AU COURANT

JUNE-JULY 2021

RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

PREFACE

It gives us immense joy to share with our readers, the combined June-July edition of our monthly newsletter, “Au Courant”.

In this edition, the current on-goings in various fields of law have been analyzed succinctly in the ‘Highlights’ section to provide readers some food for thought. These include a crisp summary of the Insolvency and Bankruptcy Code (Amendment) Bill, 2021, brief comments on the landmark judgements of Cairn Energy Plc and Cairn UK Holdings Limited v. The Republic of India and Amazon.com NV investment Holdings LCC vs Future Retail Limited and Ors. and a short synopsis on the Draft E-Commerce (Amendment) Rules, 2021.

Major happenings in various fields of law such as arbitration, competition, international trade law, securities, taxation, intellectual property, and technology, media & telecommunication have been recorded in the ‘News Updates’ segment to keep the readers abreast of 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.

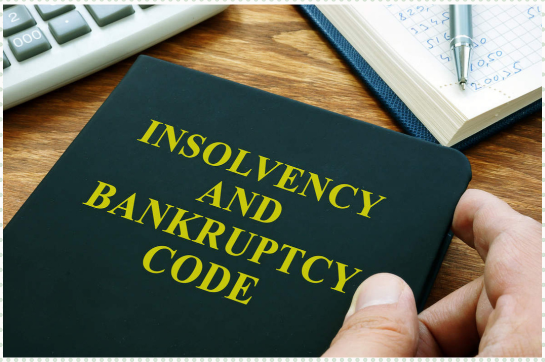
Lastly, the section ‘Call for Comments’ encourages readers to express their views and concerns on the measures under development and provide critical suggestions on issues that may have a bearing on financial and mercantile laws. Comments are invited on the Draft Electricity (Promoting Renewable Energy through Green Energy Open Access) Rules, 2021 by the Ministry of Power, Government of India and the Consultation Paper on proposed IFSCA (Insurance Intermediary) Regulations, 2021.

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

HIGHLIGHTS

RFM Law Review

THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) BILL, 2021



The two Houses of Parliament have successfully passed the Insolvency and Bankruptcy Code (Amendment) Bill, 2021 ("the Bill"), replacing the IBC Amendment Ordinance, 2021 promulgated by the President in April this year and amending the Insolvency and Bankruptcy Code, 2016. In a recent development, the Bill has received the Presidential Assent on August 13, 2021, and is now an Act of Parliament. The primary highlight of the Bill is the introduction of the "Pre-Packaged Insolvency Resolution Process" ("PIRP").

The PIRP is an alternative insolvency resolution mechanism for distressed Micro, Small and Medium Enterprises ("MSMEs") with defaults up to Rs. 1 Crore. The Ministry of Corporate Affairs, vide an order dated April 9, 2021, has specified ten lakh rupees as the minimum amount of default for the matters relating to PIRP. Essentially, the PIRP provides an opportunity to MSMEs for starting afresh with a clean slate and facilitating the proper overhaul and restructuring of their liabilities, while still providing safeguards to creditors for preventing misuse by firms.

The Bill has empowered the eligible Corporate Debtors of the MSMEs to initiate the process of PIRP for the resolution of outstanding debt upon receiving approval for the same by two-thirds of the Creditors. A significant feature of the PIRP is that in contrast to the process of Corporate Insolvency Resolution Process ("CIRP"), the control of the impugned firm remains vested with the debtor during the PIRP. The debtor would submit the base resolution plan to the Resolution Professional within two days of the initiation of the process, which would be considered by the Committee of Creditors ("CoC") formed within seven days of the PIRP commencement date. Post this, the resolution process is specified to be limited to a maximum of 120 days, with only 90 days available to the CoC for bringing a resolution plan to the Adjudicating Authority.

Under the pre-pack system, financial creditors will agree to terms with a potential investor and seek approval of the resolution plan from the National Company Law Tribunal ("NCLT"). As for the operational creditors, provided that they have not been reimbursed 100 per cent of their outstanding dues, the PIRP also allows for a 'Swiss Challenge' to the Resolution Plan of the debtor. The mechanism of 'Swiss Challenge' provides a third party to submit a resolution plan for the involved distressed firm, making the original applicant obligated to either match the improvised plan or forego the investment. The pre-pack framework, which aims to provide impetus to small investors and protect their interests, could also possibly reduce the burden on the NCLT benches by offering a faster resolution mechanism than the CIRP. **Read More**

CAIRN V. INDIA DISPUTE: THE FRENCH TRIBUNAL DECISION

In December 2020, Cairn Energy Plc and Cairn UK Holdings Ltd. initiated a suit of action against the Union of India for violating the India - Britain Bilateral Investment Treaty ("BIT") and by virtue of the same invoked arbitration proceedings. The case is centred around the imposition of retrospective tax liability by India and subsequent steps taken as part of recovery which were perceived as violative of the BIT. The Permanent Court of Arbitration ("PCA")had in its final award ordered India to pay USD 1.2 billion in damages for the 'total harm' suffered by Cairn due to the actions of the former in pursuance of recovery of the tax liability imposed.

As per the Finance Act of 2012, India imposed a tax liability of USD 1.6 billion on Cairn India ltd. for withholding tax on alleged capital gains in the year 2015. In the subsequent year arbitration proceedings were initiated by Cairn, whilst, India took measures to enforce the tax demand. However, the Tribunal opined that India had failed to uphold its fair and equitable treatment obligations under the BIT, and the imposition of tax liability retrospectively was not in the spirit of international law. The French Tribunal thus delivered the award in favour of Cairn and ordered India to provide reparations.

At the beginning of 2021, Cairn initiated proceedings in courts of the US, UK, France, Netherlands, Quebec and Singapore (all jurisdictions having Indian assets) in order to enforce the award against India. The French Tribunal's award is estimated to have an impact on about 20 properties owned by India (in France), valued at more than 20 million euros (Rs. 177 crores). However, India has staunchly opposed the execution of the award contending that the exercise of jurisdiction by the tribunal over a national tax dispute is improper, and it has challenged the same in a Dutch Court.

