RFM Law Review

RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

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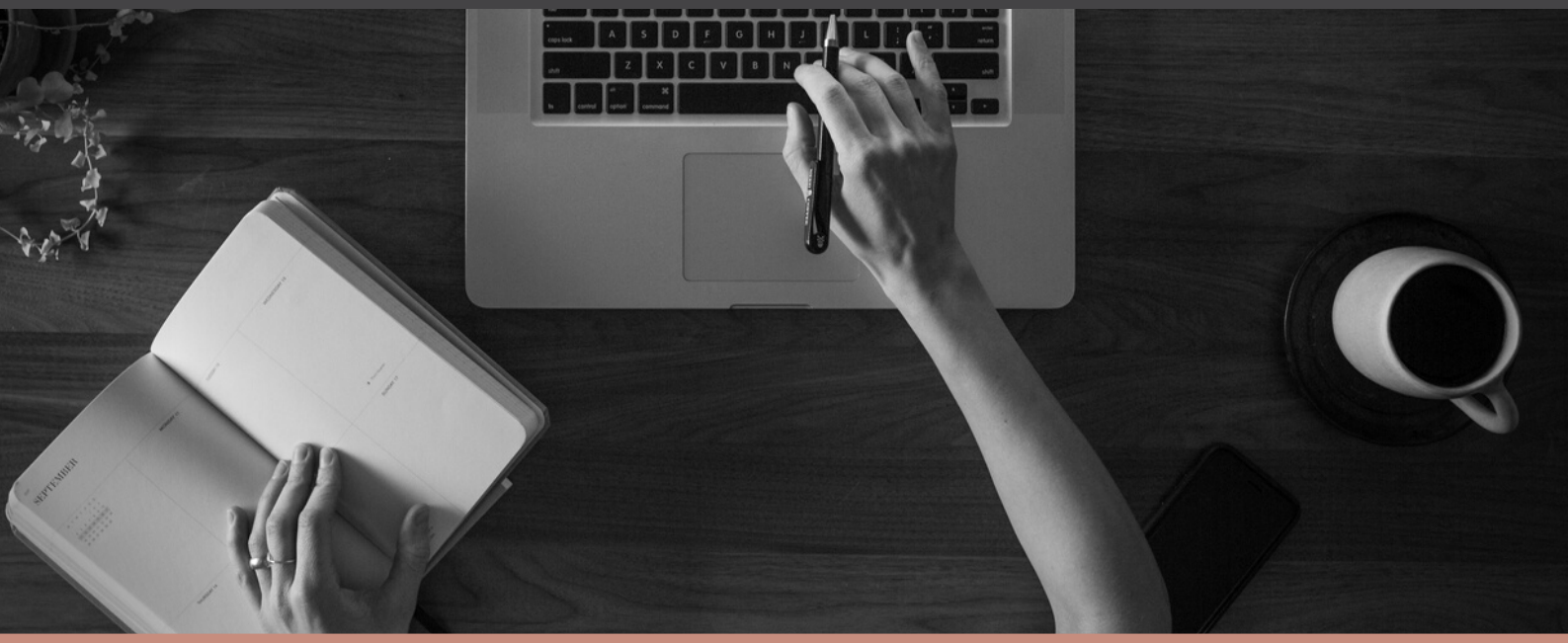
IN THIS ISSUE



PREFACE

It gives us immense joy to share with our readers, the combined May-June 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 brief comments on the landmark judgments of *Union of India v. Mohit Minerals (P.) Ltd. and Amazon.com*, *NV Investment Holdings LLC v. Competition Commission of India & Ors.*, along with a short synopsis of the order of the Competition Commission of India approving the Combination between Google and Bharti Airtel.

Major happenings in various fields of law such as alternate dispute resolution, competition law, international trade law, intellectual property rights, insolvency, mergers and acquisition, securities, and taxation 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. In this Edition, the Call for Comments invited by the Insolvency and Bankruptcy Board of India on the Changes in the Corporate Insolvency Resolution Process to reduce delays and improve the resolution value has been discussed.

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

HIGHLIGHTS

APEX COURT STRIKES DOWN LEVY OF GST ON OCEAN FREIGHT IN COST, INSURANCE, AND FREIGHT (CIF) CONTRACTS

A Supreme Court Bench comprising Justices D.Y. Chandrachud, Surya Kant, and Vikram Nath, on May 19, 2022, in the case of *Union of India v. Mohit Minerals (P.) Ltd.* has held when the Indian importer is liable to pay Integrated Goods and Services Tax (IGST) on the 'composite supply', which includes the supply of goods and supply of services of transportation, insurance, etc. in a Cost, Insurance, and Freight Contract ("CIF contract"), a separate levy on them for the 'supply of services' by the shipping line would violate Section 8 of the CGST Act.

The judgment came in a plea filed by the Union Government challenging the Gujarat High Court's order holding the constitutionality of two notifications issued by the Central Government to be unconstitutional for exceeding the powers conferred by the IGST Act and the CGST Act. In the instant case, the respondent company imports non-coking coal for domestic industries by the ocean on a 'Cost-Insurance Freight' (CIF) basis from Indonesia, South Africa, and the United States. Non-coking coal is shipped from outside India to an Indian customs station. The value of maritime freight is included in the customs tax paid on coal imports. It is important to note that the ocean freight is paid by the importer solely for 'Free-on-Board'. The foreign shipping line sends an invoice to the foreign exporter in the context of a CIF contract. Before the GST regime, a notice dated June 20, 2012, exempted service tax on ocean freight, however that exemption was revoked by a notification dated January 12, 2017, and service tax was collected on the importer via a reverse charge mechanism. Following the implementation of the GST regime, an integrated tax of 5% was imposed, among other things, on the movement of commodities in vessels from a location outside India to a customs clearing point in India. The respondent company contended that the Union Government's notifications imposed double taxation as the ocean freight is included in the value of the goods for which the importer is liable to pay customs duty.

The Court rejected the application of the aspect theory, stating that the Revenue cannot take contradictory positions, implying that on the one hand, the Revenue seeks to levy tax on importers by going beyond the text of the contract between the foreign shopping line and the foreign exporter, while on the other hand, in the case of composite supply submissions, the contract should be viewed as separate transactions operating in silos.

HIGHLIGHTS

As a result, the court dismissed the taxation of freight services. Furthermore, on the issue of the nature of the recommendation of the GST Council, the Apex Court held that the recommendations of the Goods and Services Tax (GST) Council do not bind the Union or the States, that the Parliament and the State legislatures possess simultaneous power to legislate on GST and that the Government while exercising its rule-making power under the provisions of the CGST Act and IGST Act is bound by the recommendations of the GST Council. **Read More**.

By *Raghav Sehgal, Copy Editor*

HIGHLIGHTS

NCLAT UPHOLDS THE PENALTY IMPOSED IN AMAZON-FUTURE COUPONS CASE

On 13th June 2022 the National Company Law Appellate Tribunal (NCLAT) passed an order while adjudicating an appeal in *Amazon.com NV Investment Holdings LLC v Competition Commission of India & Ors.*, directing Amazon.com NV Investment Holdings LLC (hereinafter 'Amazon') to comply with the penalty imposed upon it by Competition Commission of India (CCI). Amazon notified a combination to CCI to acquire 49% shareholding in Future Coupons Pvt. Ltd (hereinafter 'Future Coupons'). It submitted that it did not have any direct or indirect shareholding in Future Coupons and had Ltd. investor protection rights, which could be exercised only through Future Coupons and not directly by Amazon. Based on the furnished information, the CCI approved the combination.

Future Coupons filed an application before CCI under Sections 43A, 44, and 45 of the Competition Act, 2002, alleging that Amazon had initiated an arbitration proceeding against FRL, a company where Future Coupons had shareholding. It alleged that Amazon had taken completely contradictory stands in these proceedings concerning its investment in Future Coupons, as compared to the representations made before the CCI. CCI noted that Amazon failed to notify FRL Share Holding Agreement as a part of the combination and made false and incorrect representations in contravention to the provisions of the Competition Act, 2002. It also imposed a penalty of Rs. 200 Crores on Amazon for the same.

The order was appealed by Amazon contending that no misstatement or misrepresentation had been made, it was not acquiring shares/voting rights in FRL and CCI could not have inquired into a consummated transaction after a year had passed since it came into force. On the other hand, CCI contended that the order through which the deal was approved mentioned that it was contingent and could be stand revoked if, at any time, the information provided by Amazon was found to be incorrect. It also cited *Sahara India Real Estate Corporation Ltd. v SEBI & Another*, by which CCI has the power to revoke an approval given or keep the same in abeyance. The NCLAT held that Amazon concealed its violations had intentionally concealed the 'real ambit and purpose' of the 'Combination' and had failed to provide the relevant information on the combination. To secure the 'ends of justice', it upheld the penalty imposed by CCI and called the order 'fair and sensible', by Section 43A of the Act. **Read More**.

By *Srishti Kaushal, Associate Editor*

HIGHLIGHTS

CCI APPROVES PROPOSED COMBINATION OF GOOGLE AND BHARTI AIRTEL

Google's proposed acquisition of a minority stake in major telecom company Bharti Airtel in June 2022 has recently been approved by the Competition Commission of India, the country's top competition regulator.

