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 September 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 short synopsis of the new regulatory guidelines for IPO-bound companies released by SEBI and the amendments introduced by IBBI for streamlined redressal of Guidelines, along with brief comments on the case of Munjal Showa Ltd. v. Commissioner of Customs and Central Excise.

Major happenings in various fields of law such as alternate dispute resolution, banking and finance, insolvency and bankruptcy, intellectual property rights law, mergers and acquisitions, securities 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. Also, the 'Interview' section consists of the Interview with Mr. Harshit Dusad on "Decoding the Impact of RBI's new Digital Lending Guidelines".

The Editorial Column section contains a piece by Ms. Shereen Moza (Associate Editor, RFMLR) and Mr. Shashwat Sharma (Junior Editor, RFMLR) titled 'The Compelling Case of Resolution Plans Vis-À-Vis the Powers of Adjudicating Authority'.

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 ONDC on its consultation paper on Building Trust in the ONDC Network and the comments invited by the Ministry of Communications on the Draft Indian Telecommunication Bill, 2022 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!

SEBI INTRODUCES NEW RULES FOR IPO BOUND COMPANIES

The Securities Exchange Board of India (SEBI) in its Board Meeting on 30th September, 2022 cleared a slew of proposals that have made significant changes in the regulatory framework for companies planning to go public through an Initial Public Offering (IPO). The main changes include tightening the disclosure norms for IPO bound companies and opening of a new route by which firms, at the initial stage of their IPO, can file the offer document with limited information and disclose sensitive information closer to the actual IPO process.

Enhanced disclosure norms have been mandated due to concerns that traditional financial disclosures were inadequate for some firms that typically remain loss making for a longer period. The companies would now have to disclose Key Performance Indicators (KPIs), details of pricing of shares based on past transactions and past fund raising from its investors. The companies, in addition to the audited financial numbers, must also disclose their numbers on various KPIs in different sections of Draft Red Herring Prospectus (DRHP) which are not covered in the financial statements in the offer documents. The new norms follow heavy erosion of investor wealth in recent IPOs of loss-making companies like Paytm and Zomato that led to concerns about the offer prices.

SEBI has also allowed companies planning a stock market listing to submit a confidential “pre-filing” document, - a practice followed in the United States and Canada - to safeguard their sensitive business information. Pre-filing mechanism allows issuers to carry out limited interaction without having to make any sensitive information public. This assumes significance as there were concerns raised by market participants and industry players that the draft offer document contains a lot of sensitive information about the company and if the company is not able to actually launch the IPO, then all the disclosure proves futile. Until an issuer is certain of a launch, this will help prevent price speculation, which currently happens way before the certainty of an IPO. Further, the document which incorporates SEBI’s initial observations would be available to investors for a period of at least 21 days. However, the existing mechanism of processing offer documents will continue in addition to this alternative mechanism of pre-filing.

HIGHLIGHTS

Apart from this, SEBI also approved amendments to insider trading regulations to include mutual funds in its ambit. The move comes more than a year after SEBI accused a senior executive of U.S. money manager Franklin Templeton (FT) and his family members of using non-public information to sell holdings worth about $4 million in Franklin debt funds that were shut down weeks later and caused investor panic. In India, insider trading rules are applicable to those who deal in listed securities while in possession of unpublished price sensitive information. **Read More**

By- Tarpan Soni (Junior Editor)

HIGHLIGHTS

1.EXTENDED PERIOD OF LIMITATION INVOKABLE AS EXEMPTION BENEFIT AVAILED BY APPELLANT ON BASIS OF FORGED DEPB LICENSES/SCRIPS: SC

The Hon'ble Supreme Court of India in the case of Munjal Showa Ltd. v. Commissioner of Customs and Central Excise has held that the liability to pay customs duty is invokable when the Duty Entitlement Passbook Scheme (DEPB) is fake/forged. The Supreme court while upholding the liability clause dismissed both the appeals filed by the assessee and directed the Adjudicating Authority to complete the penalty proceedings on remand, at the earliest preferably within a period of six months from the date of this judgment as the penalty proceedings were reported to be pending pursuant to the remand order passed by the CESTAT.

In the present case, M/s. Munjal Showa Ltd. (Appellant) had imported consignments using Transfer Release Advise (TRAs) issued by Bombay Customs House based on DEPB. The assessing authority on verification found that the DEPBs were forged and, therefore, asked the appellant to deposit duty with interest in place of the DEPB benefit availed by them. Thereafter, a Show Cause Notice (SCN) was issued to the appellant alleging evasion of duty by seeking exemption against debits in DEPB scripts. The Appellant replied to the SCN stating that though the DEPB Scripps were forged but there was no intention to evade Customs Duty. It was held by the authority that the DEPB were forged and the exemption availed by the appellant was inadmissible.

The appellant filed an appeal before the Customs Excise and Service Tax Appellate Tribunal (CESTAT) where the tribunal rejected the plea of the Appellant on the issue of liability of duty but remanded the matter to the original authority on the issue of penalty. The High court also reaffirmed the order of the CESTAT, confirming the duty on the ground that "fraud" vitiates everything. Further aggrieved, the appellant filed an appeal in the Supreme Court of India against the Impugned order. The Supreme Court concurred with the finding of the Department and the Tribunal and held that the Department was completely justified in invoking the extended period of limitation. The Apex court further held that whether the Appellant had knowledge about the fraud or the forged / fake DEPB licenses/Scripps and whether the Appellant was aware to take requisite precautions to find out about the genuineness of the DEPB licenses/Scripps which they purchased, would have a bearing on the imposition of the penalty, and has nothing to do with the duty liability. **Read more**

-By Arnav Mahajan, (Assistant Editor)

HIGHLIGHTS

IBBI AMENDS RULES FOR SWIFTER AND MORE STREAMLINED REDRESSAL OF GRIEVANCES

Insolvency and Bankruptcy Board of India (IBBI) has put in place a streamlined and swift complaint handling procedure, IBBI has amended rules pertaining to redressal of grievances filed against insolvency professionals. The mechanism of complaint or grievance redressal and subsequent enforcement action has been amended to have expeditious redressal and also to avoid placing under burden on the service providers. To curtail delays and ensure expeditious and result oriented enforcement mechanism, the amended rules provides for revisions in various timelines related to enforcement process for addressing the issue of delay in the present mechanism. As part of the modifications, the Committee of Creditors (CoC) constituted during the Corporate Insolvency Resolution Process (CIRP) will function as Stakeholders Consultation Committee (SCC) in the first 60 days. After adjudication of claims and within 60 days of initiation of the process, the SCC will be reconstituted based upon admitted claims. The liquidator has been mandated to conduct the meetings of SCC in a structured and time-bound manner with better participation of stakeholders. Also, the scope of mandatory consultation by liquidator with SCC has been enlarged.

Now, SCC may even propose replacement of liquidator to the Adjudicating Authority (AA) and fix the fees of liquidator, if the CoC did not fix the same during CIRP. If any claim is not filed during liquidation process, then the amount of claim collated during CIRP will be verified by the liquidator.
Wherever the CoC decides that the process of compromise or arrangement may be explored during liquidation process, the liquidator will have to file application only in such cases before the Adjudicating Authority for considering the proposal of compromise or arrangement, if any, within 30 days of the order of liquidation. Besides, specific event-based timelines have been stipulated for auction process. Before filing of an application for dissolution or closure of the process, SCC will have to advice the liquidator on the manner in which proceedings in respect of avoidance transactions or fraudulent or wrongful trading will be pursued after closure of liquidation proceedings. The new rules further lay down the manner and period of retention of records relating to liquidation and voluntary liquidation of a corporate debtor or corporate person, respectively. **Read More**

By Shashwat Sharma (Junior Editor)

ALTERNATIVE DISPUTE RESOLUTION

1. ICSI PLANS TO SETUP 20 CENTRES IN INDIA TO FACILITATE DISPUTE RESOLUTION IN INDIA

1The Institute of Company Secretaries of India (ICSI) plans to setup at least 20 centres across India over the next 12 months to facilitate dispute resolution in line with the guidance of the union law ministry. Commercial disputes keep on happening and cases remain stuck in court. ICSI has taken a decision that it should open Alternate Dispute Resolution (ADR) centres to facilitate the same. A pilot project will take place in Hyderabad and the plan is to have 20 such centres over the next year. The Centres shall decide not only corporate but as well as individual corporate disputes. Company secretaries can play an important role in resolving them through ADR mechanisms such as Arbitration, Mediation, and Conciliation.

