RFM
Law Review

RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

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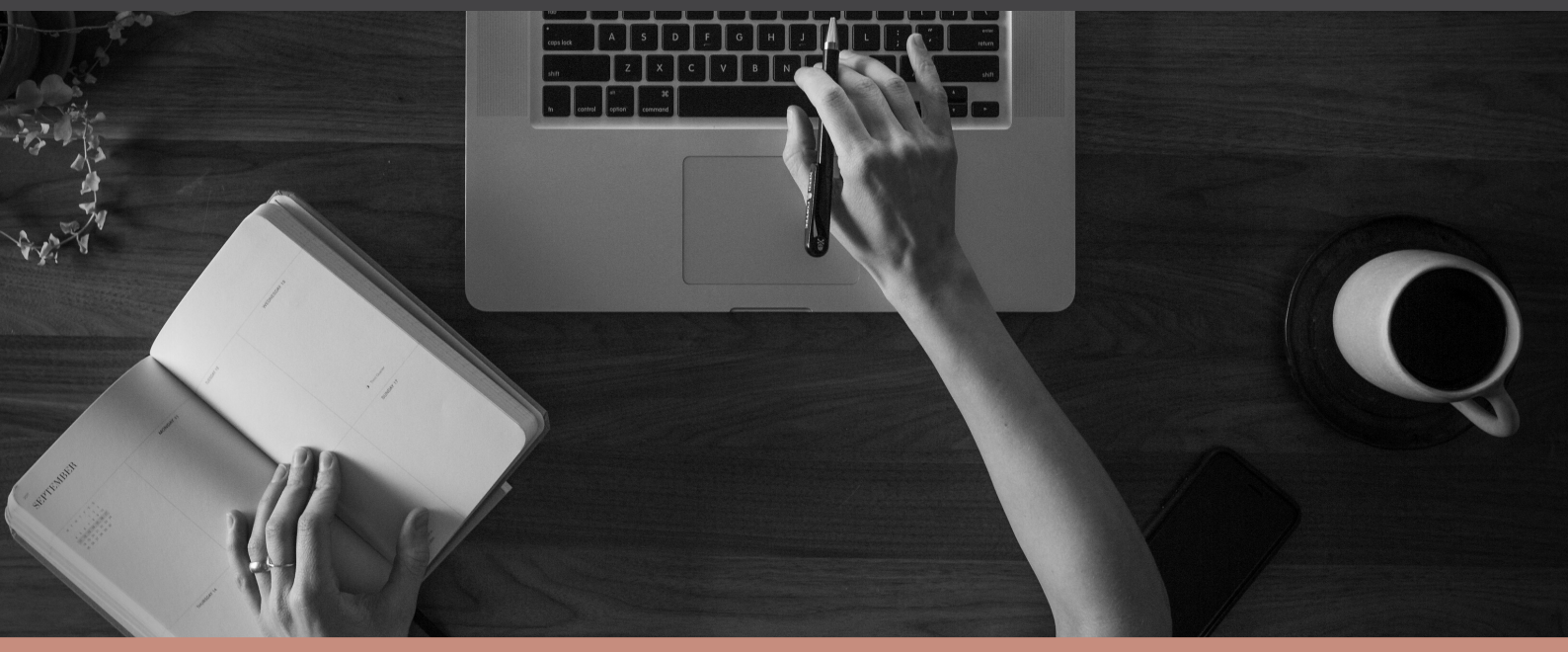
IN THIS ISSUE



PREFACE

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

In this edition, the current on-goings in various fields of law have been analysed succinctly in the 'Highlights' section to provide readers some food for thought. These include a short comment on the landmark case of Epic Games v. Apple, succinct summaries of the New Peak Margin Rules by SEBI and the recently notified IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2021 and a brief analysis of CCI's Clampdown on Cartelisation in Beer Sales.

Major happenings in various fields of law such as Arbitration, Competition, International Trade Law, Securities, Taxation, Intellectual Property, and Technology, Media & Telecommunication have been recorded in the 'News Updates' segment to keep the readers abreast of latest legal developments.

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

Furthermore, the section 'Call for Comments' encourages readers to express their views and concerns on the measures under development and provide critical suggestions on issues that may have a bearing on financial and mercantile laws. Comments are invited on the Consultation Paper for Review of Net Worth Criteria of Trading Member/Clearing Member/Depository Participants and on the Consultation Paper on Review of Price Band and Book Building Framework for Public Issues.

Lastly, the 'Interview' section contains an exciting and insightful discussion with Mr. Sachin Bhandawat (Principal Associate, Khaitan & Co.) on the topic of Trust and Estate Planning.

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

HIGHLIGHTS

APPLE V EPIC GAMES: A COMPLETE WIN FOR NEITHER PARTY

In August 2020, Epic Games had sued Apple, arguing that Apple was abusing its monopolistic position. It said that by only allowing Apple payment systems in apps on its devices, Apple was engaging in anti-competitive practices. This suit was filed after Apple banned Epic Games' video game, Fortnite, from the App Store when Epic Games introduced its own in-app payment system and terminated its contract. Epic Games introduced such in-app purchase system to avoid Apple's 30% cut of its in app-purchases which results on use of Apple's Payment System. The ban was imposed by Apple because the Developer Product Licencing Agreement, existing between Apple and Epic Games stated that Epic Games was required to pay a commission on in-app purchases and was prohibited from putting a store within the App Store. Upon filing of the suit, Apple filed a counter-claim stating that Epic Games breached the Contract and also sought declaratory judgment that the ban imposed by Apple was valid.

On September 10, 2021 the US District Court of California settled the case. It held that Epic Games failed to prove that Apple is a monopoly. The Court determined the relevant market to be the 'Digital Mobile Gaming Transactions' market. It said that success is not illegal and while Apple enjoys a market share of over 55% in the market and has extraordinarily high-profit margins, these factors alone do not show antitrust conduct. The Court noted that Epic Games failed in its burden to demonstrate that Apple is an illegal monopolist as the final trial record did not include evidence of other critical factors, such as barriers to entry and conduct decreasing output or innovation in the relevant market.

While the Court did not declare Apple to have a monopolistic position, it issued a permanent injunction against Apple, restraining it from prohibiting developers from including buttons, external links, or other calls to action that direct customers to purchasing mechanisms, in addition to the in-app purchases in their apps. It also restrained Apple from communicating with customers through points of contact obtained voluntarily from customers through account registration within the app. The order is set to effect in 90 days, post which Apple must allow third party payments. The Court said that this measured remedy will increase competition, transparency, consumer choice and information while preserving Apple's iOS ecosystem, which has pro-competitive justifications.

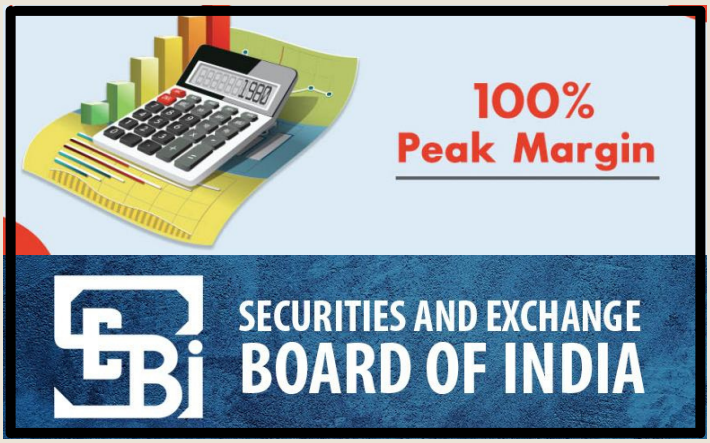
HIGHLIGHTS

Despite the order allowing third party payments, the Court ultimately decided in favour of Apple in nine out of ten counts. While it found Apple's anti-steering policies to be anti-competitive, violative under the California Unfair Competition Law and such that hide critical information from consumers, it found Epic Games guilty of breach of its contract with Apple. Under the contractual terms, deployment of personal payment systems was not allowed. It directed Epic Games to pay damages amounting to 30% of the $12,167,719 in revenue (i.e., the amount Epic Games collected from users in the Fortnite app on iOS through direct payment between August and October 2020) along with 30% of any such revenue that Epic Games collected from November 1, 2020 through the date of judgment, along with interest according to law. It also declared that Apple's termination of the agreements between Epic Games and Apple was lawful. Read More.

By *Srishti Kaushal, Associate Editor*

HIGHLIGHTS

NEW PEAK MARGIN RULES BY SEBI



The fourth and final phase of the New Peak Margin Rules by Securities and Exchange Board of India (SEBI) came into effect on 1st September 2021. As per the new rules, the traders, taking bets on Future and Options (F & O) will be required to give 100 percent margin upfront for their trades. The new rules are likely to have an impact on intraday trade i.e., the ones where the trader enters and sells the contracts within the same market session.

The SEBI introduced the New Peak Margin rules in 2020 and since, it has been implementing it in phased manner. The first phases required the traders to maintain at least 25 percent of peak margin between December 2020 and February 2021. The peak margin was then increased with equal percentages twice before the fourth and the final phase came into effect. Under the peak margin system, the margin requirement is not calculated on the day-to-day basis like the earlier existing system. Instead, the exchanges will sample the prices four times every session and the margins would be calculated based on this. This system was introduced in order to control the leverage being taken by some of the traders and thereby, to reduce systemic risks as it became a practice of taking extremely risky bets intra-day which were not being captured in the margin system.

Justice Agarwala sided with the mortgage lender, while Justice Joshi concurred with the market regulator's decision. Justice Agarwal said that the order issued by General Manager of SEBI could not be sustained and thus should be quashed. He directed the appellant to declare the results of the extraordinary general meeting and thus continue with its deal with the Carlyle Group. Justice Joshi however, upheld the validity of the order issued by the SEBI on the ground of it being in the interests of the investors. He also pointed out that in 2016, PNB Housing Finance incorporated the requirement of an independent valuation for preferential issues in its Articles of Association and thus it should have abided by its AOA.