An official statement states that the transaction has been approved based on the acquirer's changes. In an investment deal, Google International LLC and Airtel agreed to buy a 1.28 percent non-controlling minority part in the telecom player's equity share capital. An investment agreement and various business transactions were also engaged by both corporations through their affiliates. According to the announcement, the parties now seek to enter into specific additional commercial agreements in the future. Deals beyond a specific threshold need regulator permission, which maintains an eye on unethical commercial activities in the marketplace. Controlled by Google LLC, Google International LLC is a division of Google LLC. Alphabet Inc.'s latter is a fully owned subsidiary of the former.

They already collaborate on cloud services. In addition to ongoing cooperation for the G-Suite family of apps, Bharti Airtel announced a broadband plan for small businesses and start-ups last year in collaboration with Google Cloud and Cisco. Analysts claim that Airtel has long-standing client relationships and commands premium pricing from businesses even without its ties with Google and AWS. But there is room for growth in the SMB sector. On the cloud, Google is engaged in combat. Although it is a very successful company, it lags behind both Microsoft and Amazon. The above acquisition can be looked upon as a method for Google for enrolling Airtel's business customers on the Google Cloud Platform. So, it makes sense for Google to aim to attract a large number of consumers from the Airtel ecosystem to Google Cloud. Google has been acquiring many consumers digital firms under its $10 billion India Digitization Fund, such as InMobi-owned Roposo, which distributes news and media content to users' cell phones, Glance—a short-video app, along with local Indic languages content platform Dailyhunt. Last year, it also invested a staggering $4.5 billion for a 7.7 percent interest in Jio Platforms. The business has also invested in DotPe, which provides a full-stack solution, enabling ordering (both in-person and online), online payments, and delivery for SMBs. **Read More**

By *Vanshika Samir, Junior Editor*

NEWS UPDATES

ALTERNATIVE DISPUTE RESOLUTION

1. BRAZILIAN SECURITIES AND EXCHANGE COMMISSION REGULATES DISCLOSURE TO THE MARKET OF INFORMATION ON SECURITIES ARBITRATIONS

The Brazilian Securities and Exchange Commission (CVM) recently published Resolution CVM 80, which establishes a new regulatory framework for listed corporations and issuers of publicly traded securities on disclosure of information to the market. To address the concerns related to "securities class arbitrations", the resolution specifically dealt with the disclosure to the market of information on "corporate disputes", including arbitrations, meaning judicial or arbitral proceedings to which listed corporations and/or their shareholders and/or its officers are a party provided that they are based on corporate law, capital market rules or CVM regulation; and (i) either involve collective rights or rights that they shall be uniformly decided for a certain group of securities holders; or (ii) whose decision could affect the corporation or securities holders which are not a party to the dispute, such as lawsuits to annul a corporate resolution, lawsuits on officers' and/or directors' liability and lawsuits against shareholders for abuse of control. **Read more.**

2. US SUPREME COURT REJECTS PREJUDICE REQUIREMENT FOR DEFEATING A MOTION TO COMPEL ARBITRATION

The U.S. Supreme Court recently backed a Taco Bell worker resisting her employer's motion to compel arbitration, when it vacated an Eighth U.S. Circuit Court of Appeals decision that arbitration was not waived because the resisting party did not prove that it was prejudiced by the adversary's actions. The decision resolved a 9-2 circuit split; nine jurisdictions require a party resisting arbitration under a waiver to prove that they have been prejudiced, while two jurisdictions do not have such requirements. The opinion of the SC at hand took the minority position, rejecting the idea that the FAA authorizes federal courts to invent arbitration-specific procedural rules, holding that the "federal policy is about treating arbitration contracts like all others, not about fostering arbitration." **Read more.**

3. SUPREME COURT UPHOLDS DELHI HC ORDER DIRECTING DMRC TO PAY RS. 4,600 CR. ARBITRAL AWARD

The SC recently upheld a Delhi HC order directing the Delhi Metro Rail Corporation to pay over Rs 4,600 crore of the arbitral award along with interest to Delhi Airport Metro Express Private Ltd. (DAMEPL) in two equal installments in two months. The SC opined that the arbitral award, which attained finality cannot be allowed to remain as a paper award and that the judgment debtor DMRC is duty-bound to either divert its funds after seeking permission of the central government, if necessary, or raise loans to satisfy the award. An arbitral tribunal in its May 2017 award had ruled in favor of DAMEPL, which had pulled out from running the Airport Express metro line over safety issues, and accepted its claim that the running of operations on the line was not viable due to structural defects in the viaduct through which the train would run. **Read more.**

4. SUPREME COURT RULES IN FAVOUR OF RELIANCE INFRASTRUCTURE: 900 CRORE GAIN

Reliance Infrastructure is to get a gain of Rs. 900 Crore as the Supreme Court ruled in favor of the company in a five-year-old arbitration case with power producer Damodar Valley Corporation (DVC). According to the SC, DVC will pay Reliance Infra 595 Crore in the case and 303 crore by way of a bank guarantee. The firm gave an undertaking in writing that DVC will comply with the court's directive in terms of the arbitration awards. The case dates back to April 2017, Reliance Infra invoked arbitration following a dispute with DVC on account of delays in the competition of an engineering contractor based in West Bengal.

The Arbitral Tribunal ruled in favor of Reliance Infra and directed DVC to pay 898 crores to the company and release the bank guarantees as ordered by the tribunal. The amount carried an interest rate of 12% PA to be paid by DVC. The aggregated burden accumulated on DVC was about 260 crore. DVC challenged the award in the Calcutta High Court which ruled in favor of Reliance Infra. Subsequently, the SC also ruled in favor of Reliance Infra. As the arbitration matters continue to be challenged in the court of law, defeating the sole purpose of decentralization. Legislation should actively take up the loopholes conflicting with the progress of arbitration in India. **Read More**.

5. DMRC INVITES BIDS FROM 18 BANKS TO RAISE 2700 CRORE FOR 'PURCHASE OF AIRPORT LINE ASSETS'

The Delhi Metro Rail Corporation (DMRC) has invited bids from 18 banks to raise loans to 2700 crore for the purchase of Airport Line assets. The letter was sent to various banks including State Bank of India, Canara Bank, Axis Bank, etc. Banks were requested to submit their bid on the given terms and conditions. This comes in the backdrop of the Supreme Court in May upholding a Delhi HC order directing DMRC to pay over 4600 Crore arbitral award along with interest to Delhi Airport Express Private Ltd. (DAMEPL). It was concluded that the arbitral award has attained finality and cannot be allowed to remain as a paper award and added the judgment debtor DMRC is duty-bound to either divert its funds after seeking permission from the central government or raise loans to satisfy the award.
The Airport Express line connecting New Delhi Metro Station and the city airport was commissioned in 2011 after an investment of 2885 crore funded by the DAMEPL's promoters fund and banks. This comes out as a shining star to the rising levels of arbitration matters in India and their timely settlement without least Judicial Intervention. **Read More.**

By *Dhruv Bhatia and Shashwat Sharma, Assistant Editors*

NEWS UPDATES

COMPETITION LAW

1. ADIF BECOMES A PARTY TO THE CCI PROBE AGAINST APPLE

The Alliance of Digital India Foundation (ADIF), an industry body of Indian start-ups has now become a part of the Competition Commission of India's (CCI) probe against Apple over its alleged abuse of dominant power in the market of iOS applications. The original complaint was filed by Jaipur-based non-profit Together We Fight Society, arguing that Apple's imposition of a high in-app fee and other restrictions hurts competition by raising costs for app developers and customers while acting as a barrier to market entry. ADIF was the body that had approached the CCI in October last year seeking an interim stay on the new Google Billing Policy for its Play Store as it had alleged that the new Billing Policy would create an anti-competitive environment for other payment platforms. Read More.

2. GOOGLE HIT BY SECOND UK ANTITRUST PROBE INTO ONLINE AD DOMINANCE

The United Kingdom's competition regulator, Competition and Markets Authority (CMA) has opened a fresh investigation into Google, aiming at the company's role in the advertising technology market. It's the second major antitrust probe to target Google's ad practices in the U.K. The CMA had launched a separate investigation with the European Union into Google and Facebook parent company Meta earlier this year over concerns that a 2018 pact between the two companies — known as "Jedi Blue" — restricted competition in digital advertising. Google acts as both a demand-side platform, which offers publishers' ad inventory to marketers, and an ad exchange, which lets advertisers compete for advertising space on publishers' websites, the CMA said. It also runs ad servers that manage publishers' inventory. Regulators are concerned Google may have illegally favored its ad exchange services to the detriment of rivals. The CMA is also worried that Google Ltd. the compatibility of its ad exchange with third-party ad servers to make it harder for ad servers to compete. **Read More**.

