording of evidence, determination of rights, etc. Therefore, the High Court declared the clause as the Arbitration Clause and referred the dispute to the Delhi International Arbitration Centre. **Read more**

2. PENDENCY OF CASE BEFORE NCLT NOT A GROUND TO DISMISS SEC 11 A&C ACT APPLICATION

The Supreme Court opined that when the issue of arbitrability requires deep consideration, the same should be adjudicated upon by the Arbitrator. The Court further expounded that a case pending before the NCLT is not a ground to dismiss the application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Arbitration Act"), especially when both the proceedings deal with different issues altogether. The High Court of Madras had dismissed the said application because firstly, the matter was already referred to the Tribunal at the time of the filing of this application, and secondly, the proceedings were pending before the NCLT for adjudication over various acts constituting oppression and mismanagement of a minority shareholder. **Read more**

3. INTENTION OF PARTIES AS TO SEAT OF ARBITRATION CAN BE DETERMINED FROM CONDUCT

The Kerala High Court recently reiterated that the intention of the parties to an agreement, as to the seat of arbitration, can be determined from their conduct. While determining the question as to which of the above seats would be final, the High Court observed that the intention of the parties as to the seat of arbitration should be determined from other clauses

Ein the agreement and the conduct of the parties. Contracts are to be interpreted according to their purpose. The purpose of the contract is the interest, objectives, and values that the contract is designed to actualize. It comprises the joint interests of the parties. **Read more**

4 ARBITRATOR TO DECIDE WHETHER RIGHTS UNDER AN AGREEMENT ARE SUPERSEDED BY A SUBSEQUENT ONE

The Delhi High Court has ruled that the arbitration clause relates to the resolution of disputes between the parties and not the performance of the contract and thus, the arbitration agreement survives even if the contract comes to an end. The bench held that the issue of whether the rights of parties under an agreement are superseded by a subsequent agreement or not is itself an arbitrable issue that can be examined by the arbitrator, and that the question of whether an agreement containing an arbitration clause has been novated by another agreement, cannot be adjudicated at the time of considering a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (A&C Act). **Read more**

5. CHALLENGE UNDER SECTION 17 OF THE SARFAESI ACT AGAINST ACTION TAKEN BY SECURED CREDITOR, WOULD NOT BAR ARBITRATION PROCEEDINGS

IThe Delhi High Court has reiterated that arbitration proceedings and proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 (SARFAESI Act) can go hand in hand. The Court has held that even if a party intended to take action under Section 17 of the SARFAESI Act by filing a petition before the Debt Recovery Tribunal (DRT), to challenge the action taken by the secured creditor under Section 13 (4) of the SARFAESI that would not bar the initiation of arbitration proceedings by the secured creditor. **Read more**

By Ishani Chakraborty (Assistant Editor)

NEWS UPDATES

BANKING AND FINANCE

1. NEW CREDIT CARD PAYMENT RULE: RBI URGES CARD COMPANIES TO RECONSIDER THE MINIMUM AMOUNT DUE FORMULA.

The Reserve Bank of India wants banks and credit card companies to calculate the minimum amount payable on credit card bills in a way that avoids negative amortization. "Unpaid charges, levies, or taxes shall not be capitalized for the purpose of charging or compounding interest," the RBI previously stated in a master direction - Credit card and Debit card - Issuance and Conduct Directions, 2022. It had asked the banks and card issuers to implement this rule starting from October 1, 2022.

"The new rule requires the credit card issuers to set minimum amount due high enough so that the overall outstanding balance can be cleared over a reasonable period," ET quoted Sachin Vasudeva, Director & Head of Cards, Paisabazaar, as saying. Moreover, finance charges, other penalties, and taxes that apply to the outstanding amount should not be capitalized in the subsequent statement, he added. **Read More**

2. GSTN IS LISTED AS A FINANCIAL INFORMATION PROVIDER BY THE RBI UNDER THE ACCOUNT AGGREGATOR FRAMEWORK.

The Reserve Bank of India (RBI) has added the Good and Service Tax Network (GSTN) to the account aggregator framework as a financial information supplier. The most recent change is intended to facilitate cash flow-based lending to micro, small, and medium-sized businesses (MSMEs). The GSTN will be regulated by the Department of Revenue for the purpose of providing goods and services tax returns (GST).

The financial information will be contained in GST returns filed in GSTR-1 and GSTR-3B. The RBI published the framework for the registration and operation of an account aggregator framework in India in 2016. An account aggregator, in essence, allows individuals and financial institutions to share data. Lenders can then analyze this data before making a loan to an individual or company. So far, the account aggregator system has enabled almost a billion accounts, 17 banks, and 48 non-bank lenders. The latest move is

aimed at facilitating cash flow-based lending to micro, small and medium-sized enterprises (MSMEs). **Read More**

3. PUNJAB NATIONAL BANK RECEIVES GOVERNMENT APPROVAL TO REDUCE ITS HOLDING IN UTI MUTUAL FUND.

The state-owned Punjab National Bank (PNB) announced on Thursday that it has received government approval to sell its whole stake in UTI Asset Management Company Limited as part of its non-core asset disposal plan to strengthen its capital base. The bank, which owns 15.22% of UTI AMC, plans to sell its whole interest in the mutual fund firm in single or several tranches to realize a profit on investment. It is currently valued at Rs. 1,329 crores.

The bank stated that the timing for the disposal has yet to be established. PNB is a supporter of India's first mutual fund firm. Other sponsors include the State Bank of India, Life Insurance Corporation of India, Bank of Baroda, and T Rowe Price, based in the United States. PNB will sell its full ownership in UTI Asset Management Company Limited in single or several tranches to realize a return on investment. **Read More**

4. OVERNIGHT SDF BALANCES OF BANKS ARE ELIGIBLE FOR LCR CALCULATION: RBI

TOvernight balances held by banks with the Reserve Bank of India under the Standing Deposit Facility (SDF) will qualify as level-1 high-quality liquid assets for the calculation of the Liquidity Coverage Ratio, the central bank announced on Wednesday. The announcement came after banks requested clarification on the treatment of SDF under the Liquidity Risk Management Framework. The RBI's circular, which takes effect immediately, applies to all commercial banks but excludes local area banks, regional rural banks, and payments banks, according to the central bank.

SDF became the lower bound of the Liquidity Adjustment Corridor in April, replacing the reverse repo rate. The repo rate reflects the corridor's centre, while the Marginal Standing Facility shows the upper end. The SDF rate, which is 25 basis points lower than the repo rate, is currently 5.65%. Banks have generally stored excess funds with the RBI in recent years since liquidity in the banking sector has remained high. **Read More**

By Qazi Ahmed Masood (Assistant Editor)

NEWS UPDATES
COMPETITION LAW

1. NCLAT STAYS CCI IMPOSED PENALTY AGAINST OYO OVER ANTI-COMPETITIVE CONDUCT

The National Company Law Appellate Tribunal (NCLAT) has stayed the Competition Commission of India's (CCI) 169 crore penalty levied on IPO-bound Oravel Stays Limited (OYO). However, an NCLAT Division Bench comprised of Justice Rakesh Kumar, Member (Judicial), and Ashok Kumar Mishra, Member (Technical), asked OYO to pay 10% of the penalty sum.