The new rules require an upfront margin while buying and selling shares. For example., if a person wishes to buy the shares worth Rs 1 lakh of X, he must have Rs 20,000 in his account as cash and the rest of the money is to be paid within two days. From now onwards, if the same person wishes to sell Rs 1,00,000 lakh worth of his share of X, for that also, the person must have Rs 20,000 in his account. If the person fails to have this amount, fines can be levied.

HIGHLIGHTS

The new rules also close the system of BTST (Buy Today, Sell Tomorrow). According to the rules, the shares brought today cannot be sold tomorrow. For example, if a person bought X shares on Monday, he can only sell those shares after receiving the delivery of shares, not before Wednesday. The new rules also prescribe that the funds from shares sold today from delivery cannot be used for new trades the same day. Those funds can only be used for new trades the next day. The new rules are facing criticism by traders as they will now have to shell out more money to be in the futures market. The new system mandates up-front margin for intra-day positions which has become an apple of discord. The traders will also have to pay a penalty if they fall short of these margins during the session, which is also a core contention. Several delegations of traders have approached SEBI and Ministry of Finance for seeking relief from these new rules. **Read more.**

By *Vansh Bhatnagar, Junior Editor*

HIGHLIGHTS

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) (THIRD AMENDMENT) REGULATIONS, 2021

The Insolvency and Bankruptcy Board of India (IBBI) notified the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2021 on 30th September, 2021 to amend the existing Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

The primary objective of this amendment is to make the process more effective and efficient. The salient features are as follows: -

- The Committee of Creditors (CoC) is responsible for discharging its functions in acquiescence of the guidelines as may be issued by the IBBI (Regulation 17(1A)). The roles and responsibilities of the CoC have been clarified through various judgments and this amendment shall further seek to achieve the purpose of the Code.

- The amendment has made adjustments and the following are allowed to take place just once, these include an invitation for expression of interest under Regulation 36A (4A), Request for Resolution Plan (RFRP) under Regulation 36B (5), Evaluation Matrix under Regulation 36B (5), and Resolution Plan if envisaged in the RFRP (Regulation 39(1A) (a) substituted). This imposition of limitation wherein the expression of interest, Request for resolution process, etc., are allowed only once, saves the enormous costs associated with delay in insolvency process as well as strives to maintain the trust of stakeholders in this mechanism. Such a limitation makes the process more timesaving.

- The resolution professional may also exercise a challenge mechanism for allowing resolution applicants to ameliorate their resolution plans (Regulation 39(1A) (b) substituted). However, the CoC shall not be considering the resolution plans which have been [A.] received after the time specified as under Regulation 36B; or [B.] received from somebody outside the final prospective applicants' list, or [C.] has not been in accord with Section30(2) & Regulation 39(1). This is aimed at value maximisation, wherein the challenge process allows choice to the stakeholders and makes the process more effective. The challenge mechanism will therefore be an additional option which can be availed by the stakeholders under the Corporate Insolvency Resolution Process (CIRP).

- This amendment is made in furtherance to the IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2021 notified on 5th August 2021.

HIGHLIGHTS

- The major modifications made through this were with regards to permitting an insolvency professional to also be appointed as an interim resolution professional for a CIRP as the case shall be (Regulation 3(1)), requiring him to make necessary disclosures at the time of his appointment and as required thereafter (Regulation 3(2)). The resolution professional has also been given the power to access the books of account, records and other requisite documents or information as would be necessary for the successful discharge of his duties under the Code (Regulation 4). The disclosure of the former name(s) & registered office address(es) of the Corporate Debtor that might have been changed over the period of last 2 years has also been mandated as it is possible for the debtor to change them before insolvency (Regulation 4B). Further, a modification has been made in Regulation 27 to empower interim resolution professional and the resolution professionals to appoint any other professional as deemed necessary, in addition to the two registered valuers to conduct the CIRP. Also, the Resolution Professional is mandated to check if the corporate debtor has been subjected to avoidance transactions as preferential transactions, undervalued transactions, extortionate credit transactions, fraudulent trading or wrongful trading, and file applications with the Authority seeking proper relief. In pursuance of this, the amendment requires the filing of Form CIRP 8 by the Resolution Professional, conveying details of his estimation and view with regard to the avoidance transactions. **Read more.**

By *Jyoti Jindal, Copy Editor*

HIGHLIGHTS

CCI IMPOSES HEFTY PENALTY ON CARLSBERG, UBL, ALL INDIA BREWERS' ASSOCIATION (AIBA) AND 11 INDIVIDUALS FOR CARTELIZATION IN THE SALE AND SUPPLY OF BEER

भारतीय प्रतिस्पर्धा आयोग
Competition Commission of India

The Competition Commission of India (CCI) in its order dated September 24, 2021, imposed penalties totalling over Rs 873 crore on United Breweries, Carlsberg India, All India Brewers' Association (AIBA), and 11 individuals for cartelization in the sale and supply of beer. This order comes nearly four years after CCI ordered a detailed probe regarding these anticompetitive practices. In its official release, CCI stated that these leading companies have been found to be "indulging in cartelization in the sale and supply of beer in various States and Union Territories in India, including through the platform of All India Brewers' Association (AIBA)". The fines on UBL and Carlsberg India are nearly Rs 752 crore and Rs 121 crore, respectively. A fine of over Rs 6.25 lakh has been imposed on AIBA and various individuals have been fined. The period of the cartel was held to be from 2009 to October 2018, with CIPL joining in from 2012 and AIBA serving as a platform for facilitating such cartelization since 2013. CCI has also directed the companies, association, and individuals to "cease and desist" from anti-competitive practices in the future.

Because AIBA was found to be actively involved in aiding such cartelization, the Competition Commission of India ruled that it was also in violation of competition law. Anheuser Busch InBev India (AB InBev) was also found to be part of the cartel fixing beer prices but did not face a fine as the company explained the nature of the cartel and submitted evidence of email communications between key managerial personnel at an early stage in the investigation and hence, it was the first company to provide key evidence in the investigation.

The CCI, based on evidence of regular communications between the parties collected by the Director General (DG) during search and seizure (As per the release, October 10, 2018, was the date on which the DG conducted search and seizure operations at the premises of the beer companies), and based on the disclosures made in the lesser penalty applications, found that the firms engaged in price co-ordination in Andhra Pradesh, Karnataka, Maharashtra, Odisha, Rajasthan, West Bengal, Delhi, and Puducherry; in restricting the supply of beer in Maharashtra, Odisha, and West Bengal and in sharing of the market in Maharashtra and co-ordinating to supply beer to premium institutions in Bengaluru in contravention of the provisions of competition law. Furthermore, CCI discovered that key managerial personnel emailed competitors about price increases that they planned to submit to state authorities in several states, as well as coordination between UBL and AB InBev about the acquisition of second-hand bottles.

HIGHLIGHTS

Furthermore, CCI held four individuals from UBL, four individuals from AB InBev, six individuals from CIPL, and the Director-General of AIBA responsible for their respective companies' anti-competitive behaviour. Read more.

By *Raghav Sehgal, Copy Editor*

NEWS UPDATES

ALTERNATIVE DISPUTE RESOLUTION

1. ENTERTAINING INTERIM APPLICATION: SCOPE OF SECTION 9 AND 17 OF THE ARBITRATION & CONCILIATION ACT

The Supreme Court recently held in *Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd.* ("Arcelor-Essar Judgment") that the bar on the Court from entertaining interim applications under Section 9(3) of the Arbitration and Conciliation Act of 1996 applied only if the application had not been taken up for consideration at the time the Arbitral Tribunal was constituted. However, if circumstances exist which may not render the remedy under Section 17 of the Act efficacious, the Court has to consider the prayer for interim relief on merits, and pass such order, as the Court may deem appropriate. **Read more.**

2. WHETHER THE CHAIRMAN OF A COMPANY WHO IS INVOLVED IN AN ARBITRATION PROCEEDING, IS AN INELIGIBLE ARBITRATOR?

In *Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. & Ors. Vs. M/s. Ajay Sales & Suppliers*, the Supreme Court held that arbitrators must be unbiased and neutral to further the core objective of approaching an arbitration tribunal. The Court, while considering the ineligibility of the Chairman and the contention that there was no explicit mentioning of Chairman in the Seventh Schedule, held that the scope of the Schedule was much wider and it should be read keeping in mind the object of the 2015 Amendment and it should not be constrained to the wordings in the Schedule. Therefore, the meaning and scope of the Schedule cannot be limited and if the Arbitrator is found to be ineligible, the court can appoint another Arbitrator. **Read more.**

3. ARBITRATION REFERENCE CAN BE DECLINED IF DISPUTE IN QUESTION DOES NOT CORRELATE TO ARBITRATION AGREEMENT: SC

In *DLF Home Developers Ltd. v. Rajapura Homes Pvt. Ltd. & Anr.*, the Supreme Court reaffirmed that courts acting under Section 11 of the Arbitration Act are not expected to act mechanically in just delivering a dispute to an arbitrator. The courts, on the other hand, are required to consider the key preliminary issues, albeit within the confines of Section 11 of the Arbitration Act. The purpose of such a review is not to usurp the arbitral tribunal's authority, but to streamline the arbitration procedure. The Court held that even when an arbitration agreement exists, the courts can decline a prayer for reference under Section 11 if the dispute was not correlated to the arbitration agreement. **Read more.**