3. APPLE HIT WITH EU ANTITRUST CHARGE OVER MOBILE PAYMENTS TECHNOLOGY

Apple faces a possible hefty fine and may have to open its mobile payment system to competitors after European Union's antitrust regulators charged the iPhone maker with restricting rivals' access to its technology used for mobile wallets. This marks the second EU charge against Apple after EU regulators last year accused the company of distorting competition in the music streaming market following a complaint from Spotify. The European Union regulators said that Apple's anti-competitive practices dated back to 2015 when Apple Pay was launched. Apple can ask for a closed-door hearing to defend its case and also send a written response before the Commission issues a decision, which could take a year or more. The EU is set to implement new tech rules next year called the Digital Markets Act which will force Apple to open up its closed ecosystem or face fines of as much as 10% of its global turnover. **Read More**.

4. CCI PENALISES 7 ENTITIES FOR BID-RIGGING IN INDIAN RAILWAYS TENDERS

The Competition Commission of India (CCI) has penalized seven companies for indulging in cartelization and influencing the bid price of a tender launched by the Indian Railways. Also, as many as ten individuals of these seven entities were held by the CCI to be liable for the anti-competitive conduct of their respective companies/firms. The case was initially based on a lesser penalty application filed by one of the cartelizing entities. Under Section 46 of the Competition Act, a cartel member may approach the Commission by way of filing an application seeking a lesser penalty, in return for providing full, true, and vital disclosures in respect of the alleged cartel to the Commission. The cartelization was related to the supply of protective tubes to the Indian Railways using directly or indirectly determining prices, allocating tenders, controlling supply and market, coordinating bid prices, and manipulating the bidding process. The CCI imposed penalties constituting five percent of the average turnover of the companies and individuals found guilty of violating provisions of the Competition Act. The Commission, however, did not reveal the identities of the companies or the persons. **Read More**.

5. CCI FINDS AMATEUR BASEBALL FEDERATION OF INDIA GUILTY OF ABUSING ITS DOMINANT POSITION

The Competition Commission of India (CCI), on 3 June 2022 issued a 'cease-and-desist' order against the Amateur Baseball Federation of India (ABFI) after finding its conduct to be violative of Section 4 of the Competition Act, 2002 which deals with 'Abuse of Dominant Position'. The case was initiated based on information filed by the Confederation of Professional Baseball Softball Clubs (CPBSC) under Section 19(1)(a) of the Act, against ABFI alleging inter alia contravention of the provisions of Section 4 of the Act. It was alleged by the informant that ABFI had abused its dominant position by issuing a letter dated 07.01.2021 sent to the Presidents/ Secretaries of State Baseball Associations throughout the country prohibiting them from dealing with bodies and leagues not recognized by it and threatening disciplinary action if any of the players took part in the leagues and tournaments not recognized by it. Against this backdrop, the Commission issued a cease-and-desist order against ABFI; however, it refrained from imposing any monetary penalty considering ABFI has already withdrawn the impugned letter, and to that extent, the necessary market correction had already taken place. **Read More**.

6. QUALCOMM WINS FIGHT AGAINST $1 BILLION EU ANTITRUST FINE

U.S. chipmaker Qualcomm has won its fight against the $1.08 billion fine imposed on it by the European Union (EU) antitrust regulators, giving a major setback to the EU's crackdown on Big Tech. The European Commission in its 2018 decision observed that Qualcomm had paid billions of dollars to Apple from 2011 to 2016 to use only its chips in all its iPhones and iPads to block out rivals such as Intel Corp. The General Court, Europe's second-highest court had now annulled the EU finding and faulted the EU competition enforcer over the handling of the case. The court said that the Commission did not provide an analysis that made it possible to support the findings that the payments concerned hay reduced Apple's incentives to switch to Qualcomm's competitors. The court further said that several procedural irregularities affected Qualcomm's rights of defence and invalidated the Commission's analysis of the conduct alleged against Qualcomm. The EU competition enforcer can appeal on matters of law to the EU Court of Justice (CJEU), Europe's highest court. **Read More**.

By Tarpan Soni, Assistant Editor

NEWS UPDATES

INSOLVENCY LAW

1. NCLAT URGES IBBI TO AMEND CIRP REGULATIONS TO INCLUDE CLAIMS WHICH ARE NOT FILED BUT REFLECTED IN BOOK/RECORD OF CORPORATE DEBTOR

The National Company Law Appellate Tribunal (NCLAT) principal bench comprising Justice Ashok Bhushan, Ms. Shreesha Merla and Mr. Naresh Salecha in the case of Employees Provident Fund Organisation versus Subodh Kumar Agarwal urges the IBBI to consider an amendment to the IBBI (Insolvency Process for Corporate Persons) Regulations in order to include claims in information which though not filed with the Resolution Professional but clearly reflects in the books/records of the Corporate Debtor.

Employees Provident Fund Organisation (EPFO) filed an appeal before the NCLAT challenging the order dated 14.12.2021 passed by NCLT Kolkata wherein NCLT approved the resolution plan of Ambient Computronics Private Ltd. since no payment was stipulated towards EPFO in the approved Resolution Plan. NCLAT observed that is clear that no claim was submitted by EPFO but then it cannot be denied that both the Resolution Professional and SRA were well aware of the proceedings pending before EPFO under Section 7A of the 1952 Act. **Read More**.

2. ARTICLE 1 OF LIMITATION ACT,1963 WILL NOT APPLY TO PROCEEDINGS UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016: NCLAT

National Company Law Appellate Tribunal (NCLAT) in the case of S M Ghogbhai v. Schedulers Logistics India Pvt. Ltd. held that Article 1 of Limitation Act, 1963 is not applicable to the Petition filed by the Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code (IBC/Code). The Parties are involved in the business of transport services. A total no. of 174 Invoices were raised by Appellant upon Respondent and the last payment was received by Appellant on 26.09.2016. The Appellant sought reconciliation of account for the outstanding dues but the same remained unpaid.

NCLAT observed that it is well settled that the provisions of the Limitation Act are applicable to proceedings under IBC. Thereafter, the NCLAT framed the question of law which was as follows- The question to be considered in the present case is whether the Appellant can take benefit of Article 1 of the Limitation Act, 1963. **Read More**.

3. SALARY DURING NOTICE PERIOD DOES NOT FALL WITHIN THE DEFINITION OF 'OPERATIONAL DEBT' UNDER IBC: NCLT, MUMBAI

The NCLT, Mumbai Bench in the case of Sandesh Naik v. MT Educare Ltd. held that salary for purported notice period amounts to specific performance of the appointment letter and does not fall within the definition of 'Operational Debt' as the same was not salary for the actual work done by the Operational Creditor. The NCLT dismissed the Section 9 application filed by the Operational Creditor on the ground that there existed a dispute between the parties which ought to be adjudicated upon by leading evidence and conducting trials before the competent court and that the Applicant cannot use the IBC as a substitute of debt enforcement procedures. The Tribunal noted that in the present case, there existed a dispute with respect to the alleged liability of the Corporate Debtor due to alleged discrepancies in the appointment letter, which were in existence prior to the date of issuance of the Demand Notice under the Code. **Read More**.

4. INSOLVENCY LAW PANEL RED FLAGS FREQUENT CHANGES TO CORPORATE RESCUE PLANS

The Panel recommended that an amendment to IBC should be made to clarify that proceedings on dubious transactions made by the erstwhile management of the bankrupt company can continue even after the completion of the insolvency resolution plan. An expert panel led by the ministry of corporate affairs secretary Rajesh Verma has recommended changes to the insolvency and bankruptcy framework including introduction of guidelines on evaluating revisions to the bankruptcy resolution plans already filed.

The panel has also proposed a code of conduct for the representatives of lenders deciding on the future of the bankrupt business. In its report submitted to the union finance and corporate affairs minister Nirmala Sitharaman, the panel suggested that submission of unsolicited resolution plans and revisions of resolution plans needed to be curbed.

The panel recommended that an amendment to the Insolvency and Bankruptcy Code (IBC) should be made to clarify that proceedings on dubious transactions made by the erstwhile management of the bankrupt company can continue even after the completion of the insolvency resolution plan. "This will ensure that there is clarity amongst stakeholders on the manner in which such proceedings will continue after the approval of the resolution plan," the report by the insolvency law committee said. **Read More.**

5. CORPORATE INSOLVENCY OVERHAUL: IBBI PLANS TO ALLOW PART SALE OF ASSETS OR BUSINESS UNDER THE RESOLUTION PROCESS

A proposal to allow part-resolution of stressed assets of companies under the insolvency process could help lenders maximize their recoveries. The IBBI on June 28 released a 12-page discussion paper to augment the value of stressed assets. In the paper, it proposed that the resolution professional and the committee of creditors (COC), entities in charge of the company under the insolvency process, can be enabled to explore resolutions of part of the assets or process to explore resolutions of part of the assets or businesses by allowing submissions of different resolution plans for them.

However, such an option can be made only when there was interest expressed by potential resolution applicants or bidders while submitting an expression of interest, but where a resolution plan was not received within the stipulated time frame. Many times, the resolution process gets stuck because the corporate debtor may have good assets and bad assets. If a part of a business or assets of a Corporate Debtor are allowed to be resolved or sold then it would hasten the resolution of the insolvency proceedings. **Read More**.