The ICSI president reiterated that the institute has taught the company secretaries to handle similar disagreements over the last few years and will empanel the trained members so that can be shared with High Courts who may then decide to send the case to the arbitrators. **Read More**

2. RELIANCE INFRA LODGES A CLAIM FOR ₹13,400 CRORE AGAINST ADANI TRANSMISSION

Reliance Infra has lodged a complaint of ₹13,400 crores against Adani Transmission . According to Reliance Infrastructure, the arbitration claim was made before the Mumbai Centre for International Arbitration (MCIA) and relates to a purported violation of the terms of the share purchase agreement it entered into with Adani Transmission in December 2017 regarding the sale of its Mumbai power distribution business. The financial implication cannot be ascertained and it is contingent upon the final outcome of arbitration and subsequent legal challenges," the filing by Reliance Infrastructure Ltd highlighted.
In a deal worth Rs 18,800 crore, the Adani Group had purchased Reliance Infra's (previously Reliance Energy) Mumbai electricity business, which included generating, distribution, and transmission. **Read more**

3. NIGERIA TO PAY $496 MILLION TO SETTLE CLAIMS OVER STEEL PLANTS

IAfter a contract to renovate the nation's steel factories was terminated, Global Steel Holdings Ltd. filed a multibillion-dollar lawsuit against Nigeria. Nigeria has agreed to pay $496 million to resolve this claim. Global Steel, which is linked to India's Mittal family, acquired rights to Nigeria's entire state steel industry between 2004 and 2007 through five major concessions and share purchase contracts. Access to Nigeria's iron ore reserves and the central railway network were also included in the agreement.

However, the contracts were terminated in 2008 by the late Umaru Yar'Adua's government. The same year, Global Steel sought arbitration at the International Chamber of Commerce's Court of Arbitration in Paris. Between 2011 and 2020, Global Steel and the Nigerian government attempted but failed to reach an agreement. **Read More**

4. FORMER CJIS JUSTICE DIPAK MISRA, AND JUSTICE TS THAKUR APPOINTED ARBITRATORS IN THE ONGC-AFCONS DISPUTE

The bench of Justices DY Chandrachud, Sanjiv Khanna, and Surya Kant noted in its order passed on September 21 that ONGC has nominated Justice Thakur as its nominee arbitrator while Afcons has nominated Justice Misra in the ONGC-Afcons dispute. The case came before the Supreme Court when ONGC sought the termination of an arbitral tribunal's mandate and the replacement of a new set of arbitrators after their fee was sought to be amended.

The petitioner argued that once the fee payable to the arbitrators was specified in the parties' agreement, the arbitrators were required to accept their appointment on the terms agreed in the contract or refuse the arbitration if they were not agreeable. The Bench emphasized that party autonomy is a fundamental principle of arbitration and that the agreement serves as the foundation of the arbitral process. The Court concluded that there was no agreement between the parties and the arbitrators on the fees and that allowing the tribunal to persist would mean imposing a fee on the parties and the arbitral tribunal that they did not agree to. As a result, the Court ordered the formation of a new arbitral tribunal and new arbitrators were designated. **Read More**

By Qazi Ahmed Masood (Assistant Editor)

BANKING AND FINANCE

1. PAYMENT AGGREGATORS FALL WITHIN DEFINITION OF PAYMENT SYSTEM, RBI CAN ISSUE GUIDELINES FOR EFFICIENT MANAGEMENT: DELHI HIGH COURT

The Delhi High Court has recently held that payment aggregators fall within the definition of designated payments system under section 23A of the Payments and Settlements Act, 2007, and the Reserve Bank of India can issue guidelines for efficient management and regulation of payments system. The High Court passed the ruling while dismissing the petition filed by Lotus Pay Solutions Private Limited, a company engaged in providing recurring payment solutions for businesses in India through an authorised payment system.

The petitioner contended that payment aggregators only act as intermediaries and thus do not fall within the ambit of "payment system" as defined under Section 23A of the Payments and Settlements Act, 2007. The court while examining the definition of "payment system" observed that there is no definition as to what constitutes a payment service and held that services offered by payment aggregators in the facilitation of payments should fall within the ambit of payment system. **Read more**

2. RBI LIFTS PROMPT CORRECTIVE ACTION (PCA) CURBS FROM CENTRAL BANK OF INDIA

The RBI, on September 20, decided to take out the Central Bank of India from the Prompt Corrective Action (PCA) framework, subject to certain conditions and continuous monitoring. The RBI came to the conclusion that as per the assessed figures of the bank for the year ended March 31, 2022, the bank is not in breach of the PCA parameters.

Further, the Central bank of India also gave written assurances to the RBI that it would comply with the norms of minimum regulatory capital, net non-performing asset (NPA) and leverage ratio on an ongoing basis and also appraised the RBI of structural and systematic improvements undertaken by them. Central Bank of India was put under the PCA framework in 2017 because of its rising non-performing assets (NPAs) and low return on assets. **Read more**

3. RBI IMPOSES MONETARY PENALTY ON VARACHHA CO-OPERATIVE BANK

The RBI has imposed a monetary penalty of Rs 1 lakh on Surat-based Varachha Co-operative Bank for contravention of directions issued by RBI on loans and advances to directors. This penalty has been imposed in the exercise of powers vested in the RBI under the provisions of Section 47 A (1) (c) read with Sections 46 (4) (i) and 56 of the Banking Regulation Act, 1949, taking into account the failure of the bank to adhere to the aforesaid directions issued by RBI.

The action has been based on a statutory inspection conducted by the RBI with reference to the bank's financial position. The central bank also clarified that the penalty won't affect the validity of any transaction or agreement entered into by the bank with its customers and is strictly based on regulatory non-compliance. **Read more**

4. RBI ISSUES DEBIT AND CREDIT CARD TOKENISATION RULES

TThe credit and debit card rules set up by the RBI have come into effect from September 1, 2022. RBI has made it mandatory for all debit and credit cards used in online and in-app transactions to be replaced with unique tokens by September 30, 2022. The main purpose behind this new change is that sensitive information like CVV, card number, and expiry date won't be stored while processing online payments.

Every time a consumer initiates a transaction, he will either have to re-enter the card details every time or they can initiate a token request. A tokenised card transaction is considered safer as the actual card details are not shared with the merchant during the process of transaction. As per RBI, the new system will bring down the number of chargebacks, disputes and fraud, and would help consumers, merchants, and banks. **Read more**

By Arnav Mahajan (Assistant Editor)

NEWS UPDATES

INSOLVENCY AND BANKRUPTCY LAW

1. APPROVAL OF A RESOLUTION IN RESPECT OF ONE BORROWER CANNOT DISCHARGE A CO-BORROWER: SUPREME COURT

If there are two borrowers or if two corporate bodies fall within the ambit of corporate debtors, there is no reason why proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) cannot be initiated against both the Corporate Debtors, Supreme Court has observed in Maitreya DoshiI v. Anand Rathi Global Finance Ltd. & Anr. Section 7 of IBC says that the approval of a resolution in respect of one borrower cannot certainly discharge a co-borrower. If there are two borrowers or if two corporate bodies fall within the ambit of corporate debtors, there is no reason why proceedings under Section 7 of the IBC cannot be initiated against both the Corporate Debtors. The same amount cannot be realised from both the Corporate Debtors. If the dues are realised in part from one Corporate Debtor, the balance may be realised from the other Corporate Debtor being the co-borrower. However, once the claim of the Financial Creditor is discharged, there can be no question of recovery of the claim twice over. **Read More**