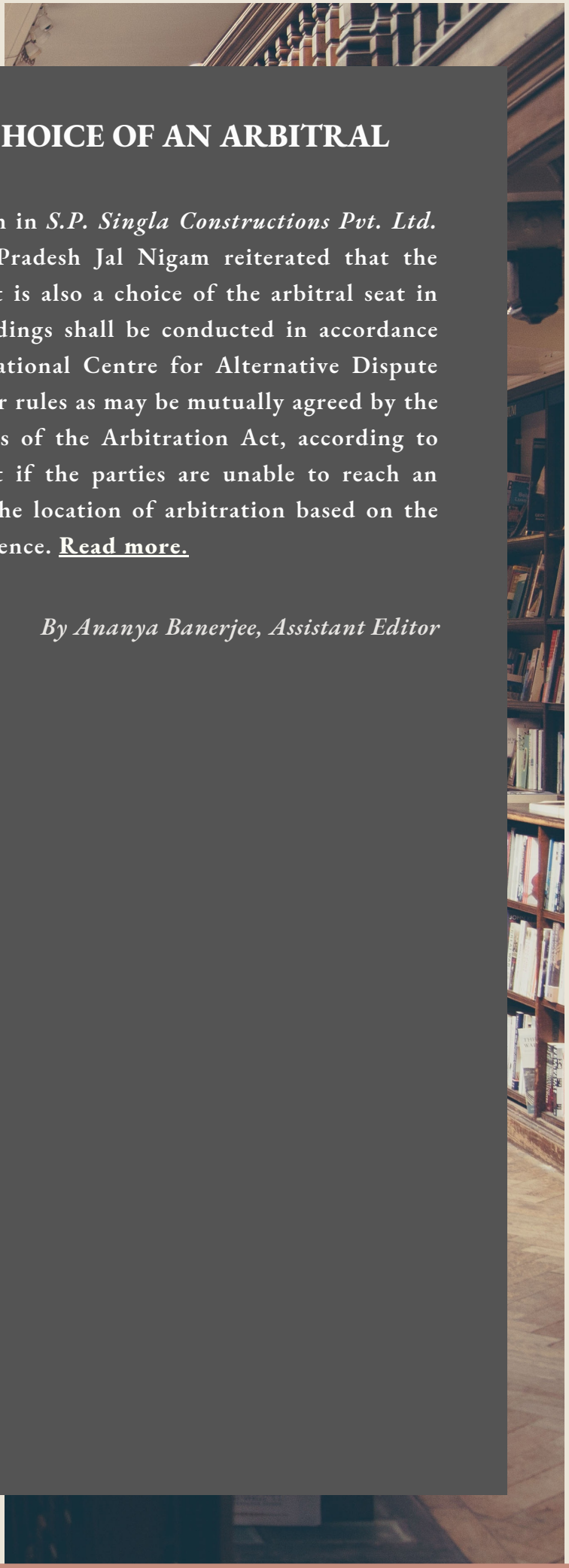
4. SCOPE OF APPEALS UNDER "UNHAPPILY WORDED" SECTION 13, COMMERCIAL COURTS ACT

The Madras High Court recently passed a detailed judgment on the scope of appeals under Section 13 of the Commercial Courts Act, 2015 in *Hindustan Unilever v. S Shanthi.* The discussion on the provision was prompted by the wording of Section 13 of the Commercial Courts Act of 2015, which led to contradictory court interpretations over time. The Court stated that there can be no doubt that the appeal provision in the abovementioned Act has been "unhappily worded." Even though no reasonable person could argue that an appeal from a decree is not provided for in the said Act, there is no doubt that there is no express provision in this regard, and that an appeal against a decree entered in a civil suit involving commercial disputes can only be maintained by inference. **Read more.**

5. CHOICE OF VENUE IS ALSO A CHOICE OF AN ARBITRAL SEAT: DELHI HIGH COURT

The High Court of Delhi in its recent decision in *S.P. Singla Constructions Pvt. Ltd. v. Construction and Design Services*, Uttar Pradesh Jal Nigam reiterated that the choice of a venue in an arbitration agreement is also a choice of the arbitral seat in absence of a contrary indication. The proceedings shall be conducted in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution (ICADR), New Delhi, or such other rules as may be mutually agreed by the parties, and shall be subject to the provisions of the Arbitration Act, according to Clause 26.3.1. The Court further stated that if the parties are unable to reach an agreement, the arbitral tribunal will choose the location of arbitration based on the facts of the case, including the parties' convenience. **Read more.**

By Ananya Banerjee, Assistant Editor



NEWS UPDATES

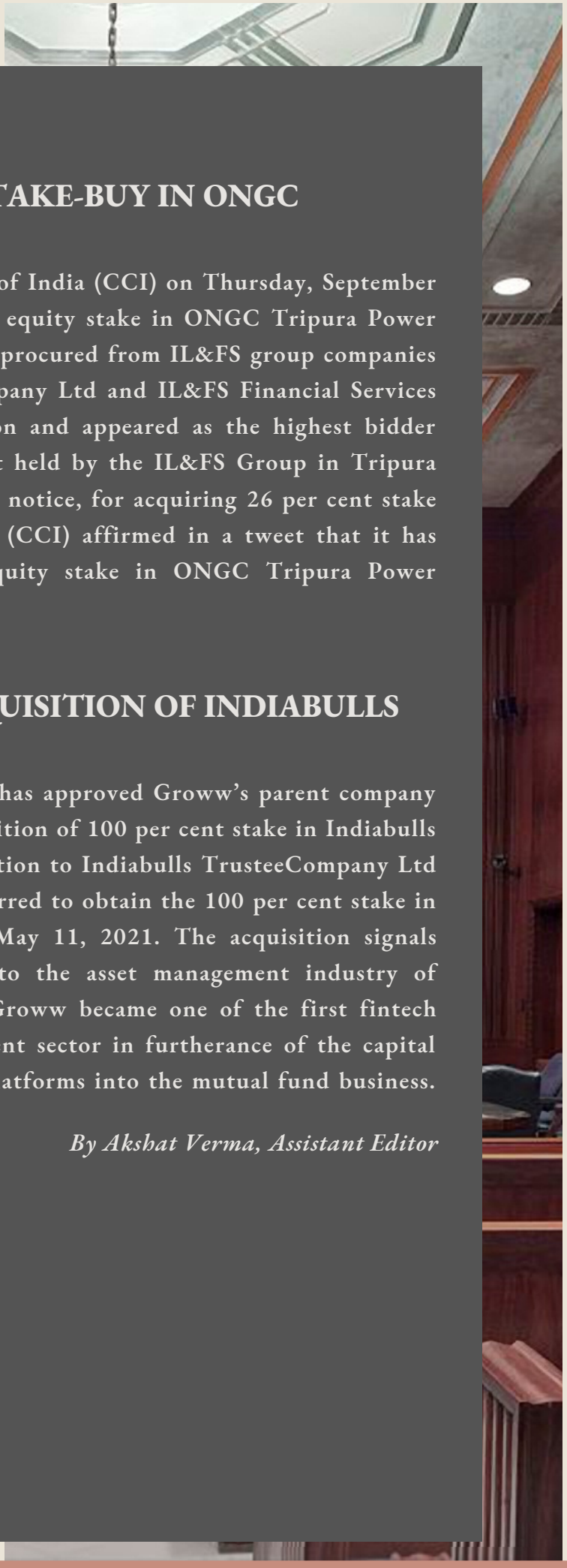
COMPETITION LAW

1. CCI GIVES NOD TO SUMITOMO MITSUI FINANCIAL'S ACQUISITION OF FULLERTON INDIA CREDIT

The Competition Commission of India (CCI) approved the acquisition of Fullerton India Credit Company by Sumitomo Mitsui Financial Group in two steps. The proposed transaction encompasses the acquisition of 100 per cent issued and paid-up equity share capital of Fullerton India Credit Company by Sumitomo Mitsui Financial Group in two steps. The first step would involve the acquisition of Fullerton India Credit Company's 74.9 per cent of the total paid-up equity share capital on a fully diluted basis from Fullerton Financial Holdings and Angelica Investments, a notice filed with the regulator said. In due course, Sumitomo Mitsui Financial Group would procure the remaining 25.1 per cent of the paid-up equity share capital on a fully diluted basis from Angelica. As per the notice, "The proposed transaction will not lead to any change in the competitive landscape or cause any appreciable adverse effect on competition in India, irrespective of the manner in which the relevant markets are defined". **Read more.**

2. ADANI PORTS ACQUISITION OF 10.4% STAKE IN GANGAVARAM PORT GAINS CCI APPROVAL

Adani Ports and Special Economic Zone Ltd. received approval from the CCI (Competition Commission of India) to acquire a 10.4 percent stake in Gangavaram port in Andhra Pradesh. The antitrust regulator in a tweet, acknowledged approving the proposed acquisition of 10.40 per cent equity shareholding of Gangavaram Port by Adani Ports and Special Economic Zones Ltd. The consideration of the acquisition is Rs 644.78 crore, and the said transaction is expected to be executed within a month's time, the company affirmed this in a BSE filing. The company affirmed that the acquisition resonates with the company's strategy of East coast to West coast parity and will provide an access to growth from new hinterland markets as it has coverage in resource-rich and industrial belt in eastern, central and southern India. Eminently, Gangavaram Port was inaugurated in September 2001 and is involved in the business of handling various types of dry bulk and breakbulk cargo. The port has handled 32.81 MMT of cargo in FY21. It has a capacity of 64 MMT. **Read more.**