By Akshat Verma and Shashwat Sharma, Assistant Editors

NEWS UPDATES

INTERNATIONAL TRADE LAW

1. CHINA VOWS TO BOOST TRADE DESPITE US TARIFF DISPUTES

After the year-on-year growth of China's exports slowed owing to lockdown measures in April, the Chinese government announced a series of additional steps to encourage external trade. On Thursday, the State Council's General Office released a paper including 13 measures targeted at increasing exports and imports. The government would encourage e-commerce enterprises to expand cross-border trade, issue more loans and credits to traders, and promote digital trade events, according to the report. Meanwhile, China's ambassador to the United States has stated that if the Biden administration decides to extend the first-batch Section 301 tax, which was supposed to expire on July 5, China will not back down. Qin stated that, even though China's economy has recently been subjected to greater uncertainty and downward pressure, the country's economy was still growing. **Read More**.

2. KOREA TO LIFT TARIFF ON FOOD IMPORTS, RAISE LTV FOR FIRST HOME SEEKERS

The South Korean government has unveiled a package to improve living conditions of households suffering from a spike in consumer prices, by slashing their expenditure burden for commodities and housing. A batch of countermeasures -- which are likely to cost about 3.1 trillion won ($2.5 billion) in state funds -- against the high inflation rate was confirmed during a meeting of economy-related ministers, presided by Deputy Prime Minister and Finance Minister Choo Kyung-ho in Seoul. A core measure is levying a zero-quota tariff on ingredients for food, including wheat, flour, cooking oil, processed eggs ,and pork, until the end of this year. **Read More**.

3. TAIWAN FIRM FOCUS ON US PATENT PROBE

Realtek, along with China's TCL Industries, is alleged to have used patents belonging to US and Canadian companies, the US trade commission said. The US International Trade Commission (ITC) has voted to launch an investigation into a patent infringement allegation against Taiwanese communication network IC designer Realtek Semiconductor Corp and other firms.

The investigation is to look into specific graphics systems, components, and digital televisions containing the parts allegedly designed with patents belonging to the complainants, the ITC said in a statement. In addition to Realtek, the ITC also voted to investigate a patent infringement case against China-based TCL Technology Ltd (TCL) and its subsidiaries in Hong Kong and other overseas markets, the commission said. **Read More**.

4. TWELFTH WTO MINISTERIAL CONFERENCE

The Twelfth World Trade Organisation (WTO) ministerial conference concluded on 17 June 2022. The outcome of the conference was the adoption of the Geneva Package after long and intense negotiations. The scope of the conference was not Ltd. to a particular issue, but rather ranged from large multilateral trade agreements to individual decisions on select agendas. The outcome was mostly unpredictable as to limitations due to the ongoing war between Russia-Ukraine and issues like Post-Covid recovery effects.

The Geneva Package showed the world that unity persists across various geo-pogeopolitical and countries. The countries can still unite for addressing problems of global common and to reinforce the institution of WTO. Further relief to the outcome was endorsethe ment by consensus by all 164 WTO members. A very difficult bar to clear in international trade negotiations. Major outcomes include the landmark Fisheries deal balancing subsidprovidedding the by government to control the exploitation of natural resources and maintain global balance. This deal also prohibits subsidies for illegal, unrepo,rted and regulated fishing. Another important outcome was trade health and food security. This decision would push the world towards cooperation and global good. All in all, the MC12 was a very positive conference for trade and foobal peace. Reigniting the lost trust in world cooperation for a better future. **Read More**.

5. IMF VISITS SRI LANKA AMID ECONOMIC CRISIS

Sri Lanka sits at the center of world trade in the Indo-Pacific Ocean, having the ability to transform its economy into one of the greatest in the region. On the contrary, the country is on the verge of total organ failure while the economy has already collapsed. The country is survivingthe on last of its resources just to survive yet some time more. To bring the situation in control, International Monetary Fund (IMF) mission team visited the island nation from 20 to 30 June. The team was sent to review the situation and discuss support measures for Sri Lanka and a comprehensive economic plan for long-term strengthening.

The team noted severe economic crisis and observed negative outcomes in the economy. While inflation is rising all around the world, Sri Lanka is being affected the most, hampering the critically low level of foreign reserves. The team noticed a humanitarian crisis induced by economic failure, with poor people being hit the most running out of necessary items for survival. The team experienced the first-hand problems being faced by the country to ascertain the best possible relief package and measures for the nation. While also providing for monetary, fiscal policy, and other actions to the country to prevent further economic downfall. This issue comes at a point with rising inflation, threats of war, and a global recession. Thus Sri Lanka can be only a start to a world order menace unless controlled and brought to normalcy as early as possible. **Read More.**

By Diya Vig and Shashwat Sharma, Assistant Editors

NEWS UPDATES

INTELLECTUAL PROPERTY RIGHTS (IPR)

1. USE OF COMPETITOR'S TRADEMARK AS KEYWORD FOR PROMOTING BUSINESS ON SEARCH ENGINES/ APP STORE VIOLATES RIGHTS OF TRADEMARK OWNER: DELHI HC

The Delhi High Court in the case of Head Digital Works Private Ltd. v. Tictok Skill Games Pvt Ltd has observed that the use of keywords for promoting a business using a competitor's trademark would be violative of the rights of the trademark owner. The Court was further of the view that there would be no difference in the use of trademarks as a keyword on search engines as opposed to using them as a keyword on App store searches.

The Court was dealing with a suit filed by Head Digital Works Pvt. Ltd. Seeking a permanent injunction. Plaintiff was engaged in the business of designing and developing software related to games of skill, deploying and maintaining an online gaming website and a mobile application via the internet. Plaintiff was providing the said services through its website www.a23.com and its mobile application 'A23'. Plaintiff was aggrieved by the use of the marks 'A23' and 'Ace2three' as 'keywords' by Defendant, Tictok Skill Games Private Ltd., on the Apple Application Store. It was submitted by Plaintiff that when any user searches for 'A23' or 'Ace2three' on the App Store the first result in the advertisement section of the search result was that of Defendant's app 'WinZO Games.' However, since the parties wished to explore an amicable resolution of disputes, the matter was referred to mediation by the Court. Read More.

2. HC AWARDS COMPENSATION TO CNN FOR VIOLATION OF ITS TRADEMARK BY A MARATHI NEWS CHANNEL

The Delhi High Court has decided in favor of the news network channel CNN and granted a permanent injunction against various entities overuse of the identical mark 'CNN' while providing similar news services. The Court observed that the plaintiff CNN has had several trademark registrations in India for the mark 'CNN', since the year 1999, in several classes.

Various other variants and formative marks of the mark 'CNN' have also been registered by the plaintiff, such as 'CNN IBN', 'CNN IBN 7', 'CNN NEWS 18', 'CNN CAFÉ', 'CNN GO', etc. The earliest mark dates back to 1999. The Defendant's channels 'CNN News Khabar Update Marathi', and 'CNN City News Network 'use the identical mark 'CNN'. The Defendants also run YouTube Channels and were promoting the mark 'CNN' on their Twitter account, Instagram posts, blogs, etc. The Court held that the network's rights in the mark 'CNN' are undisputed and unchallenged and the same had been declared as a well-known mark, while also awarding ₹3 lakh cost in terms of the relief sought. **Read More**.

3. SECTION 63 COPYRIGHT ACT - COPYRIGHT INFRINGEMENT IS A COGNIZABLE & NON BAILABLE OFFENCE: SUPREME COURT

The Supreme Court in the case of Knit Pro International vs State of NCT of Delhi has recently held that the offense of copyright infringement under Section 63 of the Copyright Act is cognizable and non-bailable. The Court noted that the offense under Section 63 of the Copyright Act, provides for a punishment that is imprisonment for a term which shall not be less than six months but which may extend to three years and with a fine. The Apex Court further noted that as per the Part II of the First Schedule of the CrPC, an offence, if punishable with imprisonment for less than 3 years or with fine only is non-cognizable and bailable. If punishable with imprisonment for 3 years and upwards but not more than 7 years, the offence is cognizable and non bailable. **Read More**.

4. CAUSING FINANCIAL LOSS TO PUBLIC: DELHI HIGH COURT RESTRAINS ROGUE WEBSITES FROM USING "AMAZON" TRADEMARK

The Delhi High Court has granted an ex parte ad interim injunction in favor of online marketplace Amazon by restraining various vogue websites from using its trademark 'AMAZON'. The Court was dealing with a suit filed by Amazon Sellers Services Private Ltd. and its affiliate arguing that its copyright subsisted in its Website and Domain Name i.e., amazon. in as well as in the overall 'look and feel' of the website 'www.amazon.in'.

It was averred that the Rogue Defendants had engaged in a pre-planned conspiracy to defraud and dupe innocent members of the public by unauthorizedly and illegally using Amazon's Marks, either on the rogue websites and social media pages operated by them and were blatantly reproducing Amazon's Website Content as well as adopting a look and feel that was identical to the website 'www.amazon.in'. It was submitted that due to the very nature of the Internet, the Rogue Websites were accessible all across the world, including, in India, i.e., within the territorial jurisdiction of the High Court and therefore any such use by them amounted to infringement of the exclusive rights owned by Amazon within the purview of the Trademarks Act, 1999. **Read More**.