2. NO BAR TO WITHDRAW ADMITTED CIRP APPLICATION BEFORE CONSTITUTION OF COMMITTEE OF CREDITORS: SUPREME COURT

The Hon'ble Supreme Court in the case of Ashok G. Rajani v. Beacon Trusteeship Ltd. has held that settlement cannot be stifled before the constitution of the Committee of Creditors in anticipation of claims against the Corporate Debtor from third persons. The Apex Court observed thus while dismissing the appeal against The National Company Law Appellate Tribunal (NCLAT) order which gave the parties the opportunity to settle their disputes before the Adjudicating Authority (NCLT) in terms of Section 12A of the IBC read with Rule 11 of the National Company Law Tribunal Rules, 2016 (NCLT Rules).The bench noted that Section 12A of The Insolvency and Bankruptcy Code, 2016 (IBC) enables the Adjudicating Authority to allow the withdrawal of an application admitted under Section 7 or Section 9 or Section 10, on an application made by the applicant with the approval of 90% voting shares of the Committee of Creditors in such a manner as may be specified.
Read More

3. NCLT HAS DISCRETION TO NOT ADMIT FINANCIAL CREDITOR'S CIRP APPLICATION? SUPREME COURT ALLOWS OPEN COURT HEARING FOR REVIEW

The Supreme Court has allowed open court hearing for the review petition filed against the judgment in Vidarbha Industries Power Ltd. v. Axis Bank Limited, the bench held that the National Company Law Tribunal has the discretion to not admit the insolvency application filed by a financial creditor even if the corporate debtor is in default. The court observed that, ordinarily, the Adjudicating Authority (NCLT) would have to exercise its discretion to admit and initiate Corporate Insolvency Resolution Process (CIRP), on satisfaction of the existence of financial debt and default on the part of the Corporate Debtor in payment of the debt, unless there are good reasons not to admit the petition. **Read More**

4. CIRP CAN BE INITIATED AGAINST CORPORATE GUARANTOR WITHOUT PROCEEDING AGAINST PRINCIPAL BORROWER: SUPREME COURT

The Supreme Court has held that CIRP can be initiated against the Corporate Guarantor without proceeding against the principal borrower. In Laxmi Pat Surana v. Union Bank of India, the Adjudicating Authority (NCLT) had admitted the petition under Section 7 of the Insolvency and Bankruptcy, 2016 (IBC) and initiated the CIRP against Maharaja Theme Parks and Resorts. The NCLAT (Appellate Authority) upheld the order passed by NCLT. The court noted that, under Section 7 of the IBC, CIRP can be initiated against a corporate entity who has given a guarantee to secure the dues of a non-corporate entity as a financial debt accrues to the corporate person, in respect of the guarantee given by it, once the borrower commits default and the guarantor is then, the Corporate Debtor. **Read More**

5. RESOLUTION PLAN WHICH IGNORES STATUTORY DUES PAYABLE TO STATE GOVERNMENT/LEGAL AUTHORITY LIABLE TO BE REJECTED: SUPREME COURT

TIn State Tax Officer (1) vs Rainbow Papers Limited, the Supreme Court has held that a Resolution Plan which ignores the statutory demands payable to any State Government or legal authority, altogether, is liable to be rejected. The court also held that Section 48 of the Gujarat Value Added Tax Act is not contrary to or inconsistent with Section 53 or any other provisions of the IBC.

Under Section 53(1)(b)(ii), the debts owed to a secured creditor, would include the State under the GVAT Act, the bench comprising Justices Indira Banerjee and AS Bopanna observed. The court added that the definition of secured creditor in the IBC does not exclude any Government or Governmental Authority. **Read More**

By Dhiren Gupta (Assistant Editor)

NEWS UPDATES

INTELLECTUAL PROPERTY RIGHTS

1. DELHI HC RECEIVES PENDING CASES OF ERSTWHILE IPAB

Delhi High Court's Intellectual Property Division (IP Division) has received a total of 401 cases from the now-abolished Intellectual property Appellate Tribunal (IPAB). IPAB was abolished by the Parliament last year by the Tribunals Reforms Ordinance, 2021. The notice issued by the High Court notified that advocates may also confirm the receipt of instructions from their respective clients they are representing and intimate the same to the Administrative Officer so that the concerned cases can be listed at an early date. The IP Division is a result of a committee constituted by Chief Justice DN Patel to streamline and review a large quantum of cases. **Read more**

2. DELHI HC: NON-FILING OF LEGAL PROCEEDINGS CERTIFICATE DOES NOT DISENTITLE PARTY TO FILE SUIT SEEKING INJUNCTION IN APPREHENSION OF TRADEMARK INFRINGEMENT

Delhi High Court has held that mere non-filing of legal proceeding certificate does not hinder a party's entitlement where it apprehends infringement of its trademark. This was decided in M/s Maan Pharmaceuticals Limited v. M/S Mindwave Healthcare Pvt Limited. M/S Mindwave Healthcare Pvt Limited had filed a suit against M/S Maan Pharmaceuticals Limited to seek permanent injunction restraining the latter from using the trademark 'BUPROEX-N' as M/S Maan claimed to be its registered owner. The Trial Court dismissed the application citing the case to be out of its territorial jurisdiction under Section 151 of the Civil Procedure Code of India, 1908. Delhi High Court in the appeal case concluded that it cannot be said that the plaint had failed to disclose that cause of action was within the jurisdiction of the trial court, however, Maan Pharma failed to point out the prejudice behind seeking injunction. The Court thus held that the trial court had rightly rejected the application. **Read more**

3. MERE GEOGRAPHICAL PRESENCE OF WEBSITE AND CUSTOMER'S ABILITY TO ACCESS THE SAME SUFFICIENT FOR GRANTING INJUNCTION IN TRADEMARK INFRINGEMENT CASES: DELHI HC

Significant presence of a website and the ability of the customers to access it is sufficient to grant injunction in the cases of trademark infringement. The Division Bench added that the possibility of confusion and deception in the mind of the general public is a good enough reason to grant injunction. These observations were made in the case TATA Sons Private Limited v. Hakunamatata TATA Founders & Ors. where the court decided in favor of TATA Sons Private Limited while granting ex-parte ad-interim injunction against two companies based in the US and the UK which were unauthorizedly using the registered trademark TATA in selling and marketing of their respective cryptocurrency and other crypto-assets. **Read More**

By Harshitaa Joshi (Assistant Editor)

INTERNATIONAL TRADE LAW

1. INDIA WILL AUTHORIZE SBI TO PROMOTE RUPEE TRADE WITH RUSSIA, ACCORDING TO FIEO

According to the Federation of Indian Export Organizations (FIEO), India will soon begin trading with Russia in rupees, as the country's largest lender, State Bank of India (SBI), has agreed to facilitate the new mechanism. The State Bank of India has come forward to facilitate rupee trade with Russia, and some other banks have also expressed interest. A. Shaktivel, is the president of the FIEO, a trade ministry-established body to promote exports.

The Reserve Bank of India (RBI) issued a detailed circular in July asking banks to make additional arrangements for export and import transactions in Indian rupees in light of the growing interest in the domestic currency among the global trading community. India's exports to Russia have slowed since Western sanctions were imposed in response to Moscow's late-February invasion of Ukraine. **Read More**

2. INDIAN GOVERNMENT BANS EXPORT OF BROKEN RICE DUE TO DOMESTIC DEMAND

The Centre imposed a ban on the export of broken rice. Furthermore, it mandated a 20% export duty on rice in the husk (paddy or rough), husked (brown rice), and semi-milled or wholly milled rice. The measures have no effect on the export of basmati or parboiled rice.

Data from the Indian Meteorological Department show that between June 1 and September 14, Uttar Pradesh, Jharkhand, Punjab, and Bihar received insufficient rainfall. The latter refers to rainfall that is 20-59% below normal in a specific region. Despite the fact that West Bengal, the country's largest producer, has received normal rainfall,

Global food supply chains have been shaken by geopolitical tensions between Russia and Ukraine. With trade disrupted in the Black Sea region, Bloomberg reported in March that rice prices are rising as traders bet it will be a cheaper alternative to wheat, which is becoming prohibitively expensive. **Read More**

3. INDIA AND GULF COOPERATION COUNCIL SIGN MOU TO FACILITATE CONSULTATIONS

External Affairs Minister S. Jaishankar met with Gulf Cooperation Council (GCC) Secretary-General Nayef Falah Mubarak Al-Hajraf and signed an agreement on the mechanism of consultations between India and the six-nation regional bloc. Mr. Jaishankar is on a three-day diplomatic visit to Saudi Arabia to discuss ways to further strengthen relations between the two countries.