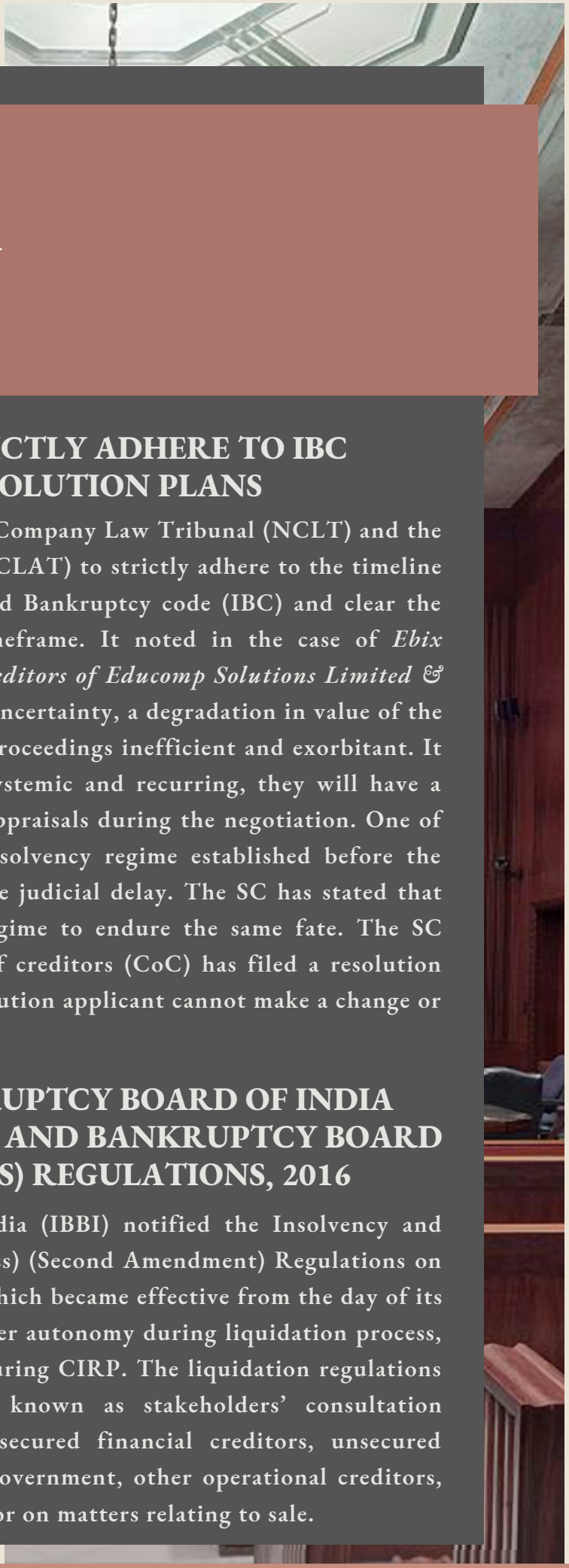
3. CCI APPROVES 26 PER CENT STAKE-BUY IN ONGC TRIPURA BY GAIL

Antitrust regulator Competition Commission of India (CCI) on Thursday, September 9. gave its nod for acquisition of 26 per cent equity stake in ONGC Tripura Power Company by GAIL (India). The stake is being procured from IL&FS group companies subsidiaries IL&FS Energy Development Company Ltd and IL&FS Financial Services Ltd. GAIL had taken part in an open auction and appeared as the highest bidder pursuant to the call for expression of interest held by the IL&FS Group in Tripura Power Corporation Ltd., as per a combination notice, for acquiring 26 per cent stake in it. The Competition Commission of India (CCI) affirmed in a tweet that it has approved the acquisition of 26 per cent equity stake in ONGC Tripura Power Company by GAIL (INDIA). **Read more.**

4. CCI APPROVES GROWW'S ACQUISITION OF INDIABULLS MUTUAL FUND BUSINESS

The Competition Commission of India (CCI) has approved Groww's parent company Nextbillion Technology Pvt Ltd for the acquisition of 100 per cent stake in Indiabulls Asset Management Firm Ltd (IAMCL) in addition to Indiabulls TrusteeCompany Ltd (ITCL). Nextbillion Technology Private concurred to obtain the 100 per cent stake in the investment firm for Rs. 175 crores on May 11, 2021. The acquisition signals Nextbillion Technology's (Groww) debut into the asset management industry of handling mutual funds schemes. With this, Groww became one of the first fintech startups to infiltrate into the asset management sector in furtherance of the capital markets regulator SEBI's approval of digital platforms into the mutual fund business. **Read more.**

By Akshat Verma, Assistant Editor



NEWS UPDATES

INSOLVENCY LAW

1. SC ASKS NCLT, NCLAT TO STRICTLY ADHERE TO IBC TIMELINES, CLEAR PENDING RESOLUTION PLANS

Supreme Court (SC) has directed the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) to strictly adhere to the timeline of 330 days set forth under the Insolvency and Bankruptcy code (IBC) and clear the outstanding resolution plans within that timeframe. It noted in the case of *Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited & Anr.*, that inordinate delays cause commercial uncertainty, a degradation in value of the corporate debtor and renders the bankruptcy proceedings inefficient and exorbitant. It articulated that if these deferments become systemic and recurring, they will have a noticeable impact on the parties' commercial appraisals during the negotiation. One of the main reasons for the faultiness of the insolvency regime established before the Insolvency and Bankruptcy Code (IBC) was the judicial delay. The SC has stated that they cannot permit the present insolvency regime to endure the same fate. The SC additionally stated that after the committee of creditors (CoC) has filed a resolution plan for stressed assets under the IBC, the resolution applicant cannot make a change or withdraw it. **Read more.**

2. THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (IBBI) AMENDS THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (LIQUIDATION PROCESS) REGULATIONS, 2016

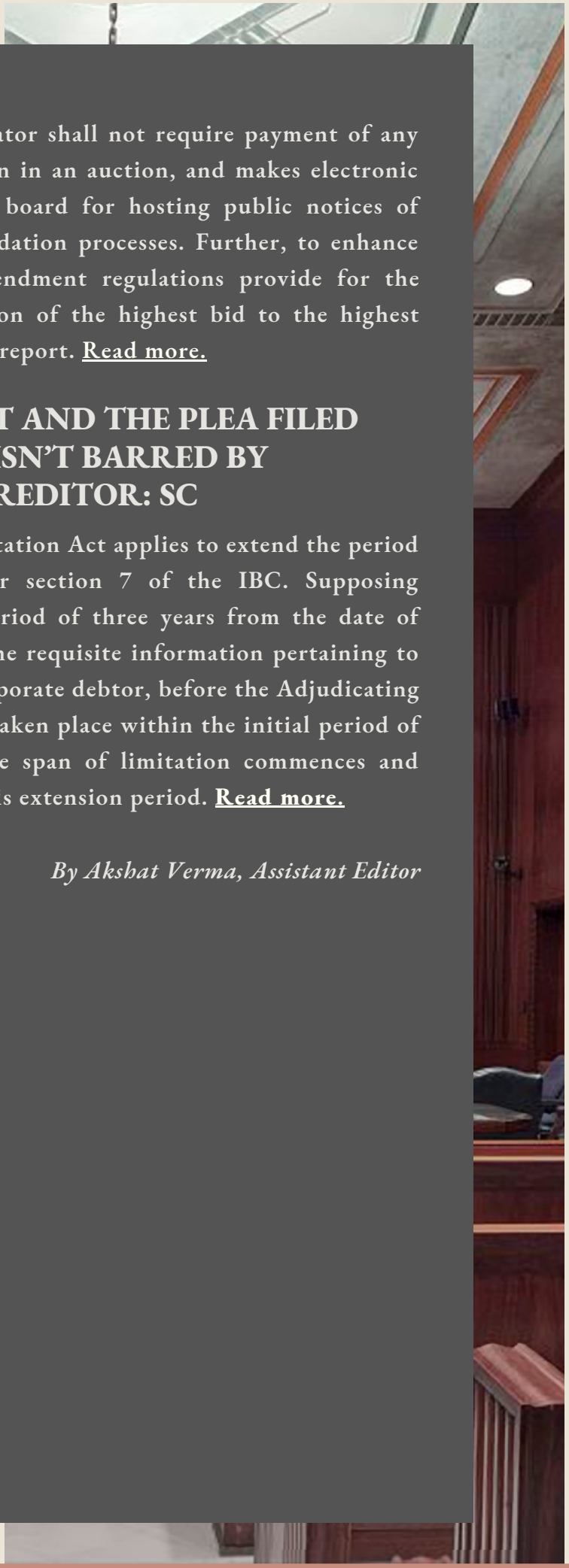
The Insolvency and Bankruptcy Board of India (IBBI) notified the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations on September 30th. The amendment regulations which became effective from the day of its notification empower the liquidator with greater autonomy during liquidation process, in comparison to the resolution professional during CIRP. The liquidation regulations also provide for a consultation committee known as stakeholders' consultation committee (SCC), which is represented by secured financial creditors, unsecured financial creditors, workmen and employees, government, other operational creditors, and shareholder/partners to advice the liquidator on matters relating to sale.

The regulations also prescribe that the Liquidator shall not require payment of any non- refundable deposit or fee for participation in an auction, and makes electronic platform at www.ibbi.gov.in available to the board for hosting public notices of auctions of liquidation assets of ongoing liquidation processes. Further, to enhance the transparency and accountability, the amendment regulations provide for the Liquidator to intimate the reasons for rejection of the highest bid to the highest bidder and report the same in the next progress report. **Read more.**

3. BURDEN OF PROVING DEFAULT AND THE PLEA FILED UNDER SECTION 7 OF IBC THAT ISN'T BARRED BY LIMITATION IS ON FINANCIAL CREDITOR: SC

Supreme Court held that section 18 of the Limitation Act applies to extend the period of limitation for filing an application under section 7 of the IBC. Supposing application under section 7 is filed after a period of three years from the date of default and if the financial creditor provides the requisite information pertaining to acknowledgement of debt, in writing by the corporate debtor, before the Adjudicating Authority, with this acknowledgement having taken place within the initial period of three years from date of default, a fresh time span of limitation commences and application can be considered, if filed within this extension period. **Read more.**