By Tarpan Soni, Assistant Editor

NEWS UPDATES

MERGERS AND ACQUISITIONS

1. ROGER SHAW MERGER FACES CONTINUED OPPOSITION

The competition commission rejected Roger's argument that the deal would benefit the economy and would offset harm to competition. The proposed Canadian 26$ billion deal was initially approved by the Canadian Radio-television and Telecommunications Commission in March. Canadian law allows mergers to be approved if those involved can prove it brings efficiency to the economy. Rogers claims to sell its Freedom Mobile unit to Quebecor for $2.85 billion in the hopes of appeasing regulators opposed to the proposed takeover of Shaw.

A deal for Freedom will cover its branded wireless and internet customer, infrastructure, spectrum and retail sites. Rogers chief executive Tony Staffieri reportedly told analysts that the company plans to retain 450,000 Shaw subscribers in Alberta and British Columbia because Quebecor and other potential buyers of Freedom refused to bid on the division. Edward Rogers, chairman of Rogers Communications added: "This is a truly Canadian-made solution that will benefit all Canadians by delivering increased competition and choice, the next generation of telecommunications services and enabling the transformative benefits of a combined Rogers and Shaw." **Read More**.

2. PHONEPE TO ACQUIRE WEALTHDESK AND OPENQ

Walmart backed PhonePe is set to acquire wealth management firms Wealthdesk and OpenQ. The former would cost about $50 million and latter for $25 million. The founder and the entire team will be working as a part of the PhonePe group and both the platforms will remain independent. Wealthdesk will continue to remain an open platform for all players and the founder Ujjwal Jain will continue defining the company. Founded in 2016, Wealthdesh is a Mumbai-based platform enabling portfolio-based investing on top of stocks and ETFS, consolidating advisory, broking, and asset and wealth management ecosystem.

Whereas OpenQ offers retail and institutional investors trading baskets and investment analytics services. These acquisitions would help PhonePe enter the wealth management market and open new revenue streams beyond payments. In December 2021, the financial service company had applied for a mutual funds licence with the SEBI, while also having plans to enter the merchant lending business in the first half of 2022.

Founded in 2015, PhonePe is led by Sameer Nigam. The company became part of Walmart after the retailer's acquisition of Flipkart group in 2018. At present, Flipkart owns about 87% stake in PhonePe while Walmart owns about 10%. **Read More**.

3. US SHALE MERGER CREATES 7$ BILLION OIL AND GAS COMPANY

After a relative lull in big mergers and acquisitions within the US shale sector, Centennial Resource Development and Colgate Energy Partners III announced plans to combine the two companies. The deal will create a company valued at around $7 billion, inclusive of $1.4 billion in debt currently held by Colgate. On a pro forma basis, the newly merged firm boasts a total hydrocarbon production of 135,000 BOE/D and holds around 170,000 leased acres in the Delaware Basin—representing the western half of the prolific Permian Basin.

Just over two-thirds of the combined acreage lie in the Texas side of the Delaware Basin with the rest in New Mexico. This encompasses about 105,000 acres leased by Colgate and another 74,000 leased by Centennial. Based on current drilling activity, the two companies estimate they hold at least 15 years' worth of new well inventory. The $7-billion deal places a $3.9-billion price tag on the privately held Colgate with the remainder comprising more than 269 shares of the publicly traded Centennial and $525 million in cash on hand. The companies added in an announcement that the impending merger should generate more than $1 billion in free cash flow next year at current oil and gas prices. **Read More**.

By Shashwat Sharma, Assistant Editor

NEWS UPDATES

SECURITIES RIGHTS

1. SEBI COMES OUT WITH SOP TO RESOLVE DISPUTE UNDER STOCK EXCHANGE ARBITRATION MECHANISM

The Securities Exchange Board of India (SEBI) has come out with a new Standard Operating Procedures (SOP) for dispute resolution under the stock exchange arbitration mechanism for disputes between a listed firm or Registrars to an Issue and Share Transfer Agents (RTAs) and its shareholders. The arbitration mechanism will be initiated post exhausting all actions for the resolution of complaints including those received through the SCORES portal. The new SOP will be applicable to listed companies or RTAs offering services on behalf of listed companies. In case of claims or disputes arising between the shareholder or investor of listed firms and the RTAs, the RTAs will be subjected to the stock exchange arbitration mechanism. In case of arbitration matters involving a claim of up to Rs 25 lakh, a sole arbitrator will be appointed and, if the value of the claim is more than Rs 25 lakh, a panel of three arbitrators will be appointed. The process of appointment of arbitrator is required to be completed by the stock exchange within 30 days from the date of receipt of complete application from the applicant. The new framework will come into force with effect from June 1. Read More.

2. SEBI WITHDRAWS PERMANENT RECOGNITION GRANTED TO ICEX

SEBI has withdrawn the recognition granted to the Indian Commodity Exchange Ltd. (ICEX). "The Securities and Exchange Board of India has withdrawn the recognition granted to the Indian Commodity Exchange Ltd., vide notification dated May 18, 2022," according to a press release issued by the securities regulator. The withdrawal of recognition follows an order passed by SEBI on May 10 after finding the bourse non-compliant on several grounds like net worth and infrastructural requirements.

Consequent to the withdrawal, ICEX has been directed to transfer the money available in the Investor Protection Fund and Investor Services Fund of ICEX to Sebi's Investor Protection and Education Fund. Besides, it has been asked to set aside sufficient funds to provide for the settlement of any claims, clear the dues outstanding to SEBI and pay SEBI registration fees as per brokers' norms by its trading members. Further, ICEX has been directed to refrain from using the expression 'stock exchange' or any variant in its name or in its subsidiary company's name. **Read More**.

3. SEBI UNVEILS NEW FRAMEWORK FOR ETFS, INDEX FUNDS

The Securities and Exchange Board of India (SEBI) has announced a new framework for managing passive funds — exchange-traded funds (ETFs) and index funds — amid the growing popularity of such funds as an investment product for retail investors. Under the framework, SEBI has laid down norms for debt ETFs and index funds, its constitution, a market-making framework for ETFs, investor education and awareness charges, disclosure guidelines, and other provisions. The regulator said the norms for debt ETFs or index funds could be based on indices comprising corporate debt securities or government securities (G-sec), T-bills and/or state development loans (SDLs) or a combination of corporate debt securities and G-secs, T-bills, and SDLs. With regard to norms for a market-making framework for ETFs, the markets watchdog said asset management companies (AMCs) need to appoint at least two market makers (MMs), who are members of the stock exchanges, for ETFs to provide continuous liquidity on the exchange platform. Such MMs need to transact with AMCs only in multiples of creation unit size. **Read More**.

4. SEBI PERMITS FPIS TO PARTICIPATE IN EXCHANGE-TRADED COMMODITY DERIVATIVES MARKET

The Securities Exchange Board of India (SEBI) has allowed Foreign Portfolio Investors (FPI) to participate in the Exchange-Traded Commodity Derivatives (ETCD) segment, a move that will further increase the depth and liquidity in the market. The regulator has already allowed institutional investors such as Category III Alternative Investment Funds (AIFs), Portfolio Management Services, and Mutual Funds to participate in the ETCD market.

However, FPIs being financial investors with huge purchasing power was not allowed to participate in the ETCD segment. Now, FPIs will be allowed to participate in the Indian ETCD market, subject to certain risk management measures. Considering that around 10,000 FPIs are presently registered in India, even if a tenth of them participate in the Indian commodity derivatives market, the same may bring considerable liquidity in the Indian ETCDs segment. In addition, their participation may help bring down the transaction costs in the commodity futures segment, owing to economies of scale. **Read More**.

5. SAT GIVES SEBI SIX MONTHS FOR A FRESH LOOK AT NSEL BROKERS CASE

The Securities Appellate Tribunal (SAT) has set aside a 2019 Order of the SEBI, which had declared five brokerages not "fit and proper". The case pertains to the beleaguered commodity exchange National Spot Exchange (NSEL) and the five brokerages — IIFL Commodities, Geofin Comtrade, Anand Rathi Commodities, Phillip Commodities India, and Motilal Oswal Commodities Broker. SAT has asked SEBI to conduct a fresh investigation into the matter and pass an order within six months. Sebi's order was based on various inputs received from agencies including the Economic Offences Wing (EOW). These brokers also allegedly traded in the so-called prohibited paired contracts. SEBI had primarily relied upon inputs received from various regulatory agencies along with investor complaints to arrive at the conclusion that the five brokerages were close to NSEL. SAT, however, did not agree with this inference. SAT has also asked SEBI to give a chance to the brokers to examine the evidence weighed by SEBI and also give them a hearing before passing orders.