Mr. Jaishankar met GCC Secretary-General and exchanged views on current regional and global issues. The Gulf Cooperation Council (GCC) is a regional, intergovernmental, political, and economic union made up of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates. **Read More**

4. RISK OF GLOBAL RECESSION IN 2023 RISES AMID SIMULTANEOUS RATE HIKES

According to the report, central banks around the world have been raising interest rates with unprecedented synchronicity this year, a trend that is expected to continue well into next year. However, the current trajectory of interest-rate increases and other policy actions may not be sufficient to return global inflation to pre-pandemic levels. Investors expect central banks to raise global monetary policy rates to nearly 4% by 2023, an increase of more than 2% from their 2021 average. Unless supply disruptions and labour-market pressures abate, the global core inflation rate (excluding energy) could reach around 5% in 2023, nearly double the five-year average before the pandemic, the study finds. **Read More**

5. COSTA RICA TO SUSPEND TARIFF BENEFITS FOR PANAMANIAN PRODUCTS

Costa Rica's foreign trade ministry announced on Thursday that tariff benefits for Panamanian products will be suspended, marking another step in a trade dispute that began in 2020 and is the subject of a World Trade Organization (WTO) lawsuit. Costa Rica suspended tariff benefits for its southern neighbor after Panamanian authorities failed to comply with a 2021 ruling governing tomato trade between the two countries, according to a statement issued by the Ministry of Foreign Affairs, which did not specify the items affected or when the suspension would take effect. It was due to sanitary reasons that Panama barred the entry of Costa Rican products. Costa Rica and Panama signed a Free Trade Agreement (FTA) in 2008. **Read More**

By Qazi Ahmed Masood (Assistant Editor)

NEWS UPDATES

MERGERS AND ACQUISITIONS

1. RELIANCE NEW ENERGY ACQUIRED CAELUX FOR $12 MILLION

Reliance's green energy arm, Reliance New Energy acquired a 20% stake in Caelux for $12 million. Caelux is an industry leader in the research and development of perovskite-based solar technology. The partnership is focused on technical collaboration and commercialization of Caelux's technology. Efficiency solar modules that can produce 20% more energy over 25 year- lifetime of a solar project will be contributed by Caelux's proprietary technology.

Reliance is setting up a global scale integrated photovoltaic Giga factory at Jamnagar, Gujarat. Mukesh Ambani expressed his wish to use world-class talent and technological innovations to create an advanced green energy manufacturing ecosystem through strategic partnership. Reliance is taking big strides in developing its technology in green energy by increasing collaboration on a global scale. Recently, Reliance Industries Limited had also proposed to acquire a majority stake in SenseHawk, a software-based management system provider for solar energy industry, for $32 million dollar. **Read more**

2. STEEL GIANT TATA TO MERGE WITH 7 SUBSIDIARIES

Tata Steel has decided to merge 7 subsidiaries with itself, including 4 listed companies Tata Steel Long Products (TSLP), Tinplate Company of India (TCIL), Tata Metaliks (TML) and TRF (the three others are unlisted namely- Indian Steel & Wire Products (ISWP), Tata Steel Mining and S&T Mining). The aim is to increase efficiency and cut operational cost. The selected subsidiaries are all majorly owned by Tata Steel.

The proposal has received a nod from the board of directors and awaits approval by the stock exchange and NCLT. The merger also includes TRF Ltd., in which Tata Steel has 34% stake. This has earned it the title of associate company. The shares of 7 subsidiaries will be evaluated and re-issued as Tata Steel shares depending on their value in comparison Tata Steel. It is being seen as a positive sign for the shareholders. Koushik Chatterjee, CFO of the steel giant, has emphasized that the move will "streamline" the process. **Read more**

3. GIFT CARD PLATFORM QWIKCILVER SOLUTIONS COMPLETES MERGER WITH PINE LABS

Prepaid, stored value and gift card provider Gift Qwikcilver completed its merger with Pine Labs, a point of payment platform set-up by Lokvir Kapoor in the year 1998. Existing services of Qwikcilver will now be provided by Pine Labs under the Qwikcilver brand name. This formal merger comes in the background of the 2019 acquisition when Pine Labs acquired Qwikcilver for $ 110 million. The formal merger hence marks the completion of documentation work. The merged entity will go by the name 'Pine Labs Private Limited' and the Pre-paid Payment Instruments (PPIs) of Qwikcilver will now be issued under the same name by Pine Labs. **Read more**

By Harshitaa Joshi (Assistant Editor)

NEWS UPDATES

SECURITIES LAWS

1. MUTUAL FUND UNITS TO BE INCLUDED IN INSIDER TRADING REGULATIONS

Capital market regulator Securities and Exchange Board of India (SEBI) in its board meeting on September 30 decided to include mutual fund units in the SEBI (Prohibition of Insider Trading) Regulations, 2015. SEBI had issued a consultation paper in this regard considering the past instances where senior officials of Asset Management Companies (AMC) had sold their units after they got some price-sensitive information.

The objective of the present regulation is to ensure parity between Mutual funds and other securities with regard to the insider trading rules of SEBI. At present, insider trading rules are applicable to dealing in securities of listed companies or those proposed to be listed, when in possession of Unpublishes Price Sensitive Information (UPSI). The inclusion of mutual funds in the regulations would mean that penalty can be imposed on Mutual fund officials who use UPSI pertaining to mutual funds, which is not yet publicly available to the unit holders. **Read more**

2. EBI PERMITS FPI'S TO PARTICIPATE IN EXCHANGE-TRADED COMMODITY DERIVATIVES MARKET

Capital market regulator SEBI issued a circular allowing Foreign Portfolio Investors (FPIs) to participate in the exchange-traded commodity derivatives segment subject to certain conditions. SEBI also released a circular specifying other relevant information including position limits and allowed segments. Considering that more than 10,800 FPIs are presently registered in India, the move is expected to further increase the depth and liquidity in the market. In addition, their participation may help bring down the transaction costs in the commodity futures segment, owing to economies of scale.

SEBI also discontinued the existing Eligible Foreign Entity (EFE) route, launched in 2018, as it required genuine exposure to Indian physical goods. SEBI further clarified that foreign investors may participate in Indian ETCDs through FPI route, with or without actual exposure to Indian physical commodities. **Read more**

3. BSE RECEIVES SEBI'S FINAL APPROVAL TO LAUNCH EGR ON ITS PLATFORM

India's leading stock exchange BSE received final approval from SEBI for launching Electronic Gold receipts (EGR) on its platform. BSE had conducted various mock trading sessions for its members after it received in-principle approval from SEBI this year. EGRs would cater to all market participants, which means buyers and sellers on the exchange as well as commercial participants such as importers, banks, refiners, and bullion traders. Jewellery, manufacturers, and retailers can participate.

EGRs are instruments representing gold and will be notified as securities with trading, clearing, and settlement features similar to other securities that are currently available in India. India is the second largest consumer of gold globally with annual demands of approximately 800-900 tonnes. Although India remained a price taker in gold, it does not play a significant role in influencing the price-setting for commodity. EGR as a platform would enable India to emerge as a price setter and infuse transparency in gold spot transactions. **Read More**

4. SAHARA INDIA COMMERCIAL CORPORATION: SC STAYS SAT ORDER LIFTING SEBI'S ATTACHMENT DIRECTIVE

IThe Supreme Court on Friday stayed the order of the Securities Appellate Tribunal (SAT) that had lifted SEBI's attachment order on Sahara India Commercial Corporation (SICCL) and its directors, including Subrata Roy, subject to the company depositing Rs 2,000 crore with the watchdog.

SEBI while appealing against the tribunal's decision had contended that the lifting order is in contravention to the SC's 2012 and 2013 orders that had directed SEBI to take all legal remedies, including- attachment and sale of properties and freezing of bank accounts, for the realisation of Rs 25,781 crore collected by two Sahara firms. SEBI further added that the tribunal had no jurisdiction to entertain the appeals by Sahara group in view of the SC's July 17, 2013 order barring any high court or judicial fora from passing any order against the market regulator in implementation of its orders. **Read more**

5. SEBI ROLLS OUT FRAMEWORK FOR CREDIT RATING AGENCIES

The SEBI came out with a new framework for credit rating agencies which involved ratings of securities with explicit credit enhancement (CE) features. The new framework, applicable from January 1, 2023, is aimed at enhancing transparency and improving the rating process, the SEBI said in a circular. Under the rule, CRAs can assign the suffix 'CE' to the ratings of instruments having explicit credit enhancement.