By Akshat Verma, Assistant Editor



NEWS UPDATES

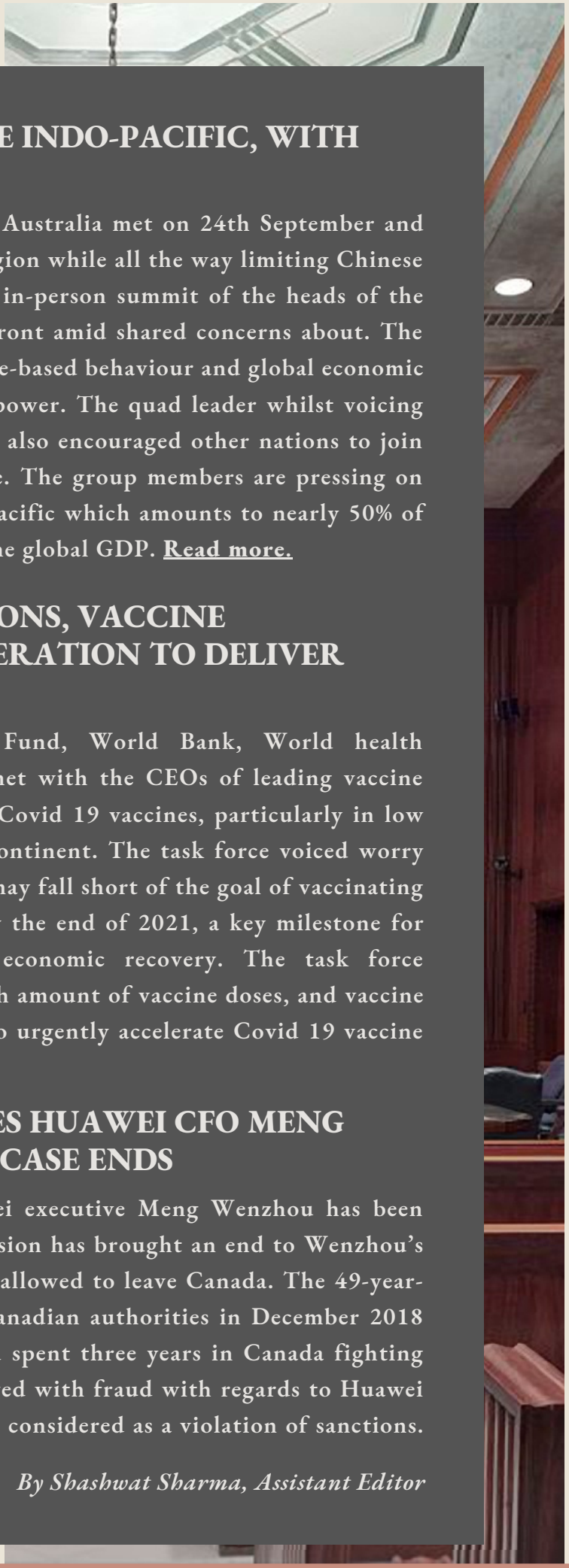
INTERNATIONAL TRADE LAW

1. US, EU AGREE TO COLLABORATE ON SEMICONDUCTOR SUPPLIES, TECH LAWS AND CHINA TRADE

The United States of America (US) and European Union (EU) have agreed to increase transatlantic cooperation to improve semi-conductor supply chains, restrict China's non-market trading policy, and adopt a more united approach to regulating large and global technology firms. Senior Cabinet officials from both continents pledged to collaborate on investment screening, export controls for critical dual-use technology, and artificial intelligence research at the launch of a new forum, the US-EU Trade and Technology Council (TTC). The conference was nearly interrupted by French outrage at the US decision to deliver nuclear submarines to Australia earlier this month, prompting Canberra to cancel a $40 billion contract with France. **Read more.**

2. OPEC+ MAINTAINS GRADUAL OIL PRODUCTION INCREASE, AMID HIGH DEMAND AND U.S. PRESSURE

The Organisation of the Petroleum Exporting Companies (OPEC) countries and their allies met on 1st September and agreed to maintain their existing policy of gradual oil output increase, despite the fact that it has raised its demand forecast for the year 2022 and is still under pressure from the U.S. to increase the output more rapidly. This decision means that OPEC+ will release 400,000 BPD in October as well after doing so in September. While the United States has called for a speedier output increase by OPEC+ as the benchmark Brent crude trades above 70$ per barrel. **Read more.**



3. QUAD LEADERS PRESS FOR FREE INDO-PACIFIC, WITH WARY EYE ON CHINA

Leaders of the United States, India, Japan, and Australia met on 24th September and vowed to pursue a free and open Indo-Pacific region while all the way limiting Chinese influence in the region. This was also the first in-person summit of the heads of the respected countries, which presented a united front amid shared concerns about. The statement released by the grouping insists on rule-based behaviour and global economic order, where China has been trying to flex its power. The quad leader whilst voicing support for smaller island nations in the region also encouraged other nations to join hands in economic and environmental resilience. The group members are pressing on free and open trade passing through the Indo-Pacific which amounts to nearly 50% of the world trade and represents roughly 55% of the global GDP. **Read more.**

4. INTERNATIONAL ORGANISATIONS, VACCINE PRODUCERS TO INCREASE COOPERATION TO DELIVER VACCINES ON TIME

The heads of the International Monetary Fund, World Bank, World health organization, and World Trade Organisation met with the CEOs of leading vaccine manufacturing companies to improve access to Covid 19 vaccines, particularly in low and middle-income countries and the African continent. The task force voiced worry that unless immediate action is taken the globe may fall short of the goal of vaccinating at least 40% of the population in all nations by the end of 2021, a key milestone for ending the Pandemic and resuming global economic recovery. The task force encouraged countries that have stocked up a high amount of vaccine doses, and vaccine manufacturers to come together in good faith to urgently accelerate Covid 19 vaccine supplies to COVAX and AVAT. **Read more.**

5. CANADIAN COURT DISCHARGES HUAWEI CFO MENG WENZHOU AS U.S. EXTRADITION CASE ENDS

In a judgement by the Canadian court, Huawei executive Meng Wenzhou has been freed from all the charges against her. This decision has brought an end to Wenzhou's 3-year long legal case due to which she was not allowed to leave Canada. The 49-year-old Chinese citizen had been arrested by the Canadian authorities in December 2018 on special request of the United States and had spent three years in Canada fighting extradition to the US where she was to be charged with fraud with regards to Huawei subsidiary's sale of equipment in Iran which was considered as a violation of sanctions. **Read more.**

By Shashwat Sharma, Assistant Editor

NEWS UPDATES

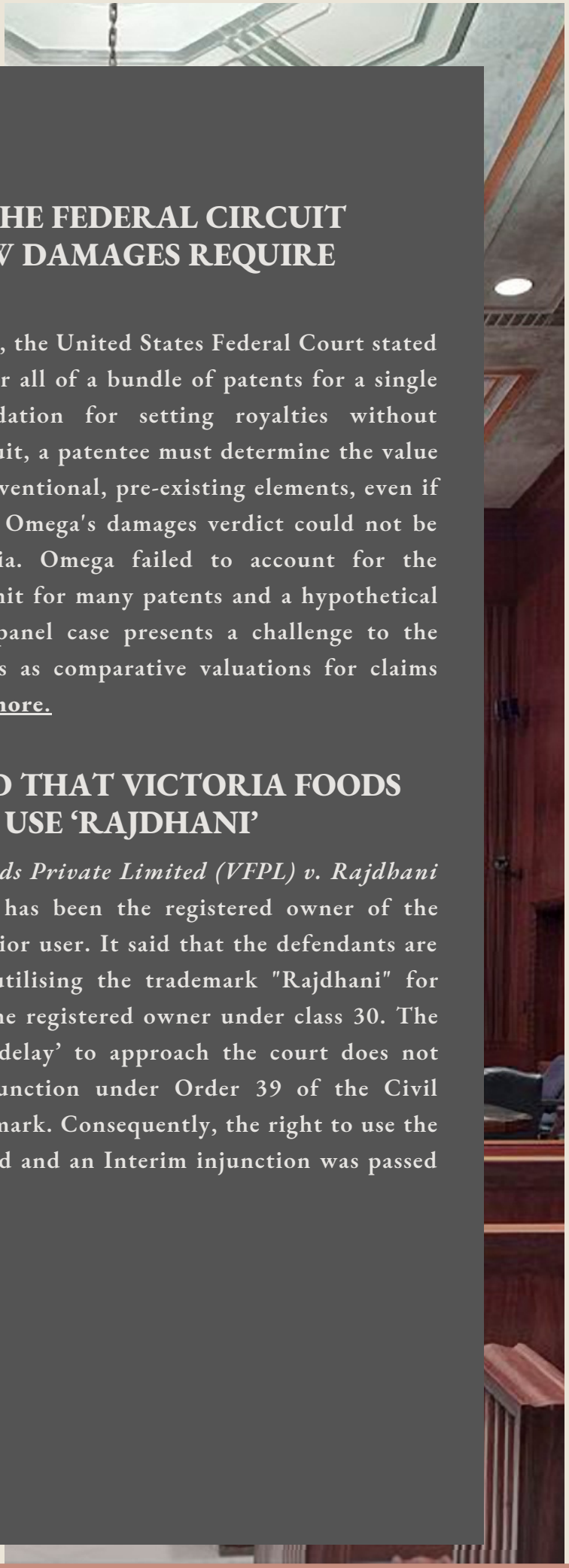
INTELLECTUAL PROPERTY RIGHTS (IPR)

1. AI CANNOT BE THE INVENTOR OF A PATENT: UK COURT OF APPEAL

The UK panel decided, by a two-to-one majority, that an inventor must be a real human person under UK law. The Court of Appeal has rejected an appeal claiming that it should have been possible for him to name an Artificial Intelligence (AI) entity as the inventor on his UK patent applications. This judgment perhaps makes more emphatic the need for a change in UK legislation to keep pace with the increasing prevalence of AI, particularly if inventions created by AI entities are to be protectable. However, as there was a dissenting judgment at the Court of Appeal, it is likely that permission to appeal to the UK Supreme Court will be sought. **Read more.**

2. PATENTS (AMENDMENT) RULES, 2021 TO REDUCE THE FEE FOR PATENT FILING AND PROSECUTIONS OF EDUCATIONAL INSTITUTIONS BY 80%

The Department for Promotion of Industry and Internal Trade (DPIIT), under the Ministry of Commerce and Industry published the Patents (Amendment) Rules, 2021 on 21st September, 2021, amending the Patents Rules 2003. Under the amended rules, educational institutions have been added to the list of Natural Person, Start-ups and Small Entities in order to promote creation, innovation and development of new technologies in the educational sector. The patent filing and processing fees that are charged on educational institutions have been reduced by 80%. Additionally, the mechanism of lodging feedback and complaints regarding the functioning of IP offices has been set up on the IPO website. Scheme for Facilitating Start-ups Intellectual Property Protection (SIPP) has also been launched to provide facilitators to start-ups for filing and processing of their applications and reimbursing of the professional charges. **Read more.**