The Finance Act, 2012 had amended the Income Tax Act, 1961 to impose tax liability on the income earned from the sale of shares of a foreign company (if they derive their value substantially from the assets located in India) on a retrospective basis. A recent development in this aspect can be seen through a proposed Taxation Laws (Amendment) Bill, 2021 which would nullify this retrospective basis for taxation. The new amendment absolving retrospective tax liability may be instrumental in paving the way forward in the Vodafone and Cairn Energy disputes. Read More

AMAZON V. FUTURE DISPUTE: SUPREME COURT ON THE STATUS OF EMERGENCY ARBITRATION IN INDIA

Upholding the enforcement of an emergency arbitration award decided by the Singapore International Arbitration Centre ("SIAC") in Amazon.com NV investment Holdings LCC vs Future Retail Limited and Ors., the Supreme Court of India ruled in the favor of Amazon in its dispute with Future Retail Group. The dispute concerned the interpretation of Section 17 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act"). The Court decided upon two issues – interpreting Section 17 (1) of the Arbitration Act in order to include the award issued by the Emergency Arbitrator of SIAC as an order, and deciding whether an appeal made against an order of a single judge bench of a High Court under Section 17 (2) is maintainable.

The Reliance-Future Group deal was challenged by Amazon through an emergency arbitration filed in the SIAC, which ruled in favour of Amazon and stayed the deal as an interim relief measure. To get the arbitration award enforced, Amazon had approached the SEBI, CCI and the Delhi High Court ("Delhi HC"). A single-judge bench of the Delhi HC upheld the award and held that an emergency arbitrator is an arbitrator for all the intents and purposes under Section 17 (1). This judgement was appealed to the division bench by the Future Group. The bench passed an interim order holding that Future Retail was not a party to the arbitration and that Amazon's control over Future Group was in violation of the Foreign Exchange Management Act, 1999.

Finally, Amazon moved to the Supreme Court against the division bench order of the Delhi HC, which, in a landmark judgement, set aside the interim order of the division bench and upheld the single judge bench verdict. It ruled that the definition of arbitration in Section 2 (1) of the Arbitration Act means any arbitration, whether or not administered by a permanent arbitral institution, and when read with Section 2 (6) and 2 (8), would include even the interim orders passed by an emergency arbitrator. It also observed that party autonomy is one of the significant pillars of arbitration in the Arbitration Act and thus, parties are free to agree upon the procedure governing them in arbitral proceedings. This will also include the rules that allow emergency arbitrators to pass interim orders.

While deciding the second issue, the Court pointed out that the single judge verdict of the Delhi HC was an order passed for enforcement of the interim directions under Section 17 (1) and therefore, it could not be appealed under Section 37 of theArbitration Act. Read More

DRAFT E-COMMERCE (AMENDMENT) RULES, 2021

The Ministry of Consumer Affairs, Food, and Public Distribution, Government of India had made effective the provisions of the Consumer Protection (E-Commerce) Rules, 2020 under the Consumer Protection Act, 2019 in 2020 to regulate the activities on an ‘E-commerce entity’ which is currently defined as "persons who own, operate or manage digital or electronic facility or platform for electronic commerce”. Now, the government has suggested amendments to the said rules and proposed that e-commerce entities should now also include entities engaged by e-commerce entities for the purpose of fulfilment of orders placed by a user on its platform, related parties, and also e-commerce businesses that operate as a limited liability partnership or a registered partnership under relevant Indian laws. The rules also suggest the following changes:

(i) Proposed addition compliance under the draft rules:

- *Registration* - Section 4 of the draft rules mandates e-commerce sites to be registered with the Department for Promotion of Industry and Internal Trade (DPIIT) and the registration number and invoice of daily orders to be displayed prominently on its platform.
- *Appointment of Officers* - Section 5 of the draft rules mandates the entities to appoint Indian officers as a Chief Compliance Officer, a nodal contact person and resident grievance officer for compliance with laws, cooperating with law enforcement agencies and other obligations respectively.
- *Grievance Redressal Mechanism* - Every e-commerce entity has to publish the contact details of the grievance officer and procedure to register a complaint on their platforms.

(ii) Proposed additional duties under the draft rules:

- *Ban on Flash Sale* - ‘Flash sale’ is defined under the rules as “a sale organized by an e-commerce entity at significantly reduced prices, high discounts or any other such promotions or attractive offers for a predetermined period of time on selective goods and services or otherwise with an intent to draw large number of consumers". The rules lay down that the e-commerce entities shall not organize a flash sale, publish misleading advertisements nor misrepresentation of information of goods or services.

- *Imported Goods* - If an e-commerce entity sells imported goods on its platform, it shall be required to provide the details of the seller or importer and the origin of the goods along with a filter mechanism, display an alternative or suggestion of a domestic product and provide rankings according to parameters that do not discriminate against domestic products.
- *Cross Selling* - Cross-selling means the sale of goods or services which are related, adjacent or complementary to a purchase made by a consumer at a time from any e-commerce entity with an intent to maximize the revenue of such an e-commerce entity. The e-commerce entity must display clearly on their platform the name of the entity providing data for cross-selling and the data of such entity used for cross-selling.
- *Express Consent Requirement* - An express consent of consumers is required for making their information available to any third party.
- *Product disclosure* - Important details like best before, size, etc. must be prominently displayed on the platform.

(iii) Proposed liabilities of E-commerce entities:

- *Fall Back Liability* - The concept makes the entities liable for any loss caused to consumers as a result of a failure in the delivery of goods and services by a seller on their platform due to negligent conduct, omission, or through the commission of any act by a seller in fulfilling their duties and liabilities in the manner as prescribed by the marketplace e-commerce entity.
- *Ban on sale of goods to sellers* - Marketplace e-commerce entities cannot sell goods or services to their registered sellers on their platforms or advertise a body of sellers for the purpose of subsidizing a sale on their platform.
- *Limitations on indirect activities* - The entities cannot take a prohibited action even indirectly through related parties.
- *Non-discrimination by logistics service providers* - The logistics service providers of the entity shall not provide differential treatment to sellers of the same category on their platform.