Along with its appeal, OYO has filed an application for an immediate temporary stay on CCI's order, claiming that if it is ordered to pay the penalty, it will be compelled to sacrifice business returns that the same would create if deployed in its business. OYO contended that if the Tribunal stays the levy of the penalty until the appeal is resolved, there will be no loss. In its appeal, OYO argued that, in addition to MMT-Go, there are strong and well-supported online travel agencies such as Yatra.com, Booking.com, Expedia, and Cleartrip, as well as direct websites and apps of hotel owners, and offline channels that offer competitive options to FabHotels and Treebo - the other two Informants in the case before CCI.
Read More

2. THE CENTRE ANNOUNCES REFORMS THAT WILL EMPOWER THE CCI IN ANTI-PROFITEERING MATTERS BEGINNING DECEMBER 1

Starting December 1, the government notified measures that will allow the Competition Commission of India to assume care of proceedings relating to the anti-profiteering provisions of the Central Goods and Services Tax Act. The CCI will now be tasked with determining whether enterprises have passed on the benefits of GST rate reductions or input tax rebates to consumers through proportionate pricing reductions.

"The Central Government, on the recommendations of the Goods and Services Tax Council, empowers the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002, to examine whether input tax credits availed by any registered person or reduction in the tax rate have actually resulted in a commensurate

reduction in the price of the goods or services or both supplied by him," the Finance Ministry said in a notification. The notification will take effect on December 1. **Read More**

3. CCI HALTS AGI GREENPAC'S ACQUISITION OF HNG

The Competition Commission of India (CCI) put AGI Greenpac's proposed acquisition of Kolkata-based Hindusthan National Glass & Industries Ltd (HNG) on hold, only days after the committee of creditors (CoC) approved the proposed resolution plan. The notification filed by AGI Greenpac on September 27 regarding the acquisition has been categorized as 'Notice Not Valid' on the CCI website. CCI has invalidated AGI Greenpac's Form 1 and requested that the company file Form 2 with additional information. Form 2 is requested when the company's market share exceeds 15%.

AGI Greenpac offered the lenders Rs 1,851 crore upfront and Rs 365 crore in deferred payments. It was proposed that HNG employees be compensated Rs 6 crore. SBI, Edelweiss, DBS, LIC, and other significant CoC members approved the strategy. Edelweiss Group has committed to contribute $133.6 million to AGI's resolution plan. **Read More**

4. CCI APPROVES THE ONTARIO TEACHERS' PENSION PLAN BOARD-MAHINDRA SUSTEN TRANSACTION

The Competition Commission of India announced on Friday that it has accepted the proposed acquisition of a 30% share in Mahindra Susten by 2452991 Ontario Ltd, an associate of the Ontario Teachers' Pension Plan Board (OTPPB). The transaction was approved through the green channel procedure, in which a transaction that does not pose a significant risk of harming competition is presumed to be approved upon notification to the competition monitor.

The CCI announced its approval of the proposed sale in a press release on its website. The proposed deal calls for 2452991 Ontario Ltd to buy a 30% equity stake in Mahindra Susten Pvt Ltd (MSPL) from Mahindra Holdings Ltd. The regulator also permitted the buyer or its affiliate to acquire a further share in MSPL of up to 9.99 percent by May 31, 2023, assuming certain conditions are met. MSPL is a wholly owned subsidiary of Mahindra Holdings Ltd, primarily engaged in the establishment, acquisition, or ownership of, and operation of renewable energy generation projects. **Read More**

By Qazi Ahmed Masood (Assistant Editor)

1. DISPUTES PERTAINING TO CONTRACTUAL ISSUES NOT TO BE RESOLVED IN SECTION 9 IBC PROCEEDINGS: NCLAT DELHI

The National Company Law Appellate Tribunal ("NCLAT"), Principal Bench, while adjudicating an appeal filed in a'XYKno Capital Services Pvt. Ltd. v. Rattan India Power Ltd., has held that disputes pertaining to contractual issues are not to be resolved in proceedings under Section 9 of IBC. The Adjudicating Authority came to the conclusion that there being pre-existing dispute application deserves rejection. The disputes pertaining to contractual issues are not to be resolved in Section 9 proceedings. Present is not a case where there is undisputed debt for which insolvency can be asked by the Appellant to be initiated. We are of the view that no error has been committed by the Adjudicating Authority in rejecting the Section 9 application, there being a pre-existing dispute.

The Bench held that disputes pertaining to contractual issues are not to be resolved in Section 9 proceedings under IBC and hence, the petition was rightly rejected by the Adjudicating Authority. **Read more**

2. ADVANCE PAID TOWARDS SERVICE IS OPERATIONAL DEBT: NCLAT DELHI

The National Company Law Appellate Tribunal ("NCLAT"), Principal Bench, while adjudicating an appeal filed in Chipsan Aviation Private Limited v. Punj Llyod Aviation Limited, has held that an advance paid towards a service falls within the definition of operational debt, even if there was no privity of contract between the Parties. The Bench placed reliance on the Supreme Court judgment in Construction Consortium Limited v. Hitro Energy Solutions Pvt. Ltd., (2022) SCC OnLine SC 142, wherein it was held that the expression 'in respect of' in Section 5(21) has to be interpreted in a broad and purposive manner and advance payment for goods and services is an Operational Debt.

Though there was no privity of contract between the Parties, the Bench yet opined that the advance payment of Rs. 60 lakhs was an Operational Debt. The Adjudicating Authority had committed an error in rejecting the Section 9 petition and thus Order dated 06.01.2022 was set aside. The Section 9 petition was revived. **Read More**

3. NO NOTICE IS REQUIRED FOR PERSONAL GUARANTOR AT THE STAGE OF APPOINTMENT OF IRP: NCLT AMRAVATI

The National Company Law Tribunal ("NCLT"), Amravati Bench, while adjudicating a petition filed in Central Bank of India v Mr. Kothapatti Raju, has held that in terms of Section 97 and Section 100 of IBC, no notice or right of audience can be given to the Personal Guarantor at a stage before appointing the Interim Resolution Professional. The Bench observed that once an application under Section 95 of IBC is filed through a Resolution Professional, the Adjudicating Authority under Section 97 of IBC shall direct the Board within seven days to confirm that no disciplinary proceedings are pending against Resolution Professional.

The Bench held that no notice is required for the Personal Guarantor at the stage of appointment of IRP. It was observed that the application under Section 95 of IBC was found to be complete. Accordingly, the Bench admitted the application under Section 95 of IBC and initiated an insolvency resolution process against the Personal guarantor.
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4. PROVIDENT FUND DUES ARE NOT ASSETS F CORPORATE DEBTOR, HAVE TO BE PAID IN FULL: NCLAT DELHI

The National Company Law Appellate Tribunal ("NCLAT"), Principal Bench, while adjudicating an appeal filed in Assam Tea Employees Provident Fund Organization v Mr. Madhur Agarwal & Anr., has held that provident fund dues are not the assets of the Corporate Debtor and they have to be paid in full.