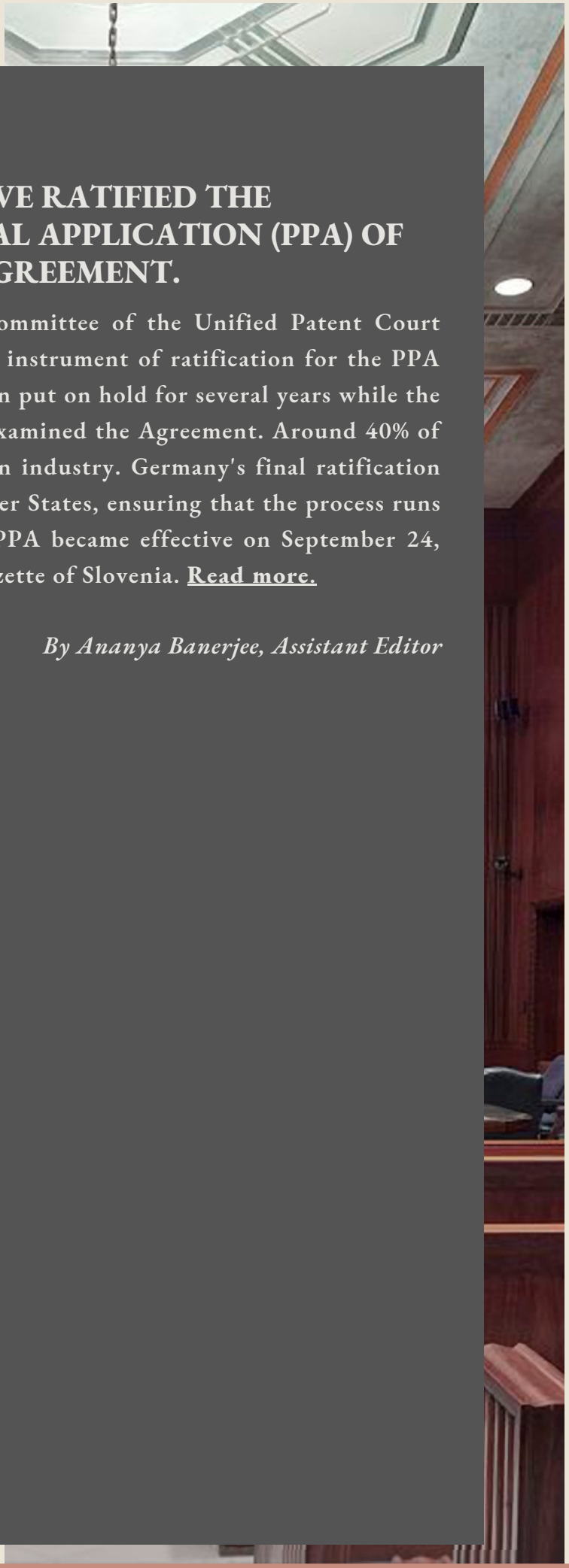


3. U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT EMPHASIZED THAT PATENT LAW DAMAGES REQUIRE APPORTIONMENT

In *Omega Patents, LLC v. Calamp Corporation*, the United States Federal Court stated that licensing policies that enable use of any or all of a bundle of patents for a single per-unit price are not a legitimate foundation for setting royalties without apportionment. According to the Federal Circuit, a patentee must determine the value of the patented qualities in relation to the conventional, pre-existing elements, even if all aspects of the infringing unit are claimed. Omega's damages verdict could not be supported by the entire-market-value criteria. Omega failed to account for the distinctions between licences pricing $5 per unit for many patents and a hypothetical agreement on a single invention. The split panel case presents a challenge to the patentees attempting to use portfolio licences as comparative valuations for claims asserting less than a complete portfolio. **Read more.**

4. DELHI HIGH COURT OBSERVED THAT VICTORIA FOODS WAS 'FIRST IN THE MARKET' TO USE 'RAJDHANI'

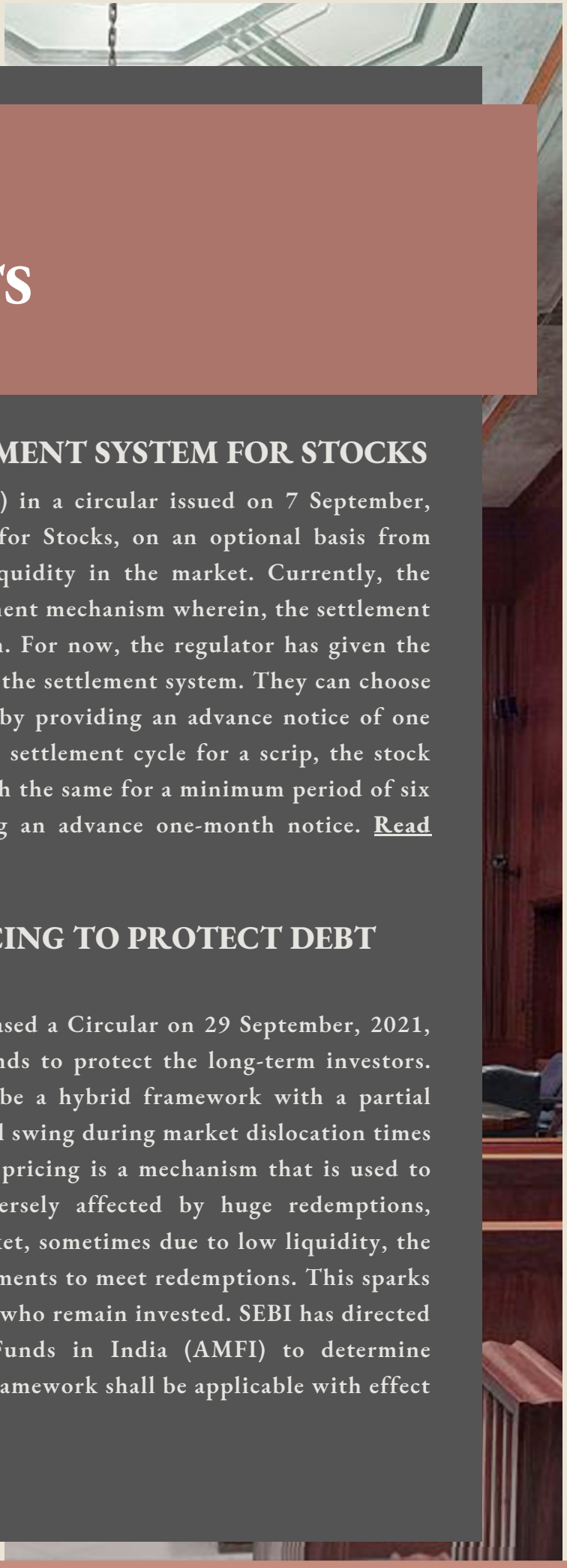
The Hon'ble Delhi High Court in *Victoria Foods Private Limited (VFPL) v. Rajdhani Masala Co. (RMC) & Anr* held that VFPL has been the registered owner of the trademark "Rajdhani" since 1996 and is the prior user. It said that the defendants are infringing on VFPL's rights by incorrectly utilising the trademark "Rajdhani" for allied and kindred goods for which VFPL is the registered owner under class 30. The Court further stated that the VFPL's 'mere delay' to approach the court does not preclude it from obtaining a temporary injunction under Order 39 of the Civil Procedure Code for violation of its registered mark. Consequently, the right to use the trade mark "Rajdhani" by VFPL was recognised and an Interim injunction was passed in favour of VFPL. **Read more.**



5. GERMANY AND SLOVENIA HAVE RATIFIED THE PROTOCOL ON THE PROVISIONAL APPLICATION (PPA) OF THE UNIFIED PATENT COURT AGREEMENT.

According to a report by the Preparatory Committee of the Unified Patent Court (UPC), the German government deposited the instrument of ratification for the PPA on September 27, 2021, after the work had been put on hold for several years while the German Federal Constitutional Court (FCC) examined the Agreement. Around 40% of all European patents are owned by the German industry. Germany's final ratification of the PPA can act as a "gatekeeper" for Member States, ensuring that the process runs smoothly. Slovenian legislation ratifying the PPA became effective on September 24, 2021, when it was published in the Official Gazette of Slovenia. **Read more.**

By Ananya Banerjee, Assistant Editor



NEWS UPDATES

SECURITIES RIGHTS

1. SEBI INTRODUCES T+1 SETTLEMENT SYSTEM FOR STOCKS

The Securities Exchange Board of India (SEBI) in a circular issued on 7 September, 2021 introduced the T+1 Settlement System for Stocks, on an optional basis from January 1. This move is aimed to enhance liquidity in the market. Currently, the Indian Stock Exchanges follow the T +2 Settlement mechanism wherein, the settlement of shares takes place two days after transaction. For now, the regulator has given the option to the stock exchanges to offer either of the settlement system. They can choose to offer the new system for any of the scrips, by providing an advance notice of one month at least. However, after opting for T+1 settlement cycle for a scrip, the stock exchange will have to mandatorily continue with the same for a minimum period of six months and can switch back only after giving an advance one-month notice. **Read more.**

2. SEBI INTRODUCES SWING PRICING TO PROTECT DEBT MUTUAL FUND INVESTORS

Securities Exchange Board of India (SEBI) released a Circular on 29 September, 2021, introducing swing pricing for debt mutual funds to protect the long-term investors. The circular stated that the framework shall be a hybrid framework with a partial swing during normal times and a mandatory full swing during market dislocation times for high-risk open-ended debt schemes. Swing pricing is a mechanism that is used to protect long term investors from being adversely affected by huge redemptions, generally by large scale investors. In bond market, sometimes due to low liquidity, the fund houses are forced to liquidate their investments to meet redemptions. This sparks a fall in net asset value (NAV), impacting those who remain invested. SEBI has directed the industry body, Association of Mutual Funds in India (AMFI) to determine thresholds for triggering the mechanism. The framework shall be applicable with effect from March 1, 2022. **Read more.**