However, logistics service providers of a marketplace e-commerce entity shall provide a disclaimer including terms and conditions governing their relationship with the sellers and any differential treatment that it gives between sellers of the same category. Read More

Alternate Dispute Resolution (ADR)

Madhya Pradesh Launches ODR Platform

The Madhya Pradesh State Legal Services Authority(“MPSLSA”) has inaugurated a pilot project for Online Dispute Resolution (“ODR”) in three districts: Gwalior, Jabalpur and Bhopal. The authority has adopted a threefold process involving reception of calls by the Urja Mahila Helpdesks, referral to online mediation and a lasting solution. Further, MPSLSA has identified and trained community mediators and partnered with Sama, an ODR Platform recognized by the Ministry of Law & Justice Government of India for technical support. The matters will be decided within seven days of the allocation and the extension may not be any more than thirty days. Read More

Patent Illegality a Ground to Set Aside the Arbitration Award

The Bench of Justices RF Nariman and BR Gavai of the Supreme Court has held in Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd that an arbitral award that rewrites the contract or ignores vital evidence while arriving at its decision is liable to be set aside under Section 34 of the Arbitration Act on the ground of Patent Illegality. This was after an appeal was filed against a Bombay High Court judgment which held that the foreign award is enforceable against the party, even though they were non-signatories to the Arbitration Agreement. Read More

Appellate Court Cannot Modify Arbitral Award

The Division Bench of JusticesR.F. Nariman and B.R. Gavai of the Supreme Court held in National Highways v. M. Hakeem that Section 34 of the Arbitration Act does not enable the appellate court to modify an arbitral award. It observed that being in the nature of an appellate provision, the section provides only for setting aside or upholding the awards. It can, however, allow the arbitral tribunal to resume the proceedings and take such actions which may eliminate the grounds for setting aside the order. Read More

French Company Takes Dispute with Egypt to ICSID

A French family-owned company Vicat, has raised a case against the Egyptian government in the International Centre for Settlement of Investment Disputes (ICSID). The case concerns its cement production business, and the company has alleged that it was forced to reduce its shares in a subsidiary company due to a law limiting the foreign ownership of the companies in the Sinai Peninsula in Egypt. Vicat had reduced its shares in its subsidiary to 42% from 56% previously. Read More

COMPETITION LAW

CCI Approves Majority Shareholding Acquisition of Three Odisha Electricity Distribution Utilities by Tata Power

The Competition Commission of India("CCI") approved the acquisition of 51 per cent of the equity share capital of DISCOMS, namely the Western Electricity Supply Company of Odisha Limited (WESCO), Southern Electricity Supply Company of Odisha Limited (SOUTHCO) and Central Electricity Supply Company of Odisha Limited (CESU) by The Tata Power Company Limited (TPCL). The CCI noted that there are no horizontal overlays between the activities of the involved parties, as the three companies distribute power in licensed areas of Odisha where the Tata group is not present. Read More

No Alleged Abuse of Dominant Position by Quality Council of India: CCI

The CCI received a complaint against the Quality Council of India ("QCI"), the parent body of the National Accreditation Board for Testing and Calibration Laboratory (NABL), inter alia alleging that the QCI abused its dominant position. The CCI, videitsorder dated July 05 2021, defined the relevant market and noted that the NABL is in a dominant position since only a small number of laboratories in India have been accredited by entities other than NABL. However, on the issue of abuse of dominant position under the Competition Act, 2002, the CCI dismissed the case. Read More

CCI Approves Acquisition of Stakes in Mukand Ltd. By Bajaj Group Entities

The CCI approved the acquisition of certain equity shareholding of Mukand Ltd by Bajaj Group entities under Section 31 (1) of the Competition Act. As per the official press release, the proposed transaction envisages the acquisition of up to 16.57 per cent of the equity share capital of Mukund by the following acquirers: Bajaj Sevashram Pvt Ltd, Bachhraj and Company Pvt Ltd, Bachhraj Factories Pvt Ltd and Sanraj Nayan Investments Pvt Ltd; all part of the Bajaj Group of companies, from the sellers. Read More

CCI Dismisses Allegations of Anti-Competitive Practices Against Uber

In an order dated July 14 2021, the CCI dismissed a complaint against Uber of the alleged abuse of dominant position and indulgence in anti-competitive practices. The CCI concurred with the findings of the Directorate General ("DG") inter alia to the presence of sufficient and regularly fluctuating competition in the relevant market, thus establishing that Uber is not a dominant player. Accordingly, in the absence of dominance, Uber cannot be said to abuse its dominant position. Read More

INSOLVENCY LAW

IBBI Amends Guidelines for 'Technical Standards for Performance of Core Services and Other Services' Under IBC Norms

On July 26 2021, the Insolvency and Bankruptcy Board of India ("IBBI"), in the exercise of the powers conferred under Section 196 of the Insolvency and Bankruptcy Code, 2016, has amended the 'Guidelines for Technical Standards for the Performance of Core Services and other Services under the IBBI (Information Utilities) Regulations, 2017'. Under this, new definitions such as 'Identity details' and 'Officially Valid Documents' ("OVD") have been inserted. OVD shall include PAN, Passport, DL, Voter's card, Aadhaar letter/e –Aadhaar. Read More

Crown Debts Which Are Not Included in The Resolution Plan Under the IBC Are Not Enforceable: Karnataka HC

The Karnataka High Court in Union of India v. Ruchi Soya Industries Ltd. held that Crown debts do not take precedence even over secured creditors under the Insolvency and Bankruptcy Code, 2016 ("IBC") since Section 238 of the IBC provides for the overriding effect of the Code over other laws. The Single Judge Bench of Justice S Sujatha laid down that if the Central or State departments do not file an application to recover debts or participate in the resolution process under the IBC, then their claims get extinguished automatically. Read More

A Dissenting Secured Creditor Can't Challenge Resolution Plan Insisting That Higher Amount Should be Paid Based on Security Interest: SC