The Bench placed reliance on its recent judgment in Regional P.F. Commissioner v Ashish Chhawchharia, Resolution Professional for Jet Airways (India) Ltd. & Anr., Company Appeal (AT) Ins. No. 987 of 2022, wherein it has been held that provident fund dues have to be paid in full. It was observed that the Resolution Professional's contention that the Appellant is an Operational Creditor and both the Operational Creditor and Financial Creditor have taken a haircut is not acceptable. The Bench held that provident fund dues are not the assets of the Corporate Debtor and they have to be paid in full. The Appellant was entitled to payment of full provident fund dues i.e. an amount of Rs. 2,10,13,798/-. The Successful Resolution Applicant was directed to make the payment of the balance amount of the Provident Fund to the Appellant to save the Resolution Plan from invalidity.
Read More

5. ADJUDICATING AUTHORUTY CANNOT ENQUIRE INTO JUSTNESS OF REJECTION OF RESOLUTION PLAN BY COC: NCLAT CHENNAI

The National Company Law Appellate Tribunal ("NCLAT"), Chennai Bench, while adjudicating an appeal filed in Dr. C. Bharath Chandran v Ms. Sabine Hospital and Research Centre & Ors., has held that the Adjudicating Authority has no authority to enquire into the 'justness' of Committee of Creditor's decision to reject a Resolution Plan. When a rejected plan is placed before the Adjudicating Authority, then it is expected to do nothing more but initiate the Liquidation process under Section 33(1) of IBC. The Bench observed that the Adjudicating Authority had given fair and equal chances to both the Resolution Applicants to the extent that a 'Resolution Plan' in tandem and cooperation of both the Parties could be submitted.

However, both the Resolution Applicants could not do so. Further, there are no provisions under IBC which authorize Adjudicating Authority to modify or interfere with the merits of the plan. It was also observed that the Adjudicating Authority has no jurisdiction or authority to analyze or evaluate the decision of the CoC to enquire into the justness of the rejection of the Resolution Plan by the dissenting Financial Creditors. **Read More**

By Dhiren Gupta (Assistant Editor)

NEWS UPDATES

INTELLECTUAL PROPERTY RIGHTS

1. 'HIGHER STANDARDS OF PROBITY EXPECTED FROM IPR LAWYERS': DELHI HIGH COURT RESTRAINS KOLKATA LAW FIRM FROM USING IDENTICAL LOGO

The Delhi High Court in the case of Sujata Chaudhri v. Swarupa Ghosh has said that there is a duty cast upon the legal professionals, particularly Intellectual Property Rights (IPR) lawyers, to ensure that they do not imitate or adopt a name or logo already used by others offering similar services. The High Court while restraining a Kolkata-based Law firm from using the impugned logo held that irreparable injury would be caused to the Plaintiff if the interim injunction is not granted.

The Plaintiff had sued the defendant, a Kolkata based law firm, for adopting an almost identical logo for its chamber. The HC observed that the Plaintiff's logo is a part of the registered mark in class 45 wherein the stylised device mark is clearly visible and the mark forms an inalienable part of the registration. Further, the court held that if the Defendant wishes to adopt the alternative logo to amicably resolve the issue, she is permitted to move an application before this Court. **Read more**

2. SIMPLICITY IN INVENTION SHOULD NOT DETER COURT FROM GRANTING PATENT: DELHI HIGH COURT

The Delhi High Court in the case of Avery Dennison Corpn. v. Controller of Patents and Designs has held that simplicity in invention should not deter Court from granting patent. The appeal was filed by the Appellant- Avery Dennison Corporation- seeking inter alia, an order to set aside the decision of the Respondent-Controller General of Patents and Designs.

The order refused the application for grant of a patent titled 'Notched Fastener', under Section 15 of the Patents Act, 1970 on the ground that the claimed subject matter of the subject patent does not constitute an invention under Section 2(1)(j) of the Act. The appellant contended that the cited prior arts are distinguishable, and the subject patent is worthy of patent protection as it involves an inventive step. The Court held that in the

"present case the improvement between the prior art and the subject invention was clearly decipherable and it did not lack any inventive step. **Read more**

3. DELHI HIGH COURT GRANTS INTERIM RELIEF TO ULTRATECH CEMENT IN TRADEMARK SUIT AGAINST 'ULTRA PLUS CEMENT'

The Delhi High Court has recently granted interim relief to cement market leader UltraTech Cement in its trademark infringement suit against another cement brand called 'UltraPlus'. The court opined that the plaintiffs are the registered proprietor of various marks in which 'Ultra' appears as a predominant part and the same as per the assertion of the plaintiffs, has also been declared to be a 'well-known trade mark' under Section 2(1)(zg) of the Trade Marks Act, 1999.

The court noted that the goods of the plaintiffs and the defendants are the same and any resemblance in the marks is likely to deceive an unwary consumer of the association of the defendants' products with the plaintiffs. The court in view of such aspects, passed an ad interim injunction in favour of the plaintiffs and against the defendants till further orders. **Read more**

4. DELHI HC: MERE REGISTRATION OF TRADEMARK DOES NOT CONFER EXCLUSIVITY OVER DESCRIPTIVE MARKS

The Delhi High Court in the case of Sanjha Chulha v. Sanjha Chulha & Ors. has held that registered proprietor does not get exclusive rights over a mark if that mark is descriptive in nature. Further, the court opined that if a prominent part of the registered trademark is used by another party either on a standalone basis or as a part of the composite mark, then this could be an indication of the deceptively similar marks. However, when a part of a composite mark is used by another party, it does not always result in the two marks being deceptively similar.

The Respondents were owners of a restaurant named "SANJHA CHULHA" in Faridabad whereas the Appellant too was engaged in a similar business and opened a restaurant in New Delhi with the same name. The Appellant had filed an application for interim relief seeking restraining orders against the Respondents from using the name "SANJHA CHULHA" and marks that are deceptively similar. The court based on the reasons dismissed the appeal of the Appellant. **Read more**

5. DELHI HC: NO JURISDICTION ARISES MERELY BECAUSE ADVERTISEMENT SPILLS OVER IN OTHER STATE OR TRADEMARK REGISTERED THROUGHOUT COUNTRY

The Delhi High Court while reiterating considerations for territorial jurisdiction, has held that the Court would not be vested with jurisdiction merely because advertisement spills over in some other state or that an application has been filed to register for trademark in entire country.

The present appeal was filed to challenge the order passed by the Learned Trial Court in the case of Hari Ram & Sons v. Prem Narain Purwar & Ors. by which the Defendants were restrained from using the trade mark 'HARI RAM AND SONS & HR LOGO'. The Appellants/Defendants in the suit had contended that the Trial Court categorically held that it did not have jurisdiction to entertain the suit but still went ahead to decree the suit and hence, the decree passed was null and void. The Respondent/Plaintiff in the suit challenged the finding of the Trial Court that it did not have the territorial jurisdiction to entertain the suit. Both the appeals arose from the same judgement and therefore, heard together and disposed by way of this common judgement. The Court set aside the order of the Trial Court and returned the plaint to be presented to the right forum. **Read more**

By Arnav Mahajan (Assistant Editor)

NEWS UPDATES

MERGERS AND ACQUISITIONS

1. TATA CONSUMER PRODUCTS TO ACQUIRE PACKAGED WATER GIANT BISLERI FOR ABOUT ₹7,000 CRORE

Almost three decades after selling soft drink brands Thums Up, Gold Spot and Limca to Coca-Cola, Ramesh Chauhan is divesting Bisleri International to Tata Consumer Products Ltd (TCPL) for an estimated ₹7,000 crore. Bisleri was originally an Italian brand that set up shop in India in Mumbai in 1965. The Chauhans acquired it in 1969. The company has 122 operational plants (13 of them owned) and a network of 4,500 distributors and 5,000 trucks across India and neighbouring countries.