3. SEBI RAISES BAR ON DISCLOSURES FOR HIGH VALUE DEBT LISTED COMPANIES

SEBI released a notification on 7 September, 2021 raising the bar on disclosures and corporate governance standards for entities that have listed their non-convertible debt securities and have an outstanding value of such debt securities of Rs 500 crore and above. The provisions related to composition of board of directors, related party transactions and audit committee will now be applied to such entities. Other provisions that will apply to such entities include obligations with respect to independent directors and employees including key managerial persons and promoters; and composition of nomination and remuneration committee, stakeholders relationship committee and risk management committee. The provisions have been introduced on a 'comply or explain' basis till 31 March, 2023 (on a 'comply or explain' basis till 31 March, 2023) and will be made mandatory thereafter. If an entity triggers the threshold of Rs 500 crore during the course of the year, it will have to ensure compliance within six months. **Read more.**

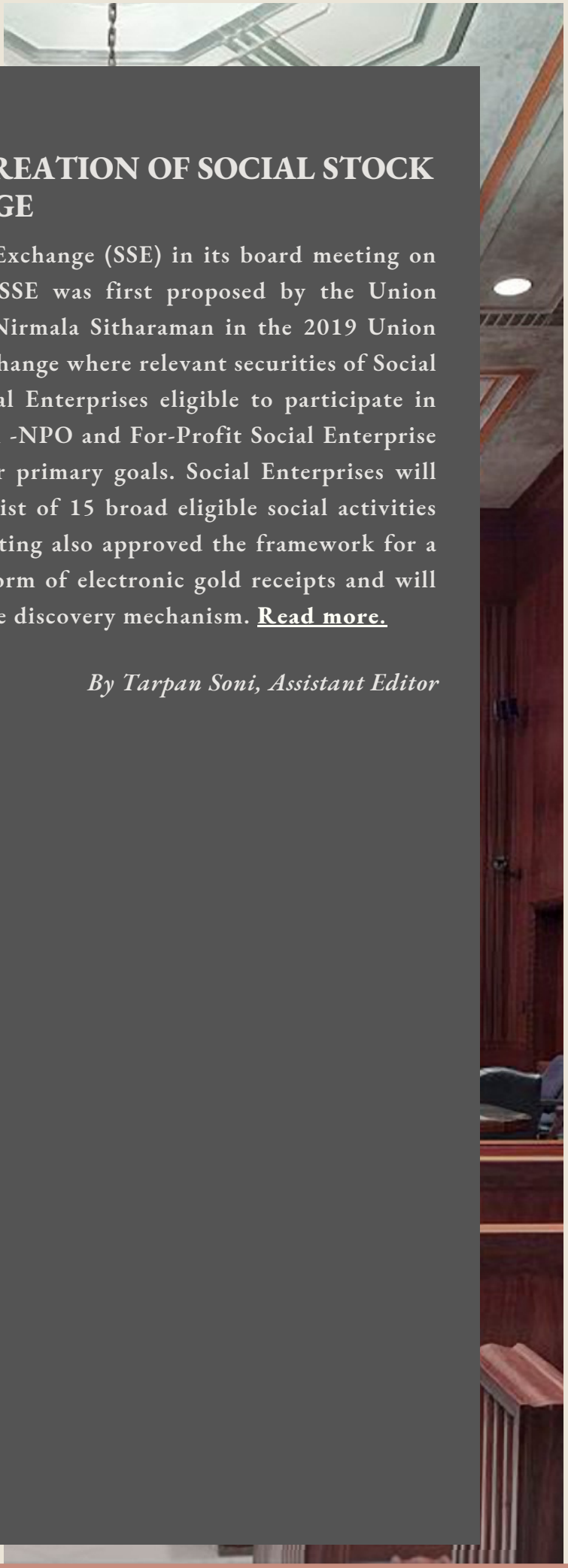
4. SUPREME COURT DISMISSES SEBI PLEA AGAINST SAT ORDER ON CARE RATINGS

The Supreme Court on 6 September, 2021 dismissed a plea by the SEBI, against the Securities Appellate Tribunal's (SAT) order reducing the SEBI penalty on CARE Ratings Limited from Rs. 1 crore to Rs. 10 lakh. SEBI had imposed a penalty of Rs. 1 crore on CARE Ratings for allegedly not reducing the ratings of non-convertible debentures which were issued by Reliance Communications in violation of Regulation 15(1) and Clause (3) and (8) of the SEBI (Credit Rating Agencies) Regulations,1999. SAT, on appeal by CARE ratings Limited, had reduced the penalty from Rs. 1 crore to Rs. 10 lakhs, which has now been upheld by the Supreme Court. However, the bench led by Justice Indira Banerjee also said that the reduction of penalty in the present case cannot be a precedent for other cases. **Read more.**

5. SEBI BOARD APPROVES THE CREATION OF SOCIAL STOCK EXCHANGE AND GOLD EXCHANGE

SEBI approved the creation of a Social Stock Exchange (SSE) in its board meeting on 28th September, 2021. The creation of the SSE was first proposed by the Union Minister for Finance and Corporate Affairs, Nirmala Sitharaman in the 2019 Union Budget. SSE shall work like any other stock exchange where relevant securities of Social Enterprises can be traded by the public. Social Enterprises eligible to participate in SSE, shall be entities (Non-Profit Organization -NPO and For-Profit Social Enterprise -FPE) having social intent and impact as their primary goals. Social Enterprises will have to engage in a social activity out of the list of 15 broad eligible social activities approved by the board. SEBI, in its board meeting also approved the framework for a gold exchange where gold shall be traded in form of electronic gold receipts and will help in having a transparent domestic spot price discovery mechanism. **Read more.**

By Tarpan Soni, Assistant Editor



NEWS UPDATES

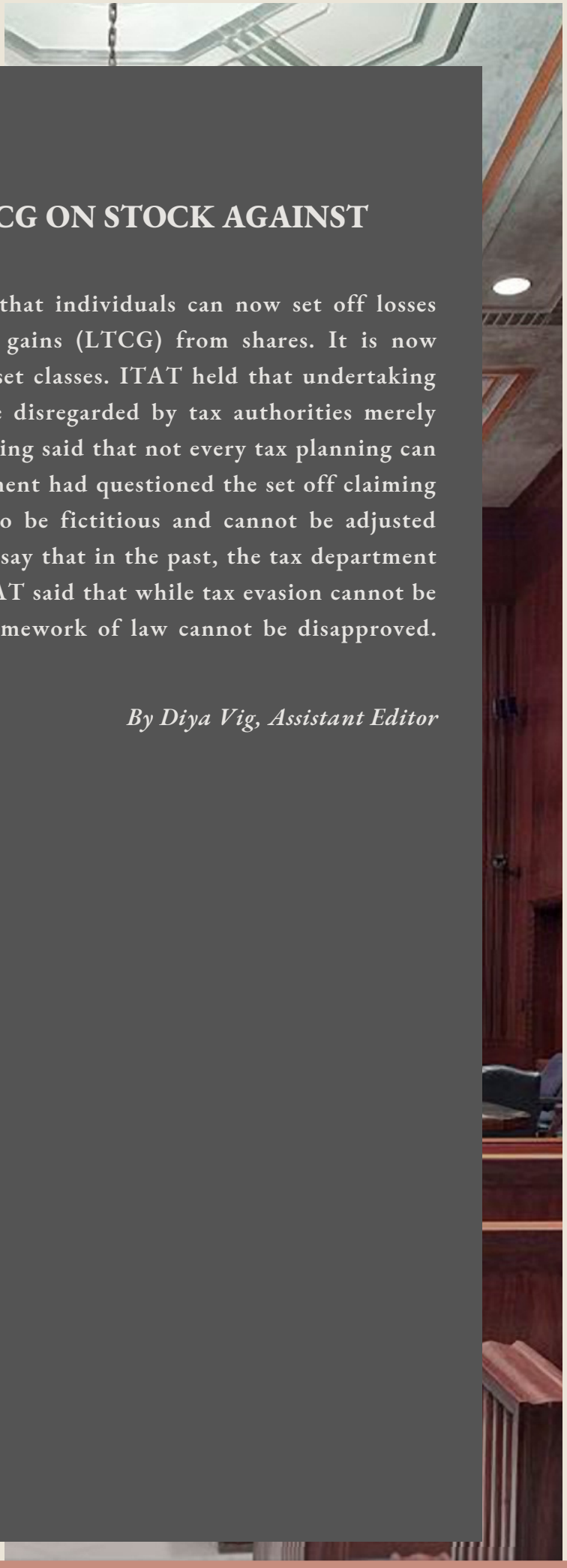
TAXATION LAW

1. SET ASIDE/REASSESSMENT CASES WHERE TIME LIMIT FOR COMPLICATION EXPIRES ON 30/9/2021 TO BE EXCLUDED FROM SEC. 144B

Central Board of Direct Taxation (CBDT) has excluded Assessment Orders in cases where pendency could not be created on Income Tax Business Application (ITBA) because of technical reasons or cases not having a Permanent Account Number (PAN), as the case may be, from the ambit of Faceless assessment. CBDT has included two more situations as exceptions to assessment order in set-aside cases where assessment is to be done 'de novo'; and assessment orders in cases where assessment is to be done under section 147. The assessment referred to these exceptions shall be done by the jurisdictional Assessing Officer only if the time limit for completion of assessment expires on 30-09-2021. Further such assessment must be pending with jurisdictional Assessing Officer as on 11-09-2021 or thereafter, which cannot be completed as per procedure laid down by section 144B due to technical or procedural constraints in the given period of limitation. **Read more.**