In India Resurgence Arc Pvt. Ltd. v. M/S. Amit Metaliks Ltd. & Anr., a division bench of Justices Vineet Saran and Dinesh Maheshwari of the Supreme Court held that a dissenting secured creditor cannot challenge an approved resolution plan under the IBC with an argument that a higher amount should have been paid to it on the basis of the security interest held by it over the corporate debtor. The Court observed that it was not the intent of the Code that a security interest available to a dissenting financial creditor over the assets of the corporate debtor gives him some right over and above other financial creditors so as to enforce the entire of the security interest. Read More

A Person Giving an Interest-Free Loan to The Corporate Debtor to Cover Its Working Capital Needs Is a Financial Creditor: SC

A division bench of the Hon'ble Supreme Court, comprising Justices Indira Banerjee and V. Ramasubramanian, in Orator Marketing Private Limited v Samtex Desinz Private Limited, delivered a landmark judgement upholding that interest-free loans would fall under the definition of 'Financial Debt' as defined under Section 5 (8) of the IBC. It held that the provision of Section 5 (8) of the IBC that reads, "… a debt along with interest if any

…" had been overlooked by the NCLT and the NCLAT to the extent of the term "if any" thereby providing that interest is not an essential requirement for a loan to be considered a "financial debt" under the IBC. Read More

International Trade Law

UK And Australia Agree to the 'Comprehensive and Ambitious' Free Trade Deal

Britain and Australia announced a free trade deal in furtherance of building cordial trade relationships post Brexit. The trade deal appears to be the first bilateral trade deal that has come into play post Brexit and has been envisioned as a step for Britain towards expanding from the European market. Australia also stands to benefit in the agricultural sector from this deal. The two-way trade between the two countries is estimated at USD 20.7 billion at present. Britain is yet to formalize and publish the full agreement but intends on portraying this deal as an invitation to the rest of the Indo-Pacific as well as European countries. Read More

China Passes Counteractive Anti-Sanctions Law

In June 2021, the Standing Committee of China's National People's Congress passed Anti-Sanction laws in order to counteract escalating pressure from the United States and the European Union over trade, technology, Hong Kong and Xinjiang. The law aims at putting countries/individuals/entities that uphold such sanctions in a "list" and as a consequence of which they would be denied entry or deported from China. Furthermore, trade with China would be forbidden and their assets on Chinese soil would be seized or frozen, thus leading foreign investors to a bleak business situation. Read More

The 47th G7 Meet, 2021 concluded in UK

England hosted the Group of Seven (G7) Leader's Summit after the G7 Finance Ministers reached an agreement in principle on a global minimum tax regime. Furthermore, the Summit focused upon the global recovery post the pandemic while strengthening the framework of dealing with future pandemics. Emphasis was also laid upon the principle of free and fair trade. Also, among other things importance was shed upon tackling climate change while preserving the planet's biodiversity and culminating global shared values. Read More

Uzbekistan: Opening Doors to Liberalization and Free Trade

Through the Cabinet Ministers Resolution No. 429, the Government of Uzbekistan has passed a resolution in order to incorporate free trade and open its doors to further liberalized custom procedures and foreign trade. The most significant feature of the resolution would be that Uzbek companies are now permitted to purchase goods from abroad and sell them directly to third parties without importing them to Uzbekistan. Erstwhile, a fine equivalent to payment of the goods procured could be imposed if they were not physically imported. The resolution also allows the purchase of raw materials without having a definite buyer for the same. Read More

INTELLECTUAL PROPERTY RIGHTS

Rajya Sabha Releases The "Review of The Intellectual Property Rights Regime in India"

The Department-related Parliamentary Standing Committee on Commerce has released a report titled "Reviewing the Intellectual Property Rights Regime in India." It highlighted the significance of the IPR regime in India and compared it with the regime in the US and China. The Report acknowledges the absence of the "patent pending" criteria and recommends the Department to incorporate the same. It also explored and recommended inter alia Patent Prosecution Highway, IP Financing Legislation and judicial impact assessment. While revealing the current problems in the IPR regime, the committee recommended other countless changes and outlined the plan for their implementation. Read More

YouTube not Liable for Infringing Content Posted by Users

The Court of Justice of the European Union has clarified the position on a long-running debate on the responsibilities of online platforms with regards to copyright infringement. It held that the operators of internet platforms are not liable if copyright-protected works are uploaded by users to their platforms without authorization. This means that the online platforms are not responsible for the copyright infringements by the users as long as they are unaware of the illegal content uploaded by their users. But once they become aware of the presence of this illegal content, they have to block the user or remove the content. The court held that the platforms may also be held liable if they fail to incorporate sufficient measures for countering such infringements. Read More

Delhi High Court Creates a Separate Intellectual Property Division

After the Intellectual Property Appellate Board ("IPAB") was scrapped by an ordinance passed in April 2021, the Delhi High Court has issued a circular stating creation of an Intellectual Property Division ("IPD"). The IPD will be dealing with all original and appellate proceedings, fresh filings and suits related to IPR inter alia and all other proceedings which were hitherto maintainable before the IPAB.

Though the luminaries opine that this change is a superficial one as there is no alteration in the roster or number of the judges in order to have an exclusive judicial mechanism for IPR, there could be benefits in the long run. The creation of the division after the scrapping of the IPAB is symbolic because it recognizes the IPRs as an important and exclusive domain. Read More

Don't Act "Smart": The TATA Case

Tata Sons Pvt. Ltd. approached the Delhi High Court against M/s Electro International, alleging that the latter, through its website www.tatacliqsmart.com, deals in various products including TATA products. The domain name is strikingly similar to the domain www.tatacliq.com, registered with TATA. Aggrieved by the similarity of the domain name and the similar retail, TATA group contended that there is a copyright infringement and counterfeiting of their products. When the court tried to access Electro's website, it was unavailable. However, TATA produced relevant screenshots to prove their claim and an interim injunction was granted in favour of TATA. Read More