Credit enhancement refers to all the factors that reduce the risk of a loan as if it were an unsecured loan. While assigning such credit ratings, CRAs will have to conduct independent due diligence on the nature of specified support consideration and form a definitive internal view, and, wherever warranted, obtain an independent external legal opinion for ascertaining the strength of the credit enhancement. **Read more**

By Arnav Mahajan (Assistant Editor)

NEWS UPDATES
TMT LAWS

1. VODAFONE ENTITLED TO CLAIM CENVAT CREDIT ON TOWER AND PREFABRICATED BUILDINGS: CESTAT

The Delhi bench of the customs, excise and service tax appellate Tribunal (CESTAT), held that Vodafone is entitled to claim CENVAT credit on Capital Goods such as towers/tower material and prefabricated buildings/shelters. Vodafone, being the appellant here has claimed to have discharged service tax liability on the services they provide i.e. Telecommunication services to customers and business support services.

The primary issue was regarding the towers being immovable structures and their placement without harming the quality and risking safety measures. In conclusion, The CESTAT observed that the entire tower and shelter are fabricated in the factories of the respective manufacturers, and these are supplied in completely knocked down (CKD) condition. They are merely fastened to the civil foundation to make it wobble-free and ensure stability. They can be unbolted and reassembled without any damage in a new location. **Read More**

2. EXPORT OF SOFTWARE EMBEDDED INTO HARDWARE; SALE PROCEEDS FROM EXPORT OF HARDWARE ELIGIBLE FOR DEDUCTION: KARNATAKA HIGH COURT

In the case of M/s. Subex Limited v. The Deputy Commissioner of Income Tax Although the hardware was separately invoiced and was not manufactured by the assessee (M/s. Subex Limited), the Karnataka High Court ruled that the assessee may deduct the proceeds from the export of the hardware component if the software cannot be used independently. This is in accordance with Section 10A of the Income Tax Act, 1961. Taking a judicial note of the fact that the software and the hardware components were inseparable from each other, the division bench held that issue of separate invoices by the assessee for sale of hardware and software components is inconsequential. The Court ruled that what is relevant is the intention of the parties and the product that is actually sold. **Read More**

3. EUROPEAN COMMISSION TO PRESENT NEW MEDIA LAW, LEAVING OWNERSHIP UNADDRESSED

The proposed European Media Freedom Act (EMFA), comes in reaction to what the Commission says are a range of issues within Europe’s media landscape, including a lack of convergence between national regulators, insufficient safeguarding of editorial independence, an uneven economic playing field and the fragmentation of the media market. Media policy is usually regarded as a national prerogative. To justify its intervention, the Commission referred to the need to address the fragmentation of media rules that prevent the proper functioning of the single market. Safeguarding editorial content is also provided through measures covering very large online platforms, namely those with more than 45 million users in the EU. **Read More**

4. WE ARE AN INTERMEDIARY, CANNOT DECIDE IF CONTENT IS LAWFUL OR NOT: TWITTER TELLS DELHI HIGH COURT

Twitter has informed the Delhi High Court that being an intermediary, it cannot decide whether any content on its platform is lawful or not unless put to "actual knowledge" (Shreya Singhal V. Union of India) after determination by courts or the appropriate government bodies. The High Court had in March expressed its displeasure over Twitter's conduct and asked the social media platform why it did not take action and suspend accounts that post 'blasphemous' and objectionable content, to this the US-based social media giant has questioned the maintainability of a writ petition against it, arguing that it is not a 'State' as defined under Article 12 of the Indian constitution. It argued that it is a private intermediary and its services can be availed only upon the acceptance of its Terms of Service, subject to applicable law. **Read More**

By Dhiren Gupta (Assistant Editor)

INTERVIEW

GUIDELINES ON DIGITAL LENDING TO BANKS AND NON-BANKING FINANCE COMPANIES WHICH DISBURSE LOANS THROUGH DIGITAL LENDING PLATFORMS

Harshit Dusad is a Senior Associate at JSA and his focus areas are banking & finance, project finance and trade finance. His experience includes work on matters pertaining to foreign currency lending, rupee financing and security creation in relation thereto. He has advised and assisted clients with their documentation with respect to general lending &; financing mandates, resource raising transactions and transactions involving financial commitment by way of overseas direct investments. He has also played instrumental role in structuring and strategizing transactions pertaining to shipping finance, construction finance and real estate financing. He has also advised banks, financial institutions and corporates on structuring and strategizing security arrangements in relation to charge over movables, immovables, tangible and intangible assets.

Disclaimer: All opinions presented in the interview are the personal opinions of Mr. Dusad

On 2 September2022, the Reserve Bank of India (RBI) issued the 'Guidelines on Digital Lending' (Guidelines) to banks and non-banking finance companies (NBFCs) which disburse loans through digital lending platforms. This followed the press release issued by the RBI on 10 August 2022 on the implementation of the recommendations of the Working Group on Digital Lending (Press Release).

(Q1) In the Press Release, the RBI had mentioned that it was examining the recommendation suggested by the working group to prohibit First Loss Default Guarantee (FLDG) arrangements in the market, and that in the interim, banks and NBFCs entering into FLDG arrangements must adhere to the Master Direction - Reserve Bank of India (Securitisation of Standard Assets) Directions, 2021 (Securitisation Guidelines). Now with the released guidelines, the RBI is intending

to completely restrict any FLDG Arrangements in the market. Even though it is a step in the right direction to protect the borrowers, this could drastically affect the access to capital for fintech companies who are working towards designing new-age credit products, and increasing offerings to new-to-credit borrowers. What do you think about such restriction on FLDG Arrangements? Do you think that the RBI could have come up with some other less restrictive approach in this regard, while also protecting the borrowers?

In a typical FLDG transaction, a third party enters into an arrangement with a bank / NBFC whereby such third-party requests the bank / NBFC to extend loans to the customers on its platform and in case of default by the customer, the third-party guarantees to makes the repayment to the RE. In simple terms, FLDG is a loan insurance. These third parties may be both, regulated as well as unregulated by a financial sector regulator.

While such an arrangement may look attractive for consumers and it may result into easy credit access, however, it is also highly volatile. There is a requirement to strike a balance between the prevailing economic conditions and the new-age credit products.

Given that these third-party entities may fall out the purview of the RBI or other financial services sector regulator, the actual risk falls on banks / NBFCs which are actually undertaking the lending operations. If any default is committed by the borrower and the third-party which would have offered FLDG is also not able to offer guaranteed amounts to the bank / NBFC it will be a huge loss for the bank / NBFC, as they may not be able to recover their amounts. It will ultimately create stress on the financial situation of such bank.

Also, given that these third-party entities are unregulated, it may also put the borrower and their confidential information in jeopardy.

With this step, RBI has made it clear that if any entity wants to undertake lending operations, it can approach RBI for a license and upon such license is issued, the entity may directly undertake lending operations. In my view, this is a correct approach to secure both regulated lenders as well as borrowers.

(Q2) The new Guidelines reduce the interference of Lending Service Providers (LSPs) and dictate that all loan disbursals and repayments be executed directly between the borrowers' bank accounts and the bank accounts of lenders. Certain exceptions have been provided to this general rule. However, the exceptions do not specifically cover any repayments made by borrowers through digital payment methods offered by payment service providers / payment aggregators (under which the funds would be routed through the escrow accounts required to be maintained by such payment aggregators). Further, the RBI has not generally permitted digital lending platforms to enter into escrow account arrangements. Would this create increased operational complexities for both lenders as well as fintech platforms in managing the disbursement and repayment fund flows?

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Definitely, it would have been very convenient for consumers if they were permitted to using the platform of the LSP availing utilisations of loans and for making repayments thereof. It would have created a single-window mechanism for all the parties.

However, we need to understand that LSPs may include small players as well. If the amounts are routed through LSP accounts, all end-use related compliance will be required to be completed by such LSPs, which they may not be able to undertake properly. Also, given that loans are being actually extended by one entity (i.e., the banks) however the disbursal of the same to the borrowers is by another entity (i.e., the LSP), it will unnecessarily create multiple layers. It will make difficult to trace such loans.