The current management will continue for two years as part of the deal. Chauhan, 82, has been in indifferent health in recent times and says he doesn't have a successor to take Bisleri to the next level of expansion. Tata Consumer is aggressive in the fast-moving consumer goods (FMCG) space and aims to be among the top three in the sector. It also sells packaged mineral water under the Himalayan brand as well as Tata Copper Plus Water and Tata Gluco+. Acquiring Bisleri will catapult it to No. 1 in the segment.
Read More

2. ADANI PORTS ACQUIRES 49.38% STAKE IN INDIAN OIL TANKING FOR ₹1,050 CRORE

Adani Ports and Special Economic Zone Ltd (APSEZ) announced the acquisition of 49.38 per cent equity stake in third-party liquid tank storage player Indian Oiltanking Ltd (IOTL) for ₹1,050 crores. APSEZ said it has signed a definitive agreement with Oiltanking India GmbH and Oiltanking GmbH for the acquisition of 49.38 per cent in IOTL and also an additional 10 per cent equity stake in IOT Utkal Energy Services Ltd, a subsidiary of IOTL. Oiltanking India GmbH is a wholly-owned subsidiary of Oiltanking GmbH. The owned facilities include the Navghar terminal in Maharashtra, the Raipur terminal in Chhattisgarh and Goa terminal. The BOOT terminal with Indian Oil Corporation Ltd (IOCL) is at Paradip (Odisha) and O&M contracts with IOCL are at JNPT (Maharashtra) and Dumad (Gujarat). The company also has a biogas plant of 15 TPD capacity in Namakkal (Tamil Nadu). The Investment is in line with the company's strategy to increase its footprint as a transport utility and augment liquid storage assets in India. **Read More**

3. VIATRIS BUYS TAPARIAS' EYECARE BUSINESS FOR RS 2,460 CRORE

IViatris Inc. has agreed to acquire Famy Life Sciences - the eyecare (ophthalmology) business of the Taparia family for a total cash payout of around Rs 2,460 crore ($300 million). The Taparia family had owned Famy Care Group. Viatris will acquire Oyster Point Pharma which markets a novel dry eye product in the US. Together, the two deals are worth between $700 million and $750 million. The company expects the new acquisitions will help top-line growth and also add at least $500 million in adjusted Ebitda by 2028. Tyrvaya, a nasal spray to treat dry eyes, got USFDA approval in October 2021. Viatris will develop a handful of under-development products under phase 3 clinical trials. **Read More**

4. VMWARE OWNERS APPROVE $61 BILLION BROADCOM MERGER

IVMware shareholders voted to approve the pending merger with Broadcom, cementing a critical step that moves the deal closer to the finish line. The vote took place at a meeting of stockholders, which considered not just the fate of the merger but the compensation that Broadcom has arranged for VMware executives. With majority shareholder Michael Dell having already pledged his 40-per cent ownership stake to vote in favour of the acquisition, the outcome of the vote was heavily weighted towards seeing the deal through. In all, 352.6 million shares were cast in favour of being acquired by Broadcom — 99.61 per cent of the total vote — while 681,000 shares were cast in opposition and 687,000 shares were listed as having abstained. VMware said there are 424.4 million shares of the company's common stock that were eligible to cast votes. Of those, 353.9 million voted. **Read More**

5. HDFC LIFE COMPLETES MERGER OF EXIDE LIFE A DAY AFTER IRDAI'S APPROVAL

A day after insurance regulator IRDAI's final approval, HDFC Life Insurance on Friday announced the completion of the Exide Life merger. This marks the completion of the first-ever merger and acquisition (M&A) transaction in the Indian life insurance sector. HDFC Life acquired a 100 per cent stake in Exide Life Insurance Company from its parent firm Exide Industries for Rs 6,687 crore to increase its presence in the south India market. With the transfer of its life insurance business to HDFC Life, Exide Industries acquired 4.12 per cent stake in HDFC Life. This merger will accelerate the scale-up of HDFC Life's agency channel and enhance its geographical presence in tier II and tier III markets. The insurer had received approval from the Mumbai bench of the National Company Law Tribunal (NCLT) for the merger of Exide Life into itself. **Read More**

By Dhiren Gupta (Assistant Editor)

1. SEBI SUSPENDS FORMER MSEI MD AND CEO FOR SIX MONTHS FOR MULTIPLE VIOLATIONS

The Securities and Exchange Board of India (SEBI) has suspended Udai Kumar, former MD, and CEO of the Metropolitan Stock Exchange of India (MSEI), from working with any market infrastructure institution or affiliated firms for six months. In February 2018, the capital markets regulator performed a special-purpose inspection of MSEI. SEBI discovered that the exchange's policy for reimbursement of clearing fees in the currency derivative segment, as well as its technology system, violated certain regulations stipulated by the regulator.

Furthermore, during Kumar's tenure, numerous contracts were allegedly awarded without competitive bidding, payments were allegedly made to some suppliers without the submission of bills, and the bourse appeared to have fewer computers than it had paid for. MSEI also failed to declare that fixed deposits totalling Rs 41.24 crore and deposits with banks (with maturities greater than 12 months) totalling Rs 14.56 crore were made from a member's fund held by the exchange, according to SEBI. **Read More**

2. SEBI REGULATES THE BUYING AND SELLING OF MUTUAL FUNDS UNDER INSIDER TRADING RULES

SEBI has changed rules to include the buying and selling of mutual fund units within the scope of insider trading prohibitions. At the moment, insider trading restrictions apply to dealing in securities of publicly traded businesses or those that are about to be listed when in possession of Unpublished Price Sensitive Information (UPSI). Mutual fund units are expressly excluded from the rules' definition of securities.

Under the new laws, asset management companies (AMCs) will be required to report aggregated holdings in units of mutual fund schemes held by the AMC, trustees, and their immediate relatives on stock exchange platforms. “Details of all the transactions in the units of its own mutual funds... executed by the designated persons of asset management company, trustees, and their immediate relatives shall be reported by the concerned person

to the compliance officer of asset management company within two business days from the date of transaction," the regulator said. **Read More**

3. SEBI ISSUES A STANDARD FORMAT FOR REPORTING OTC TRADES IN NON-CONVERTIBLE SECURITIES

SEBI, the capital markets regulator, has issued a standard format for reporting over-the-counter (OTC) dealings in listed non-convertible securities. The development comes after SEBI discovered that investors' information on OTC trading in listed non-convertible securities provided to stock exchanges is insufficient and erroneous. As a result, erroneous and distorted information is shown on the exchanges' websites. "In order to address the issue, the Securities and Exchange Board of India (SEBI) has decided that all OTC trades will be reported in a uniform format," the SEBI said in a circular. OTC trades are often done between two market organizations with no one else knowing the price at which the transaction was completed.