Taxation Law

Karnataka High Court Allows Non-Business Profit/Loss to Be Carried Forward

In the recent case of Nandi Steels Limited v. ACIT, in the Karnataka High Court, a unique question challenging a customary financial practice was raised that whether income arising out of non-core business activities be used to set off losses from previous years. The High Court in this case decided on expanding the scope of Section 72(1)(i) of the Income Tax Act, 1995 by specifying that the provision does not use the expression "Head". Thus, the legislature has consciously left it open so that any income from the business, though classified under any other head, can still be entitled to the benefit of set-off. Therefore, the court, reversing the order of two appellate authorities, clarified that if a company, while paying taxes or preparing financial statements, had categorized a certain amount as "other business income", that amount could be used to carry forward profits or losses. Read More

Government Announces Tax Exemption and Extension in Timelines of Compliances

In light of the Pandemic, the Department of Revenue under the Ministry of Finance, released a press notification dated June 25, 2021, providing various breaks and reliefs for taxpayers. The two-pronged assistance scheme involves (i) tax exemption to such persons who either receive financial help from their employers for medical treatment or families of such persons who lost their lives due to the pandemic and (ii) extension of timelines. The families of such persons who lost their lives due to the pandemic will be provided with a tax exemption for ex-gratia payment received by them from the employer of such person or from another person. However, in cases where such payment is made by a non-employer, the exemption shall be limited to Rs. 10 lakhs in aggregate for the amount. Read More

Mumbai Tribunal Opines Write-Off of Investment as Business Loss

The issue of allowability of written-off investment in loss-making overseas subsidiaries was contended at length in the case of DCIT v.

Maneesh Pharmaceuticals Ltd. The Mumbai Bench of Income Tax Appellate Tribunal (ITAT) held that the write-off of an investment in a lossmaking overseas subsidiary is allowed as a business loss. It was opined that the investments were made out of commercial expediency and in furtherance of taxpayer's business and since a direct nexus could be established between the investment and the taxpayer's business, any loss arising thereof would be an allowable deduction. Read More

Change In Customs Brokers Licensing Regulations

The Central Board of Indirect Taxes and Customs ("CBIC") has done away with the process of renewals of license/registration through the Customs Brokers Licensing Regulations, 2021 and the Sea Cargo Manifest and Transhipment Regulations, 2018. The licenses/registrations once issued as per the aforementioned regulations would now be valid for a lifetime, and a separate provision has been made for voluntary surrender of license/registration due to inactivity. This circular is in congruence with the objective of "Contactless Customs" program initiated by the CBIC as per an earlier circular. Read More

TMT LAW

Department of Telecommunications (DoT) Issues Revised Other Service Provider Guidelines

The Revised Guidelines for Other Service Providers ("OSPs") define an OSP as an entity that provides voice-based Business Process Outsourcing ("BPO") services to customers located worldwide, including in India. Voice-based BPO services mean call centre services, where customers access the network of an OSP through a public switched telephone network (PSTN). The distinction between international and domestic OSP in the Old Guidelines has been done away with. This reinforces the DoT's intent to support the cause of ease of business. The New Guidelines further relax the requirements and permit OSP agents working from home (i.e., remote agents) to connect to the OSP Centre using any form of connectivity. Remote agents can also directly connect to the centralized EPABX of the OSP or the EPABX of the OSP or the customer. Read More

Ministry of Information and Broadcasting Amends Cable TV Network Rules, 1994

The Government amended the Cable Television Network Rules, 1994 to give legal recognition to the self-regulatory bodies for television content, who will now be registered with the government. A statutory mechanism for redressal of grievances/complaints of citizens relating to content broadcasting by television channels has also been created by the amendment. The I&B Ministry had asked all the digital news publishers, OTT Players, and traditional news platforms with digital arms to furnish details of compliance with the new rules within 15 days, from May 26, 2021. Read More

Meghalaya Brings a Legislation to Regulate Online Gaming

The Meghalaya State Government has brought in the Meghalaya Regulation of Gaming Act, 2021, which aims at regulating both 'games of skill' and 'games of chance' involving betting or wagering of money or money's worth. An Indian citizen has to obtain a prior license from the state government in order to operate in the classified games. The Act lays down various obligations for regulating the gaming industry in the state. Read More

Creation Of The 'Digital Intelligence Unit' (DIU) And 'Telecom Analytics for Fraud Management and Consumer Protection' (TAFCOP) by the DoT

The DoT announced the creation of the 'Digital Intelligence Unit' (DIU) and 'Telecom Analytics for Fraud Management and Consumer Protection' (TAFCOP) to curb financial frauds committed through misuse of telecom resources, such as consumer harassment by sending of unsolicited commercial communication (UCC), use of false or forged documents to obtain telecom resources, and other deceitful activities. The circular issued by DoT in this regard bespeaks its aim to inter alia provide effective resolution to consumers against bad actors, enable better coordination between concerned authorities and law enforcement agencies (LEAs), and monitor the circulation of UCC. Read More

Securities Rights

SEBI's Powers to Regulate Fees of Investment Advisers Upheld by The Bombay High Court

The power of the SEBI to regulate fees charged by investment advisers was upheld by the Bombay High Court in Purnartha Investment Advisers Private Limited v. SEBI on June 18,2021. The court also held that the capping of fees is not a breach of fundamental rights and that SEBI deciding the maximum fees advisers can charge, amounts to a "reasonable restriction" in carrying on the business or profession of investment advisers. SEBI had asked investment advisors to segregate advisory and distribution activities at the client level. It had even capped their fees based on two alternatives — charges based on assets under advice or a predetermined fixed amount per annum for each client that cannot exceed ₹1.25 lakh. Read More

SEBI Introduces Cross Margin Facility on Commodity Futures Trade

SEBI introduced cross margin benefit between commodity index futures and their underlying constituents' futures to improve the efficiency of the use of margin capital by market participants. Cross margin benefit of 75 per cent on initial margin may be allowed for eligible offsetting positions of index futures and futures of its underlying constituents or its variants. Clearing corporations need to apply to SEBI for approval for the provision of cross margin benefit on the indices. The application needs to be accompanied by the back testing data. Read More