(Q3) The Guidelines mandate that the banks and NBFCs must undertake comprehensive due diligence of the LSPs to ensure that they comply with the laws and regulations. What are the aspects that the lenders would need to keep in mind while conducting the due diligence process in this regard?

Banks / NBFCs will be required to conduct due diligence to ensure that LSPs have technical soundness, data storage arrangements, cyber-security policies and measures, KYC policies, privacy policies, disclosure policies, grievance redressal mechanisms etc. in place.

(Q4) The RBI has stipulated that the Guidelines will be effective from the date of the notification, i.e., 2 September 2022 for 'existing customers availing fresh loans' as well as 'new customers getting onboarded'. With respect to existing digital loans sanctioned prior to the date of the notification, the RBI has provided a transition period until 30 November 2022 for banks and NBFCs to put in place adequate systems and processes for compliance. Would the absence of a general transition period create some problems in implementation? In your opinion, would the stakeholders be able to effectively implement them?

The RBI has been releasing draft papers and recommendations since quite some time now on digital lending. Therefore, the market participants where already aware that these guidelines could come any time. Therefore, few of the banks / NBFCs had already started ensuring that the digital lending platforms with whom they undertake transactions are in compliance with extant regulations. Therefore, I do not think that there should be any problem. However, if multiple Banks / NBFCs still face issues in implementation, they have an option to approach RBI for seeking an extension. RBI has provided such extensions (on different subject matters) in the past and if the concern of banks / NBFCs is genuine, RBI may consider an extension for these guidelines as well.

(Q5) The Guidelines also have various provisions for the protection, storage and localisation of data collected by the lenders and the digital lending platforms. The borrower is required to be provided with an option to give or deny consent for use of specific data, restrict disclosure to third parties, data retention, revoke consent already granted to collect his personal data and if required, make the app delete/ forget the data. Further, all data is required to be stored in servers located within India

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while ensuring compliance with statutory obligations/ regulatory instructions. What is your opinion on the data protection provision in the guidelines?

Today, everything is there on the internet. Unlike the previous times where physical documents were required to be submitted to banks for undertaking financing activities, it can now be done at a single click. Also, given the nature of operations of digital lending players, everything happens online.

Therefore, it is crucial to safeguard the confidential data of all the persons using such digital platforms. In case of a data breach / leak, it can put such persons in jeopardy.

As regards storage of data within India, it is one of the functions of the RBI to protect the personal data of Indian citizens which are availing any banking function. Therefore, the RBI introduced a data localization policy in April 2018, whereby it had directed all payment firms to store all data pertaining to payment systems on servers in India. The data protection and storage provisions under the digital lending guidelines are also in line with the aforesaid April 2018 guidelines of the RBI.

(Q6) The Guidelines mandate that the digital lenders must provide Key Fact Statement (KFS) and provide it to the borrower before execution of the loan contract. Could you please shed a bit more light on KFS and how this will benefit the consumers?

Key Fact Statement (KFS) is a statement which will contain summary of the offer terms (such as loan amount, tenure, interest rate, penal interest rate, prepayment penalties, repayment schedule, etc.) which is being made to the users of the digital lending platform's users. The is important as it ensures transparency between the digital lending platforms and their users.

In the past, is has been seen that digital lending platforms have imposed arbitrary fees, interests and penalties on their borrowers. In case borrowers didn't agree to pay these amounts, few of the platforms have even used harassment techniques. Therefore, in order to address this, the RBI has imposed this requirement on regulated entities so that there is no after-shock to the users of digital lending platforms

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This Guest Post is authored by Mr. Vidit Mehra, Associate at IndusLaw. The author was assisted by Mr. Dhawal Srivastava, a fourth-year student at Rajiv Gandhi National University of Law, Patiala.

IBC - THE ROLLERCOASTER JOURNEY

1.INTRODUCTION

When we talk about ease of doing business in India, debt recovery forms an equally important part of the business process to save the asset from being labelled and tagged as a non-performing asset ("NPA"). While there can be multiple hurdles in running a corporation, there are hurdles that are strong enough to bring the business to a complete halt. Since it opened in 1991, the Indian economy has grown by impressive numbers. Foreign corporations entered the Indian territory that was being tried and tested for the first time with the policy of globalization and clearly, it did not disappoint, apart from a few hiccups here and there. As we grew from having teething issues to more mature issues, there was a need for restructuring the business with strong legal support. A commercial need has to meet legal backing, but the same has to be done in a balanced manner. A legislature's intent can never contradict the commercial needs of an economy. If anything, a legislature needs to support the growth of commerce. Working on these lines, India had put some laws in place such as the Sick Industrial Companies Act and 1985 ("SICA") and Board for Industrial Financial Reconstruction ("BIFR") to deal with sick, insolvent, and bankrupt companies. Although SICA and BIFT were bought into existence with the intention of saving sick companies and restoring the faith of the lenders, they did not achieve the said objectives due to complexity and lack of a straight procedure. Both SICA and BIFR were later repealed, along with a host of other local insolvency laws that were replaced by the much-celebrated Insolvency and Bankruptcy Code, 2016 ("IBC") applicable to individuals, partnerships, and companies. The National Law Company Tribunal ("NCLT"), along with trying cases under the Companies Act, 2013, has been empowered to try cases under the IBC and the law has provided for sufficient measures to ensure that the legislation is not misused.

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2. PURPOSE OF IBC

The Bankruptcy Law Reforms Committee ("BLRC") invited suggestions from various professionals, committees and the public and BLRC designed **a set of processes to streamline the insolvency and bankruptcy regime** that we presently know as the Corporate Insolvency Resolution Process ("CIR Process"). While the IBC came into force with effect on 28th May 2016, provisions of the CIR Process came into effect on 1st December 2016. The purpose of the IBC that is reflected in the object statement also emphasizes expediting the simplifying the process of insolvency and bankruptcy **by enabling a better ground for negotiation for the debtor and creditor**, while preserving and maximizing the asset value. Further, the moratorium under IBC has been designed to protect the interest of the corporate debtor by protecting the assets of the corporate debtor. One of the biggest advantages of the IBC over erstwhile recovery laws is a stringent timeline for the resolution of cases that can either end up being resolved through an approved resolution plan or the entity faces liquidation as the last resort. However, the timelines although as much as it appears strict in the fine print, may not be that strict when it comes to the application and the delay cannot be attributed to just one reason.

3. IBC AND OTHER LAWS

While there have been a lot of developments that have led to the evolution of jurisprudence around IBC, it is worth noting that interpretation of IBC along with other laws has been interesting and worth discussing:

3.1. IBC AND SARFAESI

Debt Recovery Tribunals ("DRT") were created under the Recovery of Debts due to the Banks and Financial Institutions Act, 1993 ("RDBFIA") which was later renamed Recovery of Debts and Bankruptcy Act, 1993 ("RDBA"). Despite having these legislations in place, there was a need for another law that came to be known as the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI"). Once SARFAESI was enacted, DRT became the forum to try cases on the default of secured debt. One of the drawbacks of SARFAESI, compared to IBC, is the requirement of having collateral when a case for recovery is tried under SARFAESI. On the other hand, **IBC can be enforced even in the absence of any collateral**, but it is also to be understood that IBC is not a money recovery process, as much as one would like it to be but it is a measure to essentially bring the corporate debtor to its feet. While there have been instances wherein a question of law on whether IBC will supersede SARFAESI in the event of any inconsistency between the two legislations has arisen, Section 238 of the IBC has been interpreted to its truest meaning. As per the **Hon'ble Supreme Court of India**, the law is clear that once the process under IBC has been initiated, the proceedings under SARFAESI cannot be continued. Hon'ble Supreme Court has further **interpreted the spirit of Section 238 of the IBC** by stating that "the primary focus of the legislation is to ensure revival and continuance of the corporate debtor from its own management and from a corporate death by liquidation."