The format requires the disclosure of information such as deal type, whether brokered or direct ISIN, listed or unlisted security, issuer name, coupon rate, issue description, traded price, traded yield, trade date and time, settlement date, settlement status and reported trade executed on the RFQ (Request For Quote) platform. **Read More**

4. SEBI AMENDS ICDR REGULATIONS TO PROVIDE FOR AN 18-MONTH WINDOW FOR PRE-FILED IPOS

The Securities and Exchange Board of India (SEBI) has updated the ICDR (Issue of Capital and Disclosure Requirements) regulations to include KPI disclosures, confidential filing of IPOs, and monitoring of proceeds used in qualified institutional placements (QIPs) and preferential allotments. The regulator has granted issuers that have pre-filed their draught offer documents an 18-month opportunity for an IPO following initial observations. Companies have 12 months after final observations to issue an IPO using the usual process.

Companies that choose a confidential filing can also market their issuances to qualified institutional buyers (QIBs) from the pre-filing stage until the initial observations. This was a long-awaited relaxation since SEBI released the consultation paper. Companies, on the other hand, are required to publish a public notification in three newspapers within two days after pre-filing, without disclosing any details about the matter. Market participants argue that this raises the likelihood of the document being leaked and may negate the objective of a confidential file. **Read More**

By Qazi Ahmad Masood (Assistant Editor)

1. CBIC ISSUES GUIDELINES FOR VERIFICATION OF TRANSITIONAL CREDIT CLAIMS UNDER GST

Recently, the GST Network (GSTN) has reopened the window for taxpayers to claim transitional credit under the Goods and Services Tax (GST) law from 1st October 2022 to 30th November 2022. Any taxpayer migrating from the pre-GST regime and missed claiming a transitional tax credit under VAT, service tax or excise law due to technical glitches can do so during the above period. Such transitional credit can be reported in Form TRAN-1 and TRAN-2 on the GST portal. Guidelines are provided for two scenarios- filing transitional credit forms for the first time and revising already filed ones. **Read more**

2. INCOME TAX ASSESSMENT MADE BY A NON-JURISDICTIONAL OFFICER IS VOID

The Kolkata Income Tax Appellate Tribunal (ITAT) has held that the income tax assessment made by a non-jurisdictional officer is null and void. The bench observed that in the case of a non-corporate assesse in non-metro cities, the ITR filed up to Rs. 15 lacs has to be assessed by ITO. Therefore, the assessment was made in violation of Instruction No. 1 of 2011 by the CBDT. The notice under section 143(2) was issued by ITO, Ward-1(1), Jalpaiguri, to the assesse, whereas the assessment was framed by the Assistant Commissioner of Income Tax, Circle-1(1), Jalpaiguri. The tribunal quashed the assessment order passed on the ground of lack of jurisdiction. **Read more**

3. CAPITATION FEE COLLECTED INDIRECTLY BY EDUCATIONAL INSTITUTIONS TO RECEIVE NO TAX EXEMPTION

The Madras High Court has lifted the corporate veil of the educational institution for collecting involuntary capitation fees. The bench, while cancelling the registration under Section 12A of the Income Tax Act, noted that the amounts collected by the assesses were capitation fees for allotment of seats in deviation of the Tamil Nadu Educational Institutions (Prohibition of Collection of Capitation Fee) Act, 1992. The capitation fee was

neither a voluntary contribution nor to be treated as applied for charitable purposes. The respondents/assesses were an educational trust. The assessee had registered themselves as a charitable trust under Section 12A (a) of the Income Tax Act, 1961. They filed their return of income, admitting "nil" income. **Read more**

4. SHOW CAUSE NOTICE ISSUED WITHOUT CONSULTATIONS TO BE TREATED AS COMMUNICATION FOR PRE-SHOW CAUSE NOTICE CONSULTATIONS

Show cause notice issued without pre-show cause notice consultations was directed by High Court to be considered as communication for pre-SCN consultations and thus, the assesse was given sufficient opportunity to satisfy authorities, and principles of natural justice stood substantively complied. In view of categorical directions of High Court to treat show cause notice as additional information to audit report and carry out pre-SCN consultations accordingly for further action, assesse now had sufficient opportunity to satisfy authorities that there was no case against him for issuance of SCN. Thus, principles of natural justice stood substantively complied. Assesse was given liberty to raise all legal grounds, including ground of limitation, before assessing officer which would be decided on its own merits. **Read more**

By Ishani Chakraborty (Assistant Editor)

1.DELHI HIGH COURT ORDERS BLOCKING OF 'PIKASHOW' APP IN INDIA, SAYS 'LARGE AMOUNT' OF COPYRIGHTED CONTENT BEING STREAMED ILLEGALLY

The Delhi High Court has ordered blocking of 'PikaShow' mobile application, observing that it is a "rogue app" which is intended "only to broadcast and stream illegal content." The court directed Department of Telecommunications and Ministry of Electronics and Information Technology to issue blocking orders against PikaShow app and all the domain names making it available, to ensure that it is blocked by all internet service providers (ISPs) across the country.

The Plaintiff's had filed suit seeking a permanent injuction against the mobile application 'PikaShow' alleging that it was hosting infringing content over which they have exclusive rights and copyright. They contended that their content is illegally being made available through the application, which provides free content of all well-known OTT platforms. The court while passing the order added that the injunction shall operate against any further domains which permit the application to be downloaded or which host the same. **Read more**

2. NCLT CLEARS JIO'S BUY OF RELIANCE INFRATEL

The Mumbai Bench of National Company Law Tribunal (NCLT) approved the Reliance Infratel Ltd's (RITL) acquisition by Reliance Project and Property Management Services Ltd (RP&PMSL), an arm of Reliance Jio.

Reliance Jio that looks into telco's tower and fibre business had moved the NCLT to speed up the acquisition process. Jio had urged NCLT-Mumbai to issue directions to RTIL's financial creditors to provide the necessary 'no dues certificate' to it to speed up the much-delayed bankruptcy resolution process. RP&PMSL was the resolution applicant in the RITL bankruptcy resolution process. It had presented a resolution plan involving a payment of Rs. 3, 720 crore to acquire the tower and fibre assets of the bankrupt company.

The Indian banks, vendors and other creditors have made claims of around Rs 86,000 crore under the insolvency proceedings. With the latest order, RP&PMSL now has the green signal to take over the assets of Reliance Infratel. **Read more**

3. RELIANCE GETS GREEN APPROVAL FOR WORLD'S LARGEST SUBMARINE CABLE

The environment ministry's expert panel has approved the ambitious underwater cable system for high-capacity and high-speed internet connectivity from India (Mumbai) to Europe and Asia proposed by Reliance. The cable systems, India-Europe-Xpress (IEX) and India-Asia-Xpress (IAX), are the largest globally and are expected to be ready between 2023 and 2024.