Govt eases listing norms for companies having over ₹1 Crore m-cap

The Department of Economic Affairs has amended the Securities Contracts (Regulation) Rules, 1957. Under the new rules, companies that have a market capitalization of more than ₹1 lakh crore at the time of listing can now sell just five per cent of their shares. Such entities will be required to increase their public shareholding to 10 per cent in two years and raise the same to at least 25 per cent within five years. Read More

Supreme Court held that consent is not mandatory under Section 24A of the SEBI Act

A bench of Justices DY Chandrachud and MR Shah in Prakash Gupta v. Securities and Exchange Board of India, on June 23, 2021, held that the consent of SEBI is not necessary for the compounding of offences under Section 24A of the SEBI Act, 1992. The Court said that though SEBI is not conferred with any authority to veto a decision for proceeding in trial offences, it is a regulatory and prosecuting agency and the Securities Appellate Tribunal (SAT) and the courts must obtain its views since it is an expert body. Read More

PROTECTION OF ARTIFICIAL INTELLIGENCE ORIGINATED INVENTIONS: THE DABUS/THALER EFFECT

This guest post is authored by Dr. Athira P S, Director, Centre for Intellectual Property Rights, at National University of Advanced Legal Studies (NUALS), Kochi

1.INTRODUCTION

Bloomberg, in 2016, reported an interesting incident on something known as ‘Pseudo-AI’, by looking into the practices of certain companies employing low paid workers to ‘act’ in the digital space as ‘bots’. What can be termed as a ‘Wizard of Oz’ effect, wherein the mystique surrounding Artificial Intelligence (“AI”) is thought to overpower its contemporary scope and applications, is relevant here. Some authors opine that perceiving, consequently believing, and ultimately acting on the notion that AI is more creative and smarter than human beings, may even be counterproductive. [i]

Scientists and engineers have so far considered computers and AI as tools or mediums that process human-provided inputs and act under human supervision. Furthermore, AI-assisted inventions or AI-implemented inventions have been granted patents universally. However, recently, the premise that AI entities can be as inventive and ‘smart’ as, if not more than, human inventors, has transcended science fiction to reality to a certain extent, through the filing of numerous patent applications for independent AI-generated inventions in different jurisdictions.

The World Intellectual Property Organization (“WIPO”) has discussed the relevance of AI in intellectual property over its Trend Reports as well as conversations among different stakeholders. As per WIPO, AI lacks a universally accepted definition, and it uses the phrase ‘deep supervised machine learning’ while clarifying that AI is a branch of computer science that aims to develop systems and machines capable of performing tasks that have been, so far, the ex-

exclusive domain of human intelligence. Depending on the task or area of technology, different subsets such as machine learning, deep learning, NLP, etc., may be employed.

2. THE DABUS CONTROVERSY AND RESPONSES FROM PATENT OFFICES

The DABUS ("Device for the Autonomous Bootstrapping of Unified Sentience") is an AI entity, invented by Dr. Stephen L Thaler. He classifies DABUS as a 'swarm of many disconnected neural nets' with interrelated memories, while others have identified it as 'a type of connectionist artificial intelligence' or as a 'complicated creativity machine'. As per Dr. Thaler, DABUS is the inventor of Food Container and Devices and Methods for Attracting Enhanced Attention.

For this purpose, patent applications[ii] were filed at the European Patent Office ("EPO") with a priority date of November 7, 2018, for certain inventions – fractal food container and neural flame for attracting enhanced attention – naming DABUS as the inventor. Here, Dr. Thaler, as the inventor of DABUS itself, was the applicant. Later, applications were also filed at the United Kingdom Intellectual Property Office ("UKIPO"), United States Patent and Trademark Office ("USPTO") and under the Patent Cooperation Treaty ("PCT") system.

Dr. Thaler argued that the DABUS is the inventor of these inventions and that Dr. Thaler himself must be considered as the applicant, and raised the following arguments:

1. Machines cannot own patents, and that as the employer and/or owner of DABUS, as well as a successor in title, Dr. Thaler is the rightful applicant.
2. Even when asked to modify the application and remove DABUS as the inventor, he argued that to do so would be immoral and contrary to the concept of moral rights of inventors, and skew the public notice function of the application.
3. The basis of the patent system being acknowledgement and incentivization of inventions, grant of inventorship to machine inventors would, in turn, reward the inventors of such machines.

The EPO rejected the application stating that the inventor must be a natural person. As per the European Patent Convention ("EPC"), a patent shall contain the designation of the inventor and states thus, "However, if the applicant is not the inventor or is not the sole inventor, the designation shall be filed in a separate document. The designation shall state the family name, given names and full address of the inventor", and clearly indicates that the inventor is envisaged as a natural person only. The EPO further clarified that "AI systems or machines can be neither employed nor can they transfer any rights to a successor in title", while acknowledging Dr.

Thaler's ownership over the output of DABUS, as its owner. It clarified that since a machine is designated as the inventor the application "does not meet the formal requirements under the EPC (Article 81, Rule 19(1) EPC) and further that things cannot claim rights, even if they are 'named'."

The applications filed at the UKIPO and the USPTO [iii] were also rejected, on technical grounds and formality requirements. In the UK, this decision was appealed to the High Court of England and Wales, Special Patents Court, where Dr. Thaler lost. The court clarified that since DABUS is not a natural person, it cannot own rights, and therefore cannot transfer them to Dr. Thaler as well. Referring to Section 7 and 13 of the Patents Act and on an ancillary note, Section 3.05 of the Formalities Manual of Intellectual Property Office (IPO), the court rejected the possibility of an AI entity being an inventor. The Formalities Manual was also updated in October 2019, though the IPO denies any connection to the DABUS position.

The American grounds for denial of patent application were also technical and procedural – that the process of 'conception' of an invention was the exclusive domain of human creativity. Additionally, the USPTO denied the application holding that the datasheet was not filled duly with names of the natural persons who alone can be listed as inventors. It had issued a Notice to File Missing Parts, stating that the inventors should be identified by their 'legal name'. While the final judgment in the appeal filed by Dr. Thaler [Thaler v. Iancu, et al. (No. 1:20-cv-00903)] is pending, indications do not seem too bright on the success of his position.