By Diya Vig and Tarpan Soni, Assistant Editors

NEWS UPDATES

TAXATION LAW

1. ONUS TO PROVE IDENTITY, CREDITWORTHINESS, AND GENUINENESS OF TRANSACTION LIES ON ASSESSEE: PUNE ITAT

The Pune Bench of the Income Tax Appellate Tribunal (ITAT) has ruled that the onus to prove the identity, creditworthiness, and genuineness of a transaction lies with the assessee. The assessing officer found that during the year under consideration, the share capital of the company increased, showing an increase of Rs. 9,30,00,000/-. On being asked to explain, it was contended that the increase in share capital was contributed by ten shareholders in amounts ranging from Rs. 60,00,000 to Rs.1,25,00,000/-. Various enquiries have been conducted by the department, which have been detailed in the assessment order. All the ten shareholders who subscribed to the share capital of Rs.9,30,00,000 have received amounts from the concerned M/s. Portal India. It was explained that the shares held by shareholders have been pledged to M/s. Portal India against the loans raised. In the course of assessment proceedings, the assessee furnished affidavits of the shareholders supporting the share capital and copies of bank accounts of the so-called shareholders to the assessee company. The court held that it is well established that the onus of proving the source of a sum of money found to have been received by the assessee is on him. If he disputes liability for tax, it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation under the provisions of the Income Tax Act. In the absence of such proof, the ITO is entitled to treat it as taxable income. **Read More**.

2. LOSS ARISING OUT OF SALE OF GOVERNMENT SECURITIES IS A TRADING LOSS: ITAT

The Visakhapatnam Bench of the Income Tax Appellate Tribunal (ITAT) held that the loss arising out of the sale of government securities is a trading loss. The assessee/respondent is a co-operative urban bank Ltd., which filed its return of income for the AY 2010-11, declaring a total income of Rs. 8,72,100/-.

Subsequently, the case was selected for scrutiny. In response to the statutory notices under sections, 143(2) and 142(1) of the Income Tax Act, the assessee's representative furnished various details called for by the AO. After examining the books and the information furnished by the assessor's representative, the AO completed the assessment. The ITAT held that banks, by the very nature of their business, may have to park surplus trading funds in securities and, although intended to be trading assets, may have to keep them for longer periods if funds are not required. The treatment of securities of AFS categories has to be seen in contradiction and contrast with securities of HTM categories, which are purchased and held for the purpose of investment only. **Read More**.

3. INCOME TAX PENALTY CAN'T BE IMPOSED FOR COMMITTING UNINTENTIONAL ERROR IN FORM-16: ITAT

The Pune bench of the Income Tax Appellate Tribunal (ITAT) has ruled that the income tax penalty cannot be imposed for committing an unintentional error on Form-16. The appellant/assessee is an individual who filed a return declaring a total income of Rs. 5,39,360. A notice under section 143(2) of the Income Tax Act was issued seeking an explanation regarding the return of income. According to the AO, on verification of 26AS data, it was found that the assessee accepted salary income from Sesa Sterlite Ltd. and had not offered for taxation. The issue raised was whether the CIT (A) was justified in confirming the penalty levied under section 271(1)(c) of the Income Tax Act, 1961. The ITAT observed that the assessee did not suppress the fact that no income was incurred as such. However, it was reflected in Form 26AS data, which was otherwise salary data and TDS deductions are available for examination by the AO. **Read More**.

4. GOVERNMENT EXTENDS COMPENSATION CESS LEVY UPTO 31 MARCH 2026

The Ministry of Finance has extended the time period for the levy of compensation cess up to 31 March, 2026. The government has notified the Goods and Services Tax (Period of Levy and Collection of Cess) Rules, 2022. The additional time will allow the Centre to repay the loans, including principal and interest, made to compensate states for GST collection shortfalls. The CGST Act required the Centre to reimburse states for any income deficits caused by GST implementation for a five-year period, until July 2022.

The Goods and Services Tax (Compensation to States) Act, 2017 was enacted to levy a Compensation Cess to provide compensation to the States for the loss of revenue arising on account of the implementation of the goods and services tax. It was implemented from the date from which the provisions of the Central Goods and Services Tax Act were brought into force 1 July, 2017. It was for a period of five years or for such period as may be prescribed on the recommendations of the GST Council. **Read More**.

5. PERIOD OF LIMITATION UNDER S.153 OF INCOME TAX ACT APPLIES TO REMAND PROCEEDINGS: MADRAS HC

The Madras High Court has recently observed that the period of limitation under the Sections 153 (2A) or 153 (3) Income Tax Act, 1961 (IT Act) is applicable even for remand proceedings before the Assessing Officer, Transfer Pricing Officer or the Dispute Resolution Panel (DRP). The entire proceedings had to be conducted within a period of 9 months as contemplated under Section 144C (12) of the IT Act. The High Court further observed that in matters of transfer pricing, when the matter was remanded to the DRP, the Assessing Officer had to pass a den ova draft and complete the entire proceedings within 12 months as otherwise the very purpose of extension would become meaningless. The Court also held that the outer time limit of 33 months provided under Section 153 would apply to the final order and not the draft order. Further, in cases where a period of limitation was not prescribed, the orders had to be passed within a reasonable time and not beyond 3 years. **Read More**.

By Akshat Verma and Tarpan Soni, Assistant Editors

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ANALYSING THE CONTOURS OF CROSS BORDER INSOLVENCY FRAMEWORK WITHIN THE INDIAN LEGAL FRAMEWORK

This Guest Article is authored by Shreya Prakash (Senior Associate, Shardul Amarchand Mangaldas & Co.) and Kritika Poddar (Research Fellow, Shardul Amarchand Mangaldas & Co.) as part of the RFMLR-IBBI Blog Series Competition.

INTRODUCTION

The Ministry of Corporate Affairs ("MCA") in November 2021, issued a notice inviting comments on its proposed modifications to include a cross-border insolvency framework in the Insolvency and Bankruptcy Code, 2016 ("Code") ("Notice"). This Notice followed various news reports suggesting that a Bill to add a cross-border insolvency framework to the Code would be introduced in the Budget Session of Parliament in 2022. This blog post firstly traces the history of attempts to introduce a consolidated cross-border insolvency framework under the Code. Secondly, it summarises the features of the cross-border framework proposed to be enacted by the MCA in the Notice. Finally, it makes suggestions on how the proposed cross-border insolvency framework may be strengthened so it can efficiently deal with cross-border aspects of insolvency cases.

HISTORICAL EVOLUTION

The Code was enacted in 2016 to consolidate the erstwhile fragmented regime relating to corporates, partnerships, and Ltd. liability partnerships. The initial draft of the Insolvency and Bankruptcy Bill, 2015 recommended by the Banking Law Reforms Committee did not contain provisions dealing with cross-border matters. To offset this lacuna, the Joint Parliamentary Committee suggested the inclusion of sections 234 and 235 in the Code.

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Sections 234 and 235 require that bilateral arrangements entered into between India and other countries would provide the manner in which cross-border issues related to each country would be dealt with. This at best provides for the creation of multiple ad hoc frameworks that could result in heterogeneous and conflicting rules to resolve cross-border issues. This would result in uncertainty for creditors, debtors as well as courts. Worse still, this framework relied on the negotiation of multiple agreements which could take years.

Given this, in October 2018, the Insolvency Law Committee ("ILC") proposed a Draft Part Z in the Code largely based on the United Nations Commission on International Trade Law's Model Law on Cross-Border Insolvency (1997) ("Model Law"), which is the most widely accepted framework to address issues arising in cross-border insolvency. The ILC's recommendations were supplemented by the Cross-Border Insolvency Rules/ Regulations Committee ("CBIRC") which recommended rules and regulatory framework for the smooth implementation of the proposed Draft Part Z.

These reform efforts and the advent of cross-border insolvency cases such as those of Jet Airways and the Videocon Group emphasize the need for a robust legislative framework to deal with cross-border insolvency disputes. Draft Part Z along with CBIRC's recommendations and the modifications proposed by MCA vide its Notice is collectively referred to as the 'Proposed Framework'.

FEATURES OF THE PROPOSED FRAMEWORK

The Proposed Framework envisages the enactment of a procedural law that deals with cross-border insolvency proceedings of a debtor that has assets or creditors in multiple jurisdictions. Like the Model Law, this framework focuses on four elements as key to the conduct of cross-border insolvency cases: access, recognition, relief (assistance), and cooperation. Under the Proposed Framework, a foreign representative has the right to apply to the Adjudicating Authority, and upon recognition of a foreign proceeding, is entitled to participate in domestic insolvency proceedings under the Code. A foreign proceeding may be recognized as the main proceeding if the proceeding is taking place in the country where the corporate debtor's center of main interests lies.

On the other hand, it may be recognized as a non-main proceeding if it takes place in a country where the corporate debtor has an establishment. Recognition of a foreign proceeding as a main proceeding results in the grant of certain automatic reliefs, similar to the reliefs granted under Section 14 of the Code. In addition to these automatic reliefs, the Adjudicating Authority may grant discretionary reliefs to protect the corporate debtor's assets or the creditors' interests. Such discretionary reliefs may also be granted upon the recognition of a non-main proceeding as well. However, the recognition of a non-main proceeding would not result in the automatic grant of reliefs, unlike in the case of main proceedings. The Proposed Framework also empowers the Adjudicating Authority and insolvency professionals to cooperate and communicate directly with their foreign counterparts and provides for coordination of two or more concurrent insolvency proceedings in different countries. While the Proposed Framework in its large part stems from the Model Law, its adoption has been suggested with certain deviations.