IEX in the Arabian Sea and open seas will connect Mumbai to Europe, with landings in the Middle East and Africa (Oman, Djibouti, Saudi Arabia and Egypt) as well as through the Mediterranean Sea with landings in France, Italy and Greece, further expanding to US Coast (East). Meanwhile, IAX consists of 12 cable landings in five countries with the main trunk from Tuas (Singapore) to Mumbai and branches to Chennai, Matara (Sri Lanka), Satun (Thailand), and Morib (Malaysia). The two cable systems will take off from Versova beach and Silver beach in Mumbai, respectively. **Read more**

4 .DIGITAL PERSONAL DATA PROTECTION BILL PROPOSES TO AMEND RTI ACT TO COMPLETELY BAR DISCLOSURE OF PERSONAL INFORMATION

The draft of the Digital Personal Data Protection Bill, which was released by the Ministry of Electronics and Information Technology on November 18 for public comments, has a provision which proposes to amend the Right to Information Act 2005.

Clause 30(2) of the draft proposes an amendment to Section 8(j) of the RTI Act, which will have the effect of totally exempting personal information from disclosure. Section 8(j) of the RTI Act states that information which relates to personal information will be exempted from RTI Act, if its disclosure has no relationship to any public activity or interest or if it would cause unwarranted invasion of the privacy of the individual. Now, the draft Digital Personal Data Protection bill proposes to completely take away limitations on the restrictions to disclose personal information and also to remove the powers of the Public Information Officers to allow disclosure of such information on the ground of larger public interest. **Read more**

By Arnav Mahajan (Assistant Editor)

RECENT ON THE BLOG

This post is authored by Samarth Luthra, fifth-year student of B.B. A. LL.B. (Hons.), at University School of Law and Legal Studies, Guru Gobind Singh Indraprastha University, New Delhi.

To Extend Or To Exclude? - Liquidation Timeline's Interplay with Stay on Alienation Of Assets

1.INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (hereinafter, IBC) and all the rules and regulations made thereunder are framed with a view to resolve the insolvency of a going concern and cater to the interests of its stakeholders in a time-bound manner. In fact, most amendments made to the Code and its subordinate legislations have been directed towards easing out the process and/or providing expeditious results to those involved. One of the many examples is Regulation 44(1) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016 which was amended by a notification in 2019, and now provides that the liquidator shall complete the liquidation process of the corporate debtor within one year of its commencement instead of the two year period initially set out in 2016.

The one-year time period for completion of the liquidation process may be extended by the adjudicating authority (hereinafter also, National Company Law Tribunal or NCLT) if the liquidator moves an application under Section 60(5) to this effect read with Regulation 44(2). In such an application, the liquidator will be required to report the reasons why the process could not be completed in one year and specify the additional time required. Hereunder, the liquidators move an application for continuing their tenure which primarily contains two different kinds of prayers: (i) exclusion of a certain period of time for the purpose of computing the one-year stipulation, and/or (ii) extension of a determined period of time which the liquidator needs to finish off the liquidation process which in most cases is already underway. Though these prayers may seem interchangeable and sometimes may even be efficacious when granted interchangeably for e.g., in situations where the stay is timely lifted, the ramifications of granting an extension can result in loss of time and costs of litigation and completely devastate the ambitions of the IBC.

The extend-exclude dynamic also plays a major role in determining the liquidator's fee specified under Regulation 4 of the Liquidation Process Regulations because if the time is excluded, then the fee will be calculated as per the more beneficial brackets - amount realized and distributed in (i) the first 6 months and (ii) the next 6 months, but if the time for liquidation completion is extended, then the fee will be computed as per the lesser percentage prescribed in the amount realized and distributed in the 'thereafter' bracket. For example, let us assume that the total assets to be realized are worth Rs. 1 crore but there was a stay that disabled the liquidator from realizing this value for 12 months. Now, if the liquidator realizes the assets in the 13th month, they may either be entitled to Rs. 5 lakh, if the exclusion of the stay period is granted, or Rs 1 lakh 88 thousand, if only an extension is granted. The readers are requested to apprise themselves of the dynamic **fee table under Regulation 4.**

2.NCLT'S WOEFUL DIVERGENT APPROACH

Reducing the period for liquidation from 2 years to 1 year clearly adduced evidence of the eager intent of the law making authorities to speed up the liquidation process, but the same has not met equivalent fervor from the NCLT which has failed to assert its discretion wisely when dealing with liquidator's plea stemming from Regulation 44(2) especially when the extension or exclusion of a certain period is due to a stay on the alienation of the corporate debtor's assets.

In IBC practice, it is not unheard of for the tribunals to allow a corporate debtor's application for a stay on alienation of property even after a public announcement for liquidation has been made by the duly appointed liquidator as long as it is any time before the sale/transfer/distribution of assets. A stay or a status-quo order may be granted in situations where there is a prima facie possibility that the liquidator has **wrongly rejected the claims** of a creditor, or where the proposed method and manner of liquidation is not commercially viable. In these cases, the liquidator gets appointed, starts exercising their secondary powers, and takes charge of their duties but they are not able to complete the crux of the process, i.e., selling off the corporate debtor as a going concern or sell its assets, distributing the proceeds for repayment of debt et cetera within the one-year period laid out in Regulation 44(1).

Once the one-year period is over, the liquidator is bound by the wording of Regulation 44(2) to state the reasons for the non-completion of the process and ask for an extension to finish off the process. The problem arises when the tribunal extends the liquidation period even though the inability to liquidate is owed to an active stay on the alienation of property. Such a situation can only be described as an 'Operation successful, patient dead' scenario where the application moved by the liquidator is allowed but since the stay is still operative, any extension granted by the tribunal cannot be utilized by the liquidator to realize the asset value of the estate and repay the due to corporate debtor.

In an order passed by the NCLT Hyderabad bench in **IA No. 184/2020** in CP (IB) No. 10/7/HDB/2017, the tribunal was dealing with the unamended law which allowed for two years to finish the liquidation process. In this case, the liquidator was stopped from realizing the estate of the corporate debtor but was kept in charge of the day-to-day affairs of the corporate debtor for approximately 14 months. Once the stay was finally lifted, the liquidator attempted to culminate the liquidation process but could not succeed and finally decided to move an application to exclude the stay period from the computation of the completion period. The tribunal found this to be a fit case for exclusion.

In 2021, NCLT Hyderabad Bench in **IA No. 28 of 2021** in CP (IB) No. 150/9/HDB/2017 passed another noteworthy order. The tribunal was hearing an application that sought exclusion of 423 days for computation of the liquidation timeline on two grounds: (i) exclusion of the COVID-19 pandemic-induced lockdown period under Regulation 47A and (ii) exclusion of the stay period under Regulation 44(2). The tribunal used its discretion and deemed it proper to grant an extension of one year, instead of excluding the 423 days' time as was prayed in the interim application moved by the liquidator. These two instances provide a perspective into the contrasting views of the same bench of the NCLT.

Another instance of this divergent approach is when NCLT Chennai Bench vide an order dated 14th September 2021 in **IA No. 1343 of 2021** excluded the stay period but in its order dated 23rd November 2021 in proceedings for **IA No. 808 of 2021**, granted an extension in a plea which sought exclusion of time, and was even underpinned by Regulation 47A which only allows for 'exclusion' and not an extension for the lockdown period.

3. POSSIBLE CAUSES FOR DIVERGENCE

There are multiple possible reasons for the mismatch in the exclusion-extension dynamic. One of the most prominent reasons why the adjudicating authority may prefer granting an extension over exclusion is the way the Insolvency and Bankruptcy Board of India (hereinafter, IBBI) has framed its regulations. As stated earlier, there are scenarios when both exclusion and extension may be used interchangeably. That being said, the true operation and implication of any law must be understood with the help of statutory cues and legislative assistance. Regulation 44(2) only speaks of "additional time that shall be required for liquidation" i.e. an extension and does not envisage an exclusion in its strict sense.