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3.2 IBC AND RERA

Real Estate (Regulation and Development) Act, 2016 ("RERA" was enacted for better regulation of a highly litigious industry; real estate. The core of RERA is to regulate real estate, the agents, and the redressal of disputes. An interesting intersection of RERA and IBC was observed when homebuyers or allottees were given the status of 'financial creditors' as per the second amendment ("Second Amendment") to IBC, bringing the clarity in midst of conflicting judgments dealing with a similar issue. Simply put, the **Second Amendment** added an explanation to Section 5 of the IBC to include forward sale or purchase agreement as a 'financial debt'. The genesis of the **Second Amendment** may be found in the **Report of the Insolvency Law Committee** that deliberated that the amounts raised as a means of financing the real estate project, are thus in effect a tool for raising finance and on the failure of the project, money is repaid based on the time value of money. Post **the Second Amendment, the Insolvency and Bankruptcy Code (Amendment) Act, 2020** introduced joint filing of claims for the CIR Process whereby at least 100 (One Hundred) such allottees in the same class or 10% (ten percent) of the total allottees by quantum are required to initiate the proceedings under IBC. The quantum was introduced to prevent any potential misuse of the provisions of the IBC that was evident from the sudden surge in filing of the cases by the allottees against the real estate developers. An interesting take on IBC versus RERA proceedings may be seen from the fact that while IBC is a central legislation, RERA is particular to each state as land forms part of List-II of the Seventh Schedule of the Constitution of India, IBC may have a potential to even dilute the provisions of RERA that may result in non-favorable outcomes. However, Hon'ble Supreme Court has come to the rescue by solving the conflict between IBC and RERA. It held that **IBC shall prevail over RERA** and a resolution plan under IBC is not to be rejected on the ground of inadequate interest or compensation being granted to the homebuyers.

3.3 IBC AND PMLA

Another heavy legislation that has fought enough battles with IBC is the Prevention of Money Laundering Act, 2002 ("PMLA"). As the title itself states, the objective of the PMLA is to prevent instances of money laundering and attachment of properties that may be derived from proceeds of crime. The major conflict between PMLA and IBC is seen from the overlapping of the adjudication under these two legislations at the same time. While SARFAESI and IBC prioritize dues owed to the creditors, PMLA focuses on the attachment of the assets that might affect the outcome under SARFAESI and IBC. As asset maximization is one of the major objectives of IBC, if the assets are attached under such stringent provisions, it will be nearly impossible to attract a possible buyer for such an asset. **The Hon'ble High Court of Delhi has observed** that due to the presence of non-obstante clauses in PMLA, IBC and SARFAESI, there is no inconsistency between RDBA, PMLA, and IBC as their objectives are different from one another and that there is no inconsistency and the text and context of all three legislations are different and the court rejected the argument of the prevalence of the said laws over PMLA.

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Opposite to the observations provided by the Hon'ble High Court of Delhi, the **NCLT Mumbai bench** gave reference to the orders of the National Company Law Appellate Tribunal ("NCLAT") that held that the adjudicating authority under PMLA could not have continued with the attachment after the declaration of moratorium under Section 14 of the IBC due to the application of Section 63 read with Section 238 of the IBC. Although PMLA and IBC both contain a non-obstante clause, the IBC will prevail as it was enacted at a later date. It is further observed that criminal proceedings under PMLA will take a long time as compared to the time-bound process of IBC, thereby eroding the value of the assets. Finally, the **Hon'ble Supreme Court of India** clarified the conundrum by upholding the validity of Section 32A of the IBC which states that jurisdiction and the authority under PMLA are legislatively mandated to cease once a resolution plan gets approved by the adjudicating authority. It was further contended that the liquidation process would make an impact on the value of the property as well as the interest that may be manifested by prospective applicants. A similar stand was reiterated by the apex court that settled the long pending question of whether statutory creditors, including central and state governments, are bound by a resolution plan, once it is approved by the adjudicating authority under Section 31(1) of the IBC and **the Hon'ble Supreme Court of India** has answered in affirmative.

4. CHALLENGES WITH IBC

Like any other legislation, IBC also has some challenges affecting its implementation, and the tribunals and the apex court have always taken up the mammoth task of developing jurisprudence around the law. The sudden workload of a new law such as IBC to the already existing load of cases pending with the Tribunals under the Companies Act has **slowed down the working of NCLT** and on average, it is taking anywhere between 6 (six) to 12 (twelve) months to even get the cases admitted under IBC, while the law prescribes a total period of 180 (one hundred and eighty) plus additional 90 (ninety) days to complete the CIR Process. Further, issues of shortage of members in the NCLT have resulted in **a slow pace of adjudication** of the matters that must be fixed at the earliest. The pandemic has further slowed down the functioning of the law as creditors are allowing some time for corporate debtors to either restructure their debt or extend an additional line of credit to navigate the tough waters. The pandemic also pushed the Ministry of Corporate Affairs to **raise the erstwhile minimum default threshold** of INR 1,00,000 (Indian Rupees One Lakh only) to INR 1,00,00,000 (Indian Rupees One Crore only) under IBC. The revised limit has brought in a conflict regarding whether such a revised threshold will have a prospective or retrospective effect and different NCLTs have given **conflicting judgments** on the matter. Another major challenge to IBC is the treatment of contingent claims, that is, claims of the creditors that are already sub-judice on the date of admission of the corporate debtor under insolvency and the treatment of the same. **The Hon'ble Supreme Court of India**, while upholding the clean slate theory under IBC, observed that once CIR Process ends, the corporate debtor starts with a clean history and all the past claims and liabilities extinguishes. It took a contrary view of the **Fourth Dimension case** by allowing an arbitration proceeding to continue post completion of the CIR Process and thereby contradicting the clean slate theory and opening door to multiple claims, post CIR Process litigations against the corporate debtor, going against the very nature of Section 14 and the core objectives of the IBC. The solution here must come from the Parliament, providing clarification on the treatment of contingent claims before a new breed of litigation is pursued, increasing the existing burden on the adjudicating authorities.

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ILastly, but more importantly, the current trend suggests that creditors are not getting the worth they should under the IBC. This is despite the fact that **creditors are taking humongous hair-cut in the debt** that is ranging from more than 90% (ninety percent) of the total debt. As per the data for the year 2021, out of 3,774 admitted cases under IBC, 43% (forty-three percent) of these cases have been **closed by resolution**, liquidation, or other means, and out of these cases, only 14% (fourteen percent) have been **closed through a resolution plan**, whereas the majority of 57% (fifty-seven percent) cases have ended in the liquidation or corporate death of these entities.

5. CONCLUSION

It is said that the devil is in the details. IBC is going through a development phase and countering all the curve balls thrown at it. We need to be mindful of the fact that IBC directly relates to the economics and NPA situation of India, and it is also a trust-building method to do away with the notion that it is impossible to approach recovery or bad debt in India. While it is important to get an investment in a country, it is equally important to provide investors with comfort. Whether it is raising the minimum default threshold or effectively weeding out existing promoters from re-bidding for the corporate debtor, the legislature has done an impressive job in keeping up the true nature of the IBC with a few hiccups here and there. From 2016 to date, we have seen tremendous growth in the legislation of insolvency that has even led to the operation of 2 (two) NCLATs forums from just 1 (one) bench of appellate body earlier. It is however imperative to note that the responsibility for the development of IBC is just not with the apex court of this country, but the evolving jurisprudence has to come from the grass-root level is NCLT itself. The law, however, has a lot of scope and many improvements are on the cards, it is safe to assume that financial institutions can operate with the faith that there is an answer to what if .

THE COMPELLING CASE OF RESOLUTION PLANS VIS-À-VIS THE POWERS OF ADJUDICATING AUTHORITY

1. INTRODUCTION

A resolution plan is a proposal aimed at providing possible resolutions to the problems of a corporate debtor's ("CD") insolvency and their subsequent incapacity to repay their debts. The Insolvency and Bankruptcy Code, 2016 ("IBC") explains about a resolution plan submitted by the interested resolution applicant to the committee of creditors ("CoC") for the purpose of the Corporate Insolvency Resolution Process ("CIRP"). One of the questions that revolved around the resolution plans was whether the resolution applicant could be allowed to withdraw the resolution plan once approved by the CoC while approval from the adjudicating authority ("AA") was pending. The conflicting positions in this matter were put to rest by the Supreme Court in the case of **Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Private Limited** ("Ebix Singapore Case"). The Supreme Court settled the position that once the resolution plan is approved by the CoC, then withdrawing or modifying it becomes not permissible in law. This article seeks to analyse the facets revolving around the withdrawal of a resolution plan and lay the perspective from the point of view of a resolution applicant. Lastly, the author puts forward a way to provide a constructive provision of law that allows such modification or withdrawal in specific circumstances.