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RECOMMENDATIONS

In proposing the enactment of provisions pari materia with the Model Law, the Proposed Framework takes the right steps to ensure that India has a modern cross-border insolvency framework in place. However, in our view, these key issues ought to be addressed before the Proposed Framework is enacted:

(i) Applicability of the Proposed Framework

At present, the MCA has proposed that the Proposed Framework be made applicable restrictively in three ways. First, the MCA has suggested that the Proposed Framework would not be applicable where a corporate debtor is undergoing a pre-packaged insolvency resolution process, where a corporate debtor is a financial service provider, or where countries do not reciprocate (or are exempted from reciprocity requirements). However, in our view, the MCA should consider recalibrating its approach in this regard. One of the main reasons for introducing the Proposed Framework is that it is a comprehensive and uniform framework, that would prevent ad hoc resolutions of cross-border issues. Given this, wherever such cross-border issues are likely to arise, it may be helpful to apply this Proposed Framework. In fact, there are already various safeguards to ensure that there is flexibility and adequate deference to domestic law within the Proposed Framework. Given this, any unstated concerns regarding the appropriateness of this framework should be re-evaluated, and this framework should be adopted unless there is evidence to indicate that cross-border issues are unlikely to arise in specific cases.

(ii)Application of Part II of the Code (Insolvency resolution and liquidation for corporate persons) to foreign companies

The Proposed Framework intends to apply the provisions of Part II of the Code to foreign companies with an establishment in India. This will, in effect, allow for companies that are not incorporated in India but have an establishment in India, to be subject to Indian insolvency proceedings. Similar provisions for winding up unregistered companies exist in Sections 375-378 of the Companies Act, 2013, and the recommendation to move them to the Code would help streamline cross-border cooperation in such cases. However, before Part II of the Code is extended to foreign companies with an establishment in India, care should be taken to review whether all aspects of the corporate insolvency resolution process ("CIRP") can apply to such companies. For example, given that the whole company would not be based in India, a resolution plan preserving the 'whole company', which is how the resolution is envisaged in the Code, may not be feasible. Moreover, mandatory steps like asking for an expression of interest, and requests for resolution plans may not be applicable where Indian proceedings are not 'main proceedings'. In view of this, the MCA should consider introducing certain flexibilities and relaxations on mandatory steps of the CIRP for such companies or empower to Adjudicating Authority to grant such flexibility. Equally, the MCA should also consider allowing a direct entry into liquidation proceedings, if so envisaged as part of the foreign main proceedings.

(iii) Definition of foreign proceedings

Under the scheme of the Proposed Framework, it is only on recognition of a foreign proceeding, whether main or non-main, that the Adjudicating Authority can grant necessary reliefs for the protection of the corporate debtor's assets or the interests of the creditors.

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The explanation to the definition of 'foreign proceedings' in Clause 2(g) of Draft Part Z requires a proceeding to only be recognized as a reorganization proceeding when its objectives are the same as resolution under the Code. This may unduly limit the ability of the Adjudicating Authority to recognize proceedings and cooperate. The meaning of resolution under the Code has been interpreted restrictively to envisage a "resolution of the company as a going concern". In many jurisdictions, however, the aim may be to save businesses and not the company itself, which could potentially be excluded by virtue of this explanation. Given this, the term 'reorganization' should be construed broadly enough to include only those foreign processes where the intent and spirit is to not wind down the business. In view of this, the explanation may be deleted.

(iv) Defining public policy

Clause 4 of Draft Part Z provides the Adjudicating Authority the right to refuse any action authorized by the Proposed Framework if such action is manifestly contrary to the public policy of India. Such a provision exists under the Arbitration and Conciliation Act, 1996 ("Act") as well, but has been subject to various rounds of litigation and interpretation, that cause uncertainty, and risk expanding the scope of courts' intervention under this clause to deal with 'merits' of disputes as well, which is contrary to the purpose of the Act. In view of this, a new definition of 'public policy' was included in the Act in 2015. To avoid such litigation, and expansive interpretation in the context of cross-border insolvency, it would be helpful to adopt a similar definition of public policy in the Proposed Framework as well.

(v) Right of foreign representatives to commence proceedings

Under Article 11 of the Model Law, a foreign representative is entitled to commence proceedings under the laws of the enacting state if the pre-conditions for initiation of such proceedings are satisfied. However, the Proposed Framework only permits foreign creditors to commence proceedings under Sections 7 and 9 of the Code. In many cases, foreign creditors may be passive and less willing to initiate insolvency proceedings in foreign jurisdictions that they are unfamiliar with and more so if they expect minimal payouts to themselves. Foreign representatives may be better placed to demonstrate that a default has occurred and other prerequisites for the commencement of insolvency proceedings have been met. Given this, the MCA should consider adding a new clause in line with Article 11 of the Model Law permitting foreign representatives to commence proceedings. Clause 1(2)(d) of Draft Part Z may also be amended to recognize the right of other 'interested persons' in line with Article 1 of the Model Law.

(vi) Framework for court-to-court communication

The Proposed Framework, just like the Model Law, relies significantly on court-to-court communication and cooperation, particularly for the coordination of concurrent proceedings. To enable smooth communication, the Proposed Framework suggests the adoption of the JIN Guidelines, 2016. In addition to this, the Modalities of Court-to-Court Communication ("Modalities") may be adopted in consultation with the National Company Law Tribunal and National Company Law Appellate Tribunal, to provide more detailed mechanics for initiating, receiving, and engaging in such communication.

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For example, the Modalities provide for inter alia arrangements relating to the date, time, and language of communication between the judges, the method of engaging in such communication which can take place either directly or through a designated 'facilitator' via telephone, video conference or email and the prior consent of parties to the communication taking place.

CONCLUSION

Adoption of the Proposed Framework within the Code will eliminate many procedural challenges in the legal framework of cross-border insolvency. With the increase in foreign investments in India, a robust and comprehensive cross-border insolvency framework is the need of the hour. It is only fair that foreign investors and foreign nations are given adequate legal protection and the right to recover their monies promptly.

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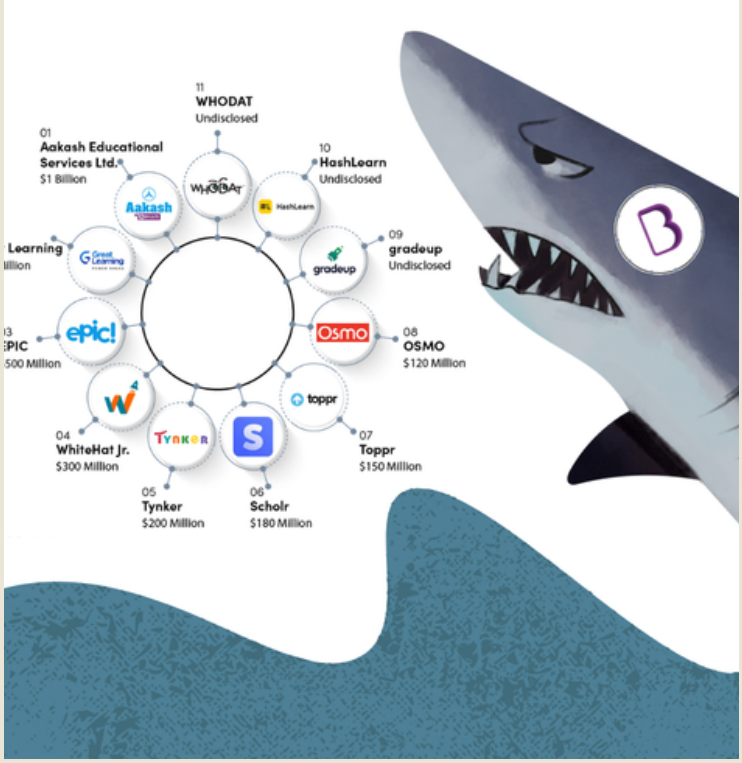
BYJU'S KILLER ACQUISITION: CCI'S KNIFE AGAINST A GUNFIGHT



This post is authored by Swetha Somu and Sanigdh Budhia, second-year students of B.B.A. LL.B. (Hons.) and B.A. LL.B. (Hons.) respectively, at Gujarat National Law University, Gandhinagar.

INTRODUCTION

The pandemic has increased the demand for ed-tech services hence incentivizing ed-tech start-ups to go on an acquisition frenzy in order to expand their portfolios and attain economies of scale. BYJU's too indulged in a series of acquisitions of different-sized ed-tech start-ups resulting in almost 60% of its total acquisitions from the year 2021. Great Learning, itself being a BYJU's-acquired platform, has recently acquired Blume Ventures-backed recruitment platform Superset. This behavior of BYJU's is similar to the "copy, acquire, kill" strategy used by Facebook. Facebook (now, Meta) has indulged in this strategy in all these past years to expand its business. Its approach towards mergers and acquisitions have always been to "neutralise the competitor" and to integrate rival's products with Facebook's products. Just like Facebook, BYJU's has also been engaging in this "acquire and kill" strategy in order to become a market leader in the ed-tech sector.