This view is further supported by the fact that the IBBI deliberately chose to "exclude" the lockdown period when it inserted Regulation 47A in April 2020, merely months after it amended Regulation 44. Further, the **causus omissus rule** states that if a situation has purposefully, or even mistakenly, not been provided by the law-maker, it shall not be produced or constructed by the court as it would amount to judicial legislating. In this context, it is seen that IBBI consciously chose to 'extend' under Regulation 44, and 'exclude' under Regulation 47A. Therefore, relying upon Regulation 44, it is not appropriate for the NCLT to exclude the time when the application under Section 60(5) is moved and to extend the time when the application is read with Regulation 47A.

On the other hand, it can be argued that the power to exclude is a corollary of the power to extend even after considering the interplay with stay orders which do not allow the process to be completed. The crux of the argument stems from the NCLT decision in **Quinn Logistics India Pvt. Ltd. v. Mack Soft Tech Pvt. Ltd.** (hereinafter, Quinn Logistics) dated 8th May 2018 where the NCLAT held that the period of a stay order which rendered the Corporate Insolvency Resolution Process (hereinafter, CIRP) immobile can be excluded from the computation of 270 days period (180 + 90) provided under **Section 12 of the IBC** for the completion of CIRP. The NCLAT also noted that the practice of exclusion has met approval from different benches of the NCLT. It is contended that the reasoning in the decision can, mutatis mutandis apply, to the liquidation proceedings initiated under **Section 33** as well. However, this point of view can be criticized just as well.

The contention that Quinn Logistic's reasoning can be extended mutatis mutandis may be considered shaky since the nature of extension under **Section 12** for CIRP, and the nature of extension for liquidation under Regulation 44(2) is very different. Court's satisfaction with respect to the 90-day extension under Section 12 only comes to the fore if the committee of creditors passes a resolution by sixty percent of the voting shares, whereas the commercial wisdom of the creditors is not a prelude in liquidation proceedings and **does not play a role** in seeking extension in liquidation proceedings, where they are merely considered as claimants. Moreover, any extension under Section 12 cannot be granted more than once whereas such a restricting proviso is not available within the liquidation process, neither in the Code nor in its subordinate legislations. Limitations put by the legislation and the wisdom of the CoC will play a vital role in determining whether the two kinds of extension are similar enough for one's judgment to be appropriated to the other's, especially because the court's discretionary powers under the CIRP and the Liquidation process are different.

4. CONCLUSION

Currently, there is no finality to the extend-exclude problem. Different Corams and Benches have shown a propensity to decide differently. In matters where the stay is lifted, an extension can be granted for the same duration of time for which the stay was in operation, but in matters where the stay is still in operation and the one-year liquidation period is over, the golden rule for the tribunals should be to lean towards granting an exclusion of the stay period irrespective of whether the time period is quantifiable or not. Under this practice, the computation is automatically halted for 'n' duration of time. This ensures that the liquidator does not have to approach the tribunal time and again if the extended time also gets over and the stay is not lifted, or even if the stay is lifted but the liquidation process cannot be completed in the remaining time. It also ensures that liquidators' fee is not impacted by a court stay outside of their scope of duties, and the maxim **Actus Curiae Neminem Gravabit** is followed.

Another method of dealing with this conundrum for the tribunals can be to keep it simple and stick to the prayer made by the liquidator. In this vein, the NCLAT New Delhi's decision **In Re: Ashish Arjunkumar Rathi, Liquidator For Ind-Barath Power (Madras) Ltd.** is worth mentioning. The impugned order, decision in I.A. 28 of 2021 mentioned above, had allowed for an extension of one year where the stay on proceedings had rendered the liquidation process moot. The NCLAT, on appeal, noted that the NCLT had erred in granting an extension since the prayer of the liquidator did not seek an extension but only to exclude the stay period, which was a fair plea considering the facts and circumstances. By virtue of this decision, the liquidator's fee was saved from suffering drastically. Apart from the changes that the tribunals can make, this problem of divergence can also be solved by bringing in a clarificatory amendment with respect to the intention of IBBI in excluding under Regulation 47A but extending under Regulation 44.

The author strongly contends that, in view of the problems highlighted above such as the inability of the liquidator to alienate property in the extended period, determining the liquidator's fee, and the divergent approaches of the tribunals, it would be prudent for the IBBI to insert a new stipulation by way of a notification in the name and form of Regulation 44(3) which should use the term 'exclude' for dealing with stay and alike situations. The operation of Regulation 44(3) should be automatic and should not require the liquidator to move the tribunals for relief, saving precious judicial time and costs while also guaranteeing a just application of the fee table under Regulation 4.

EDITORIAL COLUMN

ANALYZING CROSS BORDER FLOW OF DATA UNDER DPDP BILL, 2022

1. Introduction

'Data is the new oil, the new gold'. This phrase well explains the importance of data in today's world. The collection, processing, and storage of financial or personal data of clients and business organizations is the one thing that unites all the economies of the world. Protection of digital data in India has been a continuing concern nearly for the past decade. The sensitive and crucial data of people has been vulnerable so far and at mercy of different entities involved in collection or/and processing of data. With no proper legal framework and only a few judicial pronouncements concerning protection of data, issues concerning protection and processing of digital personal data are on a rise. In pursuance of establishing a legal framework to deal with this mushrooming predicament, the government of India came up with multiple data protection bills in the recent years. However, none could materialize due to several loopholes in the proposed laws.

Once again, the Ministry of Electronics and Information Technology (MeitY) has come up with the fourth version of such a bill, namely, the draft **Digital Personal Data Protection Bill, 2022**, three months after withdrawing the previous draft, released in 2019.

The new version of the bill differs in several aspects from its previous versions. Earlier, the proposed regulator, Data Protection Authority had much more powers with respect to regulation making and adjudication. However, the DPDP Bill, 2022 reduces the powers of proposed Data Protection Board of India as it is left with rule-making power only in 14 out of 22 clauses. The bill also differs in respect to data localization and cross border flow of data. Changes have been made to harmonize the interests of privacy and concerns of different industries. However, these changes beget several questions and issues which need to be addressed. In this article, the authors delve into the concept of cross border flow of data and discuss how the DPDP Bill, 2022 plans to regulate this flow. Further, the authors highlight the major issues and concerns revolving around data localization vis-à-vis the proposed DPDP Bill, 2022. The article also furnishes a comparative analysis of how different jurisdictions deal with cross border transfer of data.

2. Cross-Border Storing of Data

Our online presence requires sizeable data to be collected and stored by the technology giants and the protection of this personal data is an important issue arising out of this boom in digitalization. Businesses in the digital economy are international, necessitating the transmission of personal data across borders. This transfer of data to another country or jurisdiction is known as the cross-border transfer of data and requires businesses to comply with the privacy laws of the jurisdiction of the transferor state.
India has now proposed a new data protection bill that permits the cross-border transfer of data to certain notified countries and territories. Section 17 of the bill proposes that the countries will be notified after 'an assessment of such factors as the centre may consider necessary' and the following provision, Section 18 deals with the exceptions enumerated when the transfer will be exempted from the bill's provisions. **The bill is more in line with the data protection laws of Singapore, Australia, and the EU** and does away with the earlier specific data localization provision for cross-border data transfer of sensitive and critical personal data that appeared in the previous drafts. It also provides for levying heavy penalties for any kind of non-compliance.