To sum up, in all these jurisdictions, the claim of Dr. Thaler was that the patent must be granted as applied because, while Dr. Thaler is a person, he's not the inventor; and simultaneously, while DABUS is the inventor, it is not a person. This argument was not accepted. However, it is pertinent to note that all patent jurisdictions do not formally insist on a natural person being named as the inventor, for e.g., Israel,[iv] where both DABUS and Dr. Thaler are listed as applicants, while the former alone is named as the inventor.

3. AI INVENTORS: INDIAN PERSPECTIVE

The PCT National Phase Application for the DABUS inventions was filed in India, published under Section 11A of the Patents Act, 1970 on March 19, 2021. In India, even though 'true and first inventor' is not qualified in the legislative language, in practice, the inventor is a natural person, i.e., an individual or a group of individuals and an assignee may be a natural person or a legal person such as a company, university, etc. Section 7(3) states that if the inventor is not the applicant, a declaration of proof of inventorship by the inventor must be filed. This theme is carried forth in Sections 10 and 28 as well, which detail the significance of the declaration of an inventor as well as the mention of the inventor as such in the patent, respectively.

As in the case of DABUS, if it becomes necessary for the individual owner of the AI system to designate himself as the inventor to circumvent or overcome potential hurdles of opposition from the Patent Office, Section 64(1)(j) becomes crucial – which states that if the patent was ‘obtained on a false suggestion or representation’, it may be revoked. Sections 25, 52, and 64 also emphasize the requirement for full and correct disclosure of the background and details of the invention, including names of inventors. It is noteworthy that the Indian legal system recognizes that a patent not only confers economic rights but also that the actual creator must be credited with attribution and acknowledgement of his inventiveness and creativity. Evidence may be drawn from the Justice N. R. Ayyangar Committee Report, 1959, [v] which states the following about an inventor in a patent:

“*The principle is that whether or not the actual deviser has a proprietary right to the invention, he has a moral right to be named as the inventor. Such a mention besides affording him mental satisfaction gives him prestige and increases his economic worth, advantages to which he is legitimately entitled…*”

While the above excerpt clearly talks about an employee or other human inventors, the moral right of an inventor to be recognized as such in the application is vividly delineated. In this context, a question of whether moral rights may be attributed to machines is redundant; claiming another’s invention (even of a machine’s) as belonging to oneself is immoral. A system of joint inventorship, with both the AI creator and the human creator of the AI, being jointly cited as inventors may be an answer; as in such cases, the requirements of moral attribution may be met. Some authors argue that unless juristic personality is attributed to the AI creator, even the concept of co-inventorship may not be practically applied.

Even so, if as Dr. Thaler claims, the invention occurs completely outside the paradigms of human supervision or inputs, even a partial attribution to the human creator of the AI may not be justifiable, considering the lack of effective contribution in arriving at and formulating the invention. Again, another option maybe to designate the AI as an ‘employee adsimilis’, wherein the AI may be treated ‘like an employee’, on whose inventions, the owner of the AI system can claim ownership. In such cases, it is clear that the traditional tenets of patent laws, as applied to human inventors, is being extrapolated to machine inventors – and as such, they may lack traction. For instance, the requirements of ‘proof of right’ as provided under Section 7(2) and (3) of the Patents Act, 1970 (Form I as well), or duly authenticated assignment deeds, are to be fulfilled if they involve human inventors and it is not reasonable to apply them verbatim in the case of a non-human inventor.

Thus, from the Indian context, the objections inherently present in patent laws must be amended expansively so as to accommodate non-human inventors as well. Particularly, systemic requirements specifying that only natural persons may be inventors may have to be altered and devised along the lines of who the ‘applicant’ to a patent may be, which presently includes ‘legal entities’ as well. Such a scenario would accommodate the possibilities of the AI creator being identified as an inventor, while the human creator/owner of the AI system may be the applicant; the same may be facilitated by relevant legislative intervention, in line with the changing requirements of the times.

Further, the Ferid Allani case[vi] is noteworthy in this regard as it recognizes the role played by AI, Internet of Things (IoT), and Blockchain, in modern human life and expands the scope of protection of computer-related inventions under Section 3(k). For now, an AI entity may not be recognized as an inventor by the Indian Patent Office in the DABUS case; this domain must be monitored for further developments.

4. CONCLUSION

It is pertinent to note that Dr. Thaler’s team nowhere argues that the AI be recognized as the inventor fully endowed with the ability to wield any statutory rights. Instead, the argument is that to avoid the grant of recognition or inventorship to creative machines would either incentivize or force human supervisors, to claim inventorship over the respective inventions. Not only would such compulsion result in wrongful claiming, contrary to the concept of moral rights, but also might invalidate the patent itself or give rise to penal consequences, as the act of wrongful claiming may entail the same. Even if the argument is that AI lacks moral rights, human applicants may be penalized for claiming inventions that are not rightfully their own.

There have been numerous discussions at the policy level, in international, regional, and national echelons, regarding the patentability of AI-creations, including steps taken by the USPTO and UKIPO. Most authors rightly argue that this is just the first sign, the tip of the iceberg, of a revolution. As more such creations are originated and devised independently by AI entities, the legal system must change its viewpoint, as the routine tests of the conception of a patentable idea and inventorship applicable to human creators may not be sufficient for AI inventors. The test of non-obviousness, in particular, may have to be re-assessed and applied in such instances. Presently, the threshold of inventive step/non-obviousness is, what is not obvious to a human expert who is ordinarily skilled in the art, but the same cannot apply to an inventive AI system.

Hence, patent systems may need to apply different parameters of obviousness in the case of AI inventors as improvements to the corpus of knowledge by such non-human creators in particular sectors may not be obvious to human inventors or persons skilled in the art – this may particularly become relevant in the future, wherein the inventive capacities of AI systems may expand dramatically.

There has been significant literature about the veiled nature of AI reasoning,[vii] termed in some contexts as Black-box technologies, wherein even the programmers may not be aware of the complex and complicated processes the AI entities employ in decision making.[viii] Such incomprehensibility may be relevant in assessing:

1. Sufficient disclosure and enablement, wherein human applicants may not be able to fully explain the path of arrival at the solution in the patent applied for.
2. Standards of inventive step or non-obviousness, as comprehensibility and understanding of an AI originator would be different from human originators.