This article analyses how BYJU's is turning into a monopoly by making killer acquisitions while testing the capability of the Competition Act 2002 ("**the Act**") in monitoring such acquisitions. Further, the article compares the stance of killer acquisitions under the Indian Competition Act with the EU Merger Regulation ("**EUMR**"). The authors conclude by suggesting how the anti-competitive behaviour of dominant entities doing killer acquisitions could be tackled under the Act.

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ACQUISITION: BYJU'S STRATEGY FOR DOMINANCE

One major acquisition made by BYJU's in 2021 is Aakash Educational Institutions ("Aakash"). The Competition Commission of India ("CCI") had approved the acquisition of Aakash stating that no possibility of appreciable adverse effects on competition existed. However, there is a threat of abuse of dominance as BYJU is India's most valued and rapidly expanding ed-tech company at $18 billion. The online market of BYJUs can be termed as the 'relevant market' as per CCI's definition in Fast Track Call Cab Pvt. Ltd. v. ANI Technologies Pvt. Ltd. BYJU is currently holding a dominant position in the market of ed-tech with 2.4 million subscribers, the most with any ed-tech platform. Further, it is currently valued at $18 billion, the most for any ed-tech company in the world. The acquisitions undertaken by it give it the potential to abuse its position by driving other players out of the market, hence violating Section 4 of the Act. Further, through its acquisition spree, with the recent one being a recruitment firm, there are risks of negative externalities such as 'market tipping' which might occur as a result of the "network effects" created.

"Network effects" is a scenario where the value of the product depends on the number of users/buyers/consumers using it. So, the larger the user base, the larger the value of the product, hence greater the "network effects" are. BYJU's is creating the scenario of "Indirect network effects" where the increase in value of its acquired ed-tech start-up (complementary product) in turn increases BYJU's (original brand) value. Eventually, this is leading to the "market tipping" in the ed-tech sector as BYJU is strengthening its dominant position. Moreover, when the existence of market tipping is being used to establish a monopoly in the market, it is imperative to check if the dominant firm has the potential to cause anti-competitive effects and regulate the same before there is any abuse.

Therefore, the more ed-tech start-ups BYJU's acquires, the stronger its "network effects" will be. This will lead to the market tipping towards BYJU's and subsequently hindering other competitors to attract users, hence impeding effective competition.

KILLER ACQUISITIONS VIS-A-VIS INDIAN COMPETITION ACT

Killer acquisitions are generally understood as the practice of well-established firms acquiring 'nascent' competitors or start-ups. Such acquisitions are described as 'killer' because post the merger, the innovative projects of the start-up are subsumed into the acquirer, thereby pre-empting the emergence of future competition. Start-ups or nascent businesses are vital in competitive markets. They are a major source of new products and ideas, as well as of innovation and unconventional business structures. They can help break up oligopolistic markets, forcing current market leaders to reform or quit, and at the same time, they ensure that markets minimise inequality. Well-established firms and market leaders see start-ups as a threat. Hence, they acquire such start-ups.

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Killer acquisitions raise certain concerns for the antitrust regulators as such acquisitions can kill both product and innovation. It can also hamper future competition in the market as firms that have the potential to become strong, fair competitors are acquired at a nascent stage by the current market leader in the process of killer acquisitions. It is more or else like the phrase "nip in the bud". In such a scenario it becomes important to regulate such acquisitions.

Between FY-2015 and FY-2019, about 582 acquisitions were completed in the Indian start-up ecosystem. According to the CCI's E-commerce Study, in each of the platform/intermediation services, a few big companies are dominant, like Flipkart and Amazon in consumer goods, Make My Trip in accommodation, and Zomato and Swiggy in food services. These five major companies have acquired (or invested in) roughly 40 enterprises in the last ten years. Out of all these acquisitions, only three were reported to CCI.

The reason behind this low reporting of acquisitions is that CCI is currently handicapped in regulating such acquisitions. CCI's merger enforcement is hampered by (a) high thresholds, (b) the lack of a transaction value threshold, and (c) the lack of residuary power to scrutinise transactions that fall below the thresholds. Currently, under Section 5 of the Act, a merger must be notified to the CCI only if shares, voting rights, control, or assets are above the Act's threshold limit. Transactions involving nascent acquisitions are usually outside the purview of such high statutory thresholds. This is because in earlier years, organisations in digital markets place a greater emphasis on developing a network than on generating income. Therefore, killer acquisitions fall under the de minimis exemption as the transactions are below the threshold value mentioned under the Act. Since CCI does not have the residuary power to assess non-notifiable transactions like the EU, killer acquisitions have been kept out of the purview of CCI.

Later in 2018, the Government of India established the Competition Law Review Committee ("CLRC") to propose revisions to the Competition Act 2002, recognising these inherent constraints. In its study, the CLRC noted that because businesses in the digital market have lower turnover, they can easily slip under the radar of competition authorities. The CLRC suggested that deal value thresholds should be implemented to detect acquisitions that do not reach the threshold requirement but have the potential to stifle competition. Then, after examining the CLRC's recommendations, the Draft Competition Amendment Bill 2020 ("Amendment Bill") was introduced. The Amendment Bill gives central government the discretionary power in introducing measures to evaluate combinations after due consultation with CCI. Such a measure could tackle the problem of killer acquisitions but more substantive steps, such as incorporating regulatory guidelines, could be taken after taking inspiration from the EUMR.

KILLER ACQUISITION UNDER EUMR

The upsurge of killer acquisitions, predominantly in the pharmaceutical and technology market, prompted the European Commission ("EC") to induce major procedural reforms to the EUMR.

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Before the reforms, the EC lacked pecuniary jurisdiction to review transactions in regards to acquisitions under a certain revenue-based threshold thus missing out on the regulation of the acquisitions of nascent competitors. The void was addressed by the EC through the new guidance on how to apply the referral mechanism provided under Article 22 of EUMR.

Article 22 allows the EC to review acquisitions not meeting the EU dimension but having the possibility of significantly affecting the trade and competition within the territory of the Member states. Article 22 was losing significance as concentrations not meeting EU-dimension were taken care of by the national merger controls. However, the rise of innovative markets created an enforcement gap as killer acquisitions were not under the radar of the national merger control for not meeting the turn-over-based threshold.

The new guidance emphasizes that the EC and National Competition authorities will jointly address acquisitions having the potential to impede effective competition even when the national turn-over threshold for intervention is not met. This will allow the EC to entertain referral requests regarding any acquisition of nascent competitors who may become significant in the future due to their innovations or assets. Thus, killer acquisitions have been taken into cognizance and an attempt to address the anticompetitive effects resulting from it has been taken by the EU through this new guidance.

CONCLUSION

The pandemic has triggered the growth of the ed-tech sector and BYJU's acquisition of Superset comes at a time when everything, including recruitment, is being done online. This pursuit of inorganic growth by BYJU's will help its expansion in the market while also posing a risk of reduction in potential competition as a consequence. The current law under Section 5 of the Act is inadequate to deal with killer acquisitions as such due to its high statutory threshold. However, the suggested modification under the Amendment Bill is very ambiguous such that it will result in the inconsistent use of discretionary power by the government. Even though the Amendment bill lightly touches upon the possibility of reviewing transactions falling below the statutory threshold, it neither provides as to when this power can be invoked nor any set procedure that needs to be followed. Thus, the Indian competition jurisprudence can take inspiration from the new EU guidelines. The incorporation of regulatory guidelines will help CCI in conducting systematic reviews of such transactions while also providing certainty and consistency in its judgment on killer acquisitions. This way, nascent start-ups will be able to flourish and thrive in a conducive environment free of anti-competitiveness.

CALL FOR COMMENTS

IBBI SEEKS COMMENTS ON CHANGES IN CIRP TO REDUCE DELAYS AND IMPROVE RESOLUTION VALUE

The Insolvency and Bankruptcy Board of India on June 27, 2022, released a discussion paper on changes in the corporate insolvency resolution process (CIRP) to reduce delays and improve the resolution value. IBBI has sought comments from the public on this matter. Regulation 40A of the CIRP Regulations provides the timelines for activities in a CIRP. At present, timelines are seemingly presented in a linear manner creating a false impression that the activities are to be performed in a sequential manner. The proposed amendment to CIRP Regulation shall be as follows:

As per regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 the present timeline for filing an avoidance application is 135 days from the date of commencement which coincides with the timeline for submission of the resolution plan which is now being proposed to decrease the time for filing of avoidance application to 130 days. Regulation 36(1), directs the Resolution Professional (RP) to submit the Information Memorandum (IM) to the Committee of Creditors (CoC) within 95 days from the date of commencement so that sufficient time is available to the RP within the overall timeline.

Further as per the proposed changes in regulation 36A, the Expression of Interest (EoI) shall be invited within 75 days of the commencement of the CIPR proceedings. A new regulation 36C which deals with the Strategy for marketing of assets of the corporate debtor has been proposed. The resolution professional shall prepare a strategy for the marketing of the assets of the corporate debtor, where the total claims exceed Rs.100 crore. Such strategy shall consist of the measures that would be taken and the cost involved in the implementation and shall be prepared in consultation with the committee.
Comments can be submitted at www.ibbi.gov.in by 17th July 2022. Read More.

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