In comparison to the current bill, the **bill introduced in 2018** was much more stringent and specified that the data fiduciaries must store at least one copy of personal data in data centres in India. However, exceptions have been provided. The **2019** and **2021 bills** only described transfers for sensitive and critical personal data. The penalties for non-compliance were comparatively less stringent in the 2018 and 2019 bills and were limited upto 15 crores or 4% of the total worldwide turnover in the last year, whichever is higher. The 2021 bill on the other hand left the penalty to be prescribed by the government.

3. **Concerns Surrounding Transfer of Data Outside India**

Despite its attempt to do away and alleviate the issues surrounding cross border flow of data, there still exist some issues which need deliberation. Section 17 of the draft bill provides for transfer of data to countries which the government will notify after considering factors it deems necessary. Moreover, a data fiduciary can transfer data to such countries "in accordance with terms and conditions as may be specified" by the government. The bill does not lay down the factors the government needs to and should consider before notifying a country (as adequate or non-adequate) for transfer of data. The bill is also silent on the terms and conditions that a fiduciary need to comply with. Moreover, it does not lay down any concept of reciprocity or minimum standard of protection that the transferee needs to accord to the data transferred. Such open-ended law gives wide power to the government and recreates the issue of data security outside borders.

The provisions pertaining to cross border flow of data were allegedly too restrictive in the 2019 bill. However, this version has relaxed those restrictions to a scary extent. It has done away with categorisation of data as sensitive or critical and puts it under the umbrella of personal data. This implies that personal data which included passwords, financial data, biometrics, caste, sexual orientation, etc will be treated in the same way as any other digital personal data. With no specific requirements for storage and processing such data (such as requirement of explicit consent), the new bill poses a serious threat to such data and makes it vulnerable to misuse.

As of now, the IT Rules require a data transferor to ascertain whether the data transferee will accord the same level of protection to personal data or not. It allows cross-border flow of data only when there is consent. However, in absence of any rules and restrictions for the transfer of data, the present bill makes way for the free and unrestricted flow of data outside borders, as long as there is consent or deemed consent of the data principal under Sections 7 and 8 of the bill, respectively.

4. Policies of Other Jurisdictions

In the digital global economy, it is imperative for businesses to understand the principles pertaining to privacy laws. Various jurisdictions have dedicated data protection that permits the cross-border transfer of data on principles of adequacy, informed consent, contractual necessity, the interest of data subjects, and a state's legal functions. European Privacy laws known as **General Data Protection Regulations (GDPR)** permit free flow cross-border transfer of data within EU countries. Additionally, the transfer of data to non-EU countries is also permissible provided the requirements mentioned in Chapter V of the GDPR are complied with. It allows permits to the countries that give an 'adequate' level of protection to data as provided within the EU. USA came up with a set of guidelines or principles to be followed by businesses receiving data from the EU known as the **EU- US Privacy Shield framework**. In the case of **Schrems II**, CJEU declared the Privacy Shield as an invalid mechanism due to non-fulfillment of the requirements enshrined in Art. 45(2)(a) of the GDPR and since then a long-awaited new framework i.e., **Trans- Atlantic Data Privacy Framework** was introduced in March 2022.

In Singapore, **Personal Data Protection Act** allows the transfer of data outside Singapore where the recipient can protect the data to the same standard as it would be protected in Singapore. Russia has a similar **data-sharing framework**. Even in the absence of a framework for data sharing, organizations planning to transfer data can choose to have their contracts governed by model clauses or Standard Contractual Clauses (or "SCC") that have been approved by the data authorities of the nation where the data will be transferred. However, some countries like Switzerland would demand prior consent from the data protection authorities if the SCC's terms are violated.
In case of inadequacy, data can still be transferred if the data principal consents to it after being appraised of the risks associated with it. For instance, the EU, UK, Mauritius, Vietnam, Australia, and Switzerland require that consent is obtained from data principals after appraising them about the associated risks and giving them the option to refuse such consent.

5. **Conclusion**

It is high time that India devises a robust and efficient legislation to deal with security of personal data. Where it is understandable given the ever-evolving nature of digital arena that no strait-jacket formula can be devised to deal with digital personal data and that the government will have to keep reviewing it from time to time, still it needs to lay down a strong foundation for protecting the interests of data principals and harmonizing their interests with those of different businesses.

EDITORIAL COLUMN

The government must ensure that the data transferred to the other country or the international organization is allowed on the condition that they ensure an adequate level of protection to the data transferred. An independent authority must be set up by the government to decide the factors to determine such countries or territories outside of India to which a Data Fiduciary might transfer personal data. A mechanism should be provided for periodic review of the development in the notified country or organization and the list should be revised accordingly. Transfer of each data might not require any specific authorization, however, a request for consent should be presented to the data fiduciary specifying the purpose and transfer of data to another country for a specific reason. Data Fiduciaries should also be allowed to transfer data to another country provided they ensure appropriate safeguards specified by the center and on condition that enforceable data principal rights and effective legal remedies for data principal are available.

by Harshit Kapoor (Associate Editor) and Shivi Agarwal (Copy Editor)

CALL FOR COMMENTS

IRDAI ISSUES DRAFT RULES FOR 'EXPENSES OF MANAGEMENT' (EOM) OF LIFE INSURANCE COMPANIES.

The Insurance Regulatory Development Authority of India (IRDAI) has issued a draft on Expenses of Management (EoM) for life insurance firms. The draft IRDAI (Expenses of Management of Insurers Transacting Life Insurance Business) Regulations, 2022 has been released seeking comments/suggestions on the proposed regulations. The proposed regulations will come into effect from FY 2023-24 onwards.

IRDAI has suggested introducing an objective clause to enable and give flexibility to the insurers to manage their expenses within overall limits based on their gross written premium so that they can optimally utilize their resources for enhancing benefits to policyholders. The draft has proposed the insertion of a single limit of 'Expenses of Management' and additional allowances towards the rural sector and government welfare-oriented schemes; also, for expenses towards 'insurtech' and 'insurance awareness'. As per the draft, there may be an additional allowable expense of up to 15 per cent incremental premium over the previous year towards rural sector business and government schemes. There is also a mention of additional allowable expenses up to 15 per cent of the premium for Pradhan Mantri Jeevan Jyoti Bima Yojana (PMJJBY). The board-approved policy on EoM must include measures to bring cost-effectiveness and manner of transfer of benefits arising out of cost reduction to the individual policyholders. It should also include stipulations regarding the payment of commissions to agents/ intermediaries. Further, it has been stipulated that the authority may grant forbearance to insurers in case of excess expenditure up to five years of 'duration of business' instead of 10 years at present.

All the stakeholders can send their comments/suggestions to finance.life@irdai.gov.in with a copy to venkatesh@irdai.gov.in. The last date to send comments is 14th December before 5:00 PM. Read more

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