2. THE CASE CONCERNING THE WITHDRAWAL OF RESOLUTION PLAN

In the Ebix Singapore Case, the CD had filed an application for the initiation of voluntary CIRP under Section 10 of the **IBC, 2016**. In furtherance to the CIRP so filed, the resolution plan submitted by Ebix Singapore was approved by the CoC and was pending approval of the National Company Law Tribunal ("NCLT"). Before granting approval, Section 31 of the Code stipulates that the AA must be satisfied that the Resolution Plan satisfies the standards specified in Section 30(2). Nonetheless, pending the approval of the Resolution Plan by the AA, several members of the CoC submitted a request to the AA for the initiation of an investigation into the financial issues of the CD. The NCLT denied their applications and directed the Resolution Professional to convene a CoC meeting to consider the matter.

In the interim, MCA instructed the Serious Fraud Investigation Office (SFIO) to investigate the CD's operations. The breadth of investigations and major changes in the CD's facts and circumstances prompted the RA to file an appeal with the NCLT for the modification or withdrawal of the Resolution Plan. The same was granted by the AA, but on appeal by the CoC to the National Company Law Appelate Tribunal ("NCLAT"), the order of the NCLT was reversed. Indignant, the RA chose to file an appeal with the Supreme Court, contesting the NCLAT's decision.

3.COC APPROVED RESOLUTION PLAN: FATE DECIDED BY THE SUPREME COURT

The IBC, 2016 does not contain any provision explicitly allowing withdrawal of the resolution plan without considering approval of the same. Thus, the Supreme Court, not acting on their judicial overreach, resisted in making any such negotiation as this would lead to another round of litigation totally unregulated by the law. Whereas, the Supreme Court in another case, **Kundan Care Product** allowed a modification in the resolution plan as requested by both the resolution applicant and CoC invoking article 142 of the **Indian Constitution**. The Supreme Court in the case of Seroco Lightning Industries Private Limited decided against the resolution applicant in the case for withdrawing the resolution plan whereby material changes had occurred before the execution could take place. The court held that the resolution applicant being the former employees of the company would have been aware of such changes. Thus, allowing such an appeal would adversely impact the insolvency framework and would defy its purposes. The Supreme Court held that it would be judicial overreach to insert a provision that was not envisaged in the insolvency framework to prevent delays of any kind to promote timely resolution of the corporate debtor. Thus, the stance was clarified and it was noted that any modification would be justified only in the case of mutual consensus amongst CoC and RP.

4. POWER OF ADJUDICATING AUTHORITY UNDER SECTION 60(5)(C)

The IBC, 2016 empowers the NCLT to entertain matters arising out of question of law or facts in relation to CIRP against CD as the matter maybe. The Indian insolvency framework faces the problem of delayed resolution caused by pending approvals by CoC of already approved resolution plans. Moreover, the resolution plan becomes binding only after being approved by the AA thus it lacks implementation even when parties are ready to execute the resolution plan. This particular delay attracts specific attention because of material changes taking place after approval by the CoC, in certain cases CD meddles with the assets making it hard for the RA to successfully execute the plan. Further, depreciation of assets leads to adverse effects on the RA that renders the intent of IBC unfruitful. These delays were seen being stretched to longer periods during the times of the COVID-19 pandemic, thus taking a toll on the resolution applicants. The IBC was meant to provide solutions to such problems, but the legislature has overlooked such material changes that can take place during CIRP of a CD. As a result, NCLT should be empowered under section 60(5)(c) to investigate and adjudicate on any facts that may arise. This would not just provide relief to the RAs but also promote a willingness among them to resolve the CD as a going concern.

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5. CONCLUSION

As the final stance has been delivered by Supreme Court in the appeal of Ebix Singapore Case, an unwilling resolution applicant has been held to be obligated to execute the plan. Such a resolution plan executed on changed material facts would lead to an unsuccessful resolution by the RA. The NCLAT in the case of Yavar Dhala v. JM Financial Asset Reconstruction Company Ltd. held that if there is failure by the RA to successfully implement the provisions of the resolution plan, liquidation would follow. Taking into consideration all the stances, it clarifies that material changes would lead to such defaults in the implementation of resolution plan, finally pushing the corporate debtor to liquidation and hence defying the purpose of resolving a corporate debtor as a going concern. The legislature needs to address the concern of resolution applicants in such circumstances and provide a legislative framework that can allow modification or revaluation of the resolution plan to prevent CDs going to liquidation. Although the adjudicating authority has the authority to address question facts under section 60(5)(c), this has not been the case in this case. Thus, both judicial and legislative measures are required to enhance the insolvency framework that results in the timely resolution of CD as a going concern.

-By Shereen Moza (Associate Editor) and
Shashwat Sharma (Junior Editor), RFMLR

CALL FOR COMMENTS

ONDC RELEASES CONSULTATION PAPER ON 'BUILDING TRUST IN THE ONDC NETWORK', SEEKS PUBLIC COMMENTS

The Open Network for Digital Commerce (ONDC), set up to democratise e-commerce in India, has floated a consultation paper where it highlights the steps taken by ONDC to build trust among the market participants- buyers, sellers, logistics, etc. The consultation paper 'Building Trust in the ONDC Network' invites public feedback on the trust-building steps taken so far. Trust within Indian commerce is based upon the brick-and-mortar model wherein buyers derive satisfaction from the physical examination of products and sellers' trust is based on the real-time payments they received for their products. ONDC aims to build the trust of market participants on digital platforms and for this, they seek public opinion so that better changes could be introduced at the initial stage. ONDC in this regard has sought views on whether the measures they are taking are sufficient or not; what actions can be taken to bridge the gap; which measures should likely be avoided; do the measures provide a high degree of trust compared to other platforms. They aim to utilise this feedback before the large-scale implementation of the project.

Further, ONDC has also invited public comments on 24 issues pertaining to payments, fulfilment of orders, returns, and refunds, search and discovery, placing an order, payment and settlement, grievance management, and community governance. The 24 questions floated by the consultation paper include- What is the best way for ONDC to enforce its algorithmic accountability requirements from Buyer Apps; What are the concerns around the linked orders and on-network logistics that ONDC should be aware of?; What are the issues in the system proposed by ONDC for payments and settlements?; What mechanisms can ONDC and Network Participants put in place to avoid issues related to returns, refunds, and cancellations from escalating into disputes? Besides, ONDC being set up to decentralise e-commerce seeks an answer to how it could streamline policy compliance monitoring and enforcement without centralising responsibilities and power within itself.

ONDC will be accepting comments on this consultation paper through this **form**. The last date to submit comments is 31st September 2022. **Read More**

CALL FOR COMMENTS

MINISTRY OF COMMUNICATIONS SEEKS COMMENTS ON THE DRAFT INDIAN TELECOMMUNICATION BILL, 2022

Ministry of Communications had initiated a public consultative process to develop a modern and future-ready legal framework in telecommunication. In July 2022, a Consultation Paper on 'Need for a new legal framework governing Telecommunication in India' was published and comments were invited. Comments have been received from various stakeholders and industry associations. Based on the consultations and deliberations, the Ministry has now prepared the draft Indian Telecommunication Bill, 2022. To facilitate further consultations, an Explanatory note to provide a brief overview of the Bill has also been prepared. Considering telecommunication is a key driver of economic and social development, and telecommunication infrastructure and telecommunication networks are important parts of public infrastructure, it is necessary to ensure availability of affordable, reliable, secure and universal telecommunication services; and considering spectrum is a valuable and inexhaustible natural resource, has an element of public good, and it is vital to ensure its efficient management and use of the spectrum. The draft bill consolidates and amends the laws governing provision, development, expansion and operation of telecommunication services, telecommunication networks and telecommunication infrastructure and assignment of spectrum and for matters connected. Comments may be sent by email to naveen.kumar71@gov.in. The Last date for sending the comments is 20th September 2022. Read More

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