These imply, again, that the patent system as we know it, would have to essentially evolve to accommodate AI-originated inventions. Thus, the Thaler Effect, as we may term it, and the impact of the DABUS case in initiating dialogue and discourses in the global techno-legal arena regarding AI-originated inventions are very significant, notwithstanding their success or failure at different patent offices. As more AI-creations come forth in a multitude of fields, moulding or augmenting existing laws may not be sufficient. The dynamic and forceful tide of independent AI-powered conception and creations might demand a sea-change of our intellectual property laws as well as of our collective understanding.

<u>Endnotes:</u>

[i] Gary Smith, The AI Delusion 237 (Oxford University Press 2018).
[ii] The applications EP 18 275 163 and EP 18 275 174 were filed in 2018.
[iii] Stephen Thaler v. Andrei Iancu, 1:2020cv00903 (08/06/2020), in his official capacity as Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, and United States Patent and Trademark Office.
[iv] Erika K. Carlson, Artificial Intelligence can Invent but not Patent—For Now, (November 2020) Engineering 6(11):1212-1213, DOI:10.1016/j.eng.2020.09.003.
[v] Shri Justice N. Rajagopala Ayyangar, A Report on the Revision of the Law in India Relating to Patents for Inventions, 1959 (India), Para 432, Clause 22—Mention of inventor as such in patent, available at https://ipindia.gov.in/writereaddata/Portal/Images/pdf/1959-_Justice_N_R_Ayyangar_committee_report.pdf.

[vi] Ferid Allani v. Union of India, 2019 SCC Online Del 11867.
[vii] Michael O'Neill & Lee Spector. Automatic programming: The Open Issue? Genetic Programming and Evolvable Machines, Springer Nature (2020), available at https://link.springer.com/article/10.1007/s10710-019-09364-2.
[viii] Yavar Bathaee, The Artificial Intelligence Black Box and the Failure of Intent and Causation, 31 Harv. J. L. & Tech. 889 (2018).

MORE FROM THE BLOG

EUROPEAN SUPER LEAGUE – A COMPETITION LAW SCRUTINY

This post has been authored by Khushi Dua & Tapamoy Ghose, second-year students of B.A.LL.B. (Hons.) at the National University of Advanced Legal Studies, Kochi. The authors in this post provide an in-depth study into the proposed European Super League model through the lens of anti-trust regulations in the European Union. Read More

TRACKING INDIA'S INTERNATIONAL INVESTMENT PARTICIPATION IN THE ISDS REFORMS

This post has been authored by Urmil Shah, a fourth-year student of B.A.LL.B. (Hons.) at the AURO University, Surat. In this article, the author delves into an analysis of the Investor-State Disputes Settlement (ISDS) system in the Indian context and provides various models which can be implemented to ensure meaningful reforms. Read More

HOLLYWOOD V. BOLLYWOOD: COPYRIGHT INFRINGEMENT

This post has been authored by Nandini Modi, a fourth-year student of B.B.A.LL.B. (Hons.) at Jindal Global Law School. Through this article, the author delves into the debate of whether there is a copyright infringement when Bollywood production houses indulge in the practice of creating remakes of Hollywood films, with special emphasis on the idea/expression dichotomy. Read More

GOOGLE V. ORACLE: THE LONG WAR WITNESSES ITS FINAL BATTLE

This guest post is authored by Ms. Niharika Salar, Assistant Professor at NALSAR University of Law, Hyderabad. In the piece, the author delves into the judicial decision of the US Supreme Court in the Google-Oracle dispute with a special focus on the fair use doctrine and the welfare theory. Read More

CALL FOR COMMENTS

1. DRAFT ELECTRICITY (PROMOTING RENEWABLE ENERGY THROUGH GREEN ENERGY OPEN ACCESS) RULES, 2021

The Ministry of Power, Government of India, released the "Draft Electricity (promoting renewable energy through Green Energy Open Access) Rules, 2021" on August 16, 2021. Among other goals, the rules aim to standardise open access (from sources other than licensed distributors) regulations all across the country, with current regulations being different for each state. The rules have been framed for the purpose of purchase and consumption of green energy, including energy from waste-to-energy plants.

The rules state that state power commissions will be mandated to frame mechanisms to allow consumers to procure green energy through open access, and any such application will have to be cleared within 15 days. The tariff in this case, shall also be determined by the commission. The rules also propose that there shall be no capacity limit for industries and large power consumers for setting up solar power generation units for self-consumption.

Additionally, the draft rules also state that Renewable Purchase Obligations (RPO) of an industrial user can be met through the use of green hydrogen as well. The norms in this regard will also be notified. Apart from this, the rules also deal with aspects such as nodal agencies, cross-subsidy surcharges, banking, etc.

Public comments have been sought on the draft rules within 30 days of their notification, i.e., till September 15, 2021, through specified methods. Read More

2. CONSULTATION PAPER ON PROPOSED IFSCA (INSURANCE INTERMEDIARY) REGULATIONS, 2021

The International Financial Services Centres Authority (hereinafter, "IFSCA"), a statutory body established under the Government of India to develop and regulate financial products, financial services and financial institutions in the International Financial Services Centres (IFSCs) in India, has released a Consultation Paper on the proposed IFSCA (Insurance Intermediary) Regulations, 2021 on August 13, 2021.

In pursuance of its goal "to enact a comprehensive regulatory framework for the insurance intermediaries in IFSC focusing on ease of doing business and by adopting international best practices being followed by regulators globally", the IFSCA released the consultation paper containing the draft regulations on insurance intermediaries. The draft regulations, among other things, specify the eligibility criteria, registration requirements, permissible activities, and other similar regulations for setting up an IFSC Insurance Intermediary Office (IIIO).

Comments on the Consultation Paper have been invited from the general public and stakeholders through a specified method by September 03, 2021. Read More

EDITORIAL BOARD

RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

ISSN(O): 2347-3827

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