2. CAIRN ENERGY AND AIR INDIA JOINTLY SEEK STAY ON NEW YORK COURT PROCEEDINGS

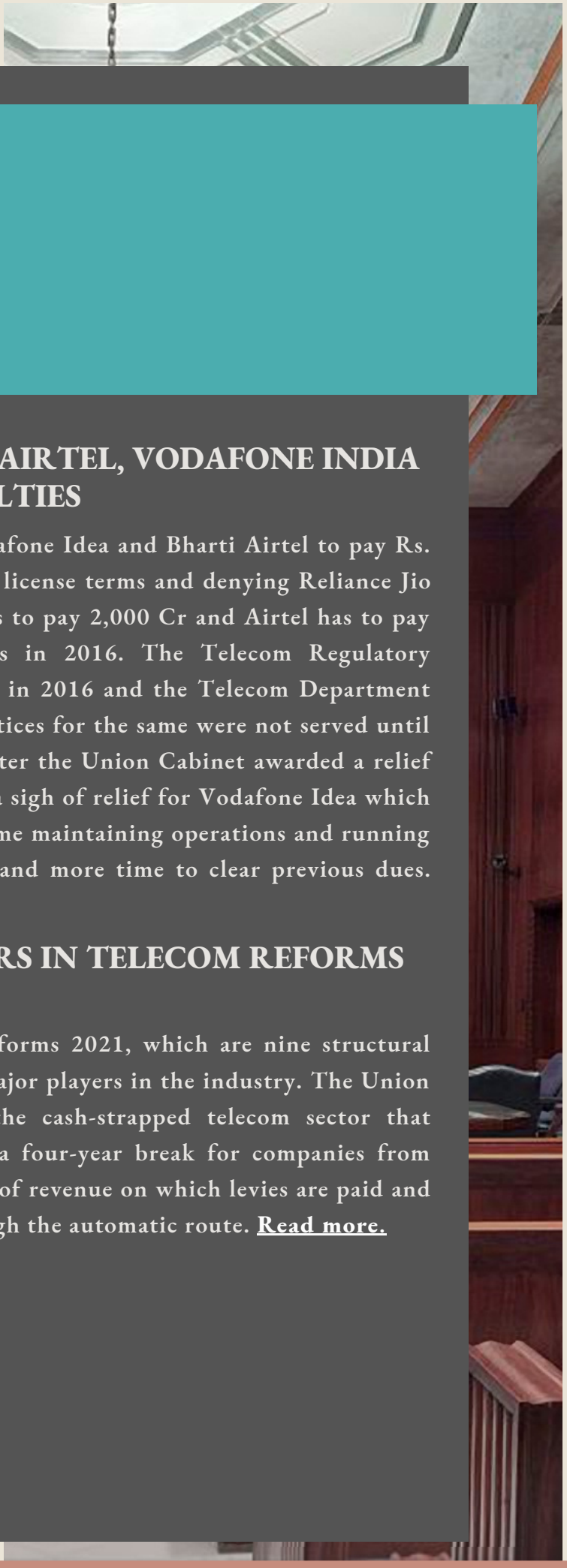
Cairn Energy and Air India have requested a federal court in New York to halt further proceedings in Cairn Energy's US case against the airline for the enforcement of a $1.2-billion arbitral verdict. The move observes the public authority authorizing a law to scrap review tax collection in the country, which essentially will bring about withdrawal of the Rs 10,247 crore charge interest on Cairn, as per the court records. The British organization had won a global Comment [E1]: Not correct source discretion grant against duty of such expenses and tried to assume control over Air India resources when the public authority would not respect the honour and paid USD 1.2 billion or more with interest and punishment. **Read more.**



3. INDIVIDUALS CAN SET OFF LTCG ON STOCK AGAINST REAL ESTATE DEALS: ITAT

Income Tax Appellate Tribunal (ITAT) held that individuals can now set off losses from property sale against long-term capital gains (LTCG) from shares. It is now perfectly legal to set off tax liability across asset classes. ITAT held that undertaking tax planning is "not illegal" and shouldn't be disregarded by tax authorities merely because it's beneficial to the taxpayers. The ruling said that not every tax planning can be construed as tax avoidance. The tax department had questioned the set off claiming that the sale of shares "prima facie appears to be fictitious and cannot be adjusted against any taxable income." Industry trackers say that in the past, the tax department has questioned several similar transactions. ITAT said that while tax evasion cannot be glorified, genuine tax planning within the framework of law cannot be disapproved. **Read more.**

By Diya Vig, Assistant Editor



NEWS UPDATES

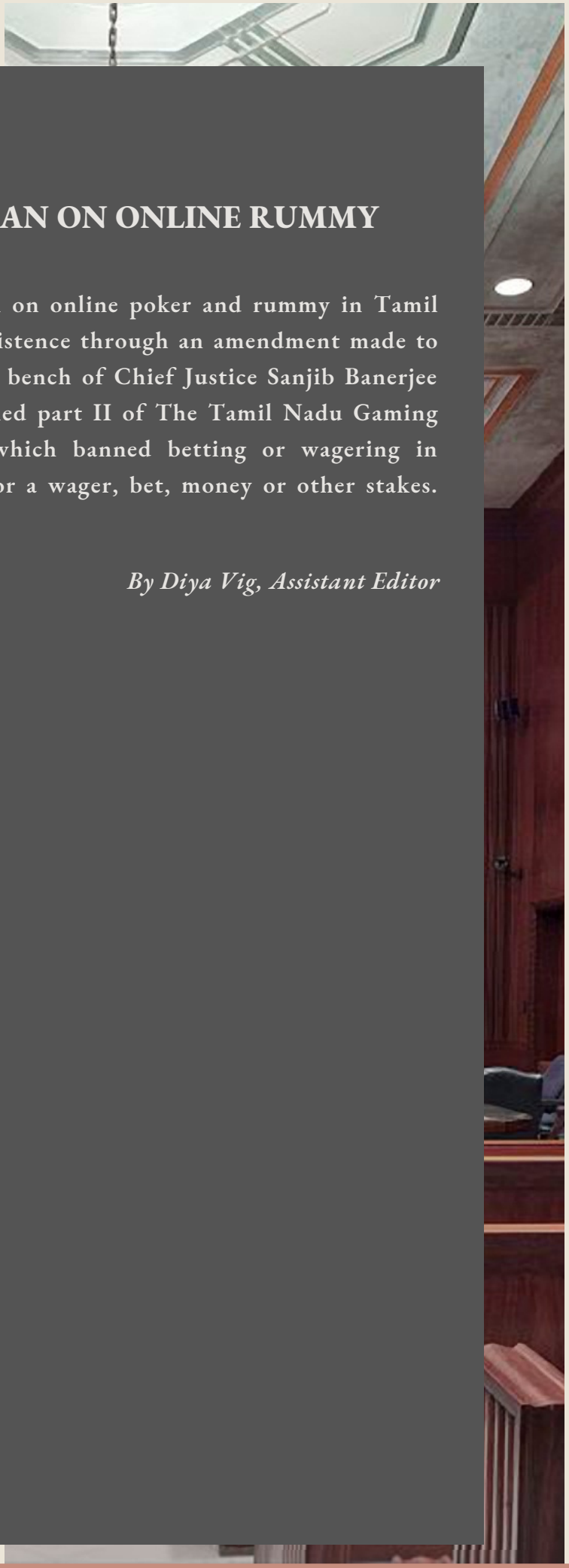
TMT LAW

1. TELECOM DEPT. ASKS BHARTI AIRTEL, VODAFONE INDIA TO PAY RS 3,050 CRORE AS PENALTIES

The Telecom Department issued orders to Vodafone Idea and Bharti Airtel to pay Rs. 3,050 crores as penalties for allegedly breaking license terms and denying Reliance Jio Info COMM their networks. Vodafone Idea has to pay 2,000 Cr and Airtel has to pay 1,050 for the violation of norms and terms in 2016. The Telecom Regulatory Authority of India had suggested the penalties in 2016 and the Telecom Department accepted the recommendations in 2019. The notices for the same were not served until September, 2021. The update comes 2 weeks after the Union Cabinet awarded a relief package for the industry. The package came as a sigh of relief for Vodafone Idea which had previously said that it was having a hard time maintaining operations and running a risk of shutdown without government help and more time to clear previous dues. **Read more.**

2. GOVERNMENT OF INDIA USHERS IN TELECOM REFORMS 2021

The Union Cabinet approved the Telecom Reforms 2021, which are nine structural reforms that address the call-in duress of the major players in the industry. The Union Cabinet has approved a relief package for the cash-strapped telecom sector that includes permission to share scarce airwaves, a four-year break for companies from paying statutory dues, change in the definition of revenue on which levies are paid and allowing 100 per cent foreign investment through the automatic route. **Read more.**



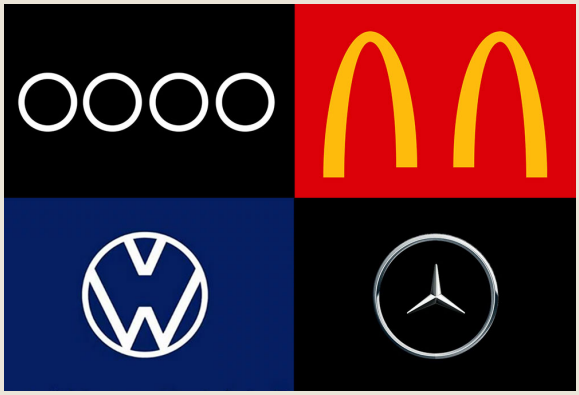
3. MADRAS HC STRIKES DOWN BAN ON ONLINE RUMMY AND POKER

The Madras High Court struck down the ban on online poker and rummy in Tamil Nadu as unconstitutional, which came into existence through an amendment made to The Tamil Nadu Gaming Act, 1930. The first bench of Chief Justice Sanjib Banerjee and Justice Senthilkumar Ramamoorthy quashed part II of The Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021, which banned betting or wagering in cyberspace and also games of skill if played for a wager, bet, money or other stakes. **Read more.**

By Diya Vig, Assistant Editor

RECENT ON THE BLOG

INNOVATION CHALLENGING THE FLUIDITY OF LEGISLATION: THE DISRUPTIVE CREATIVITY OF FLUID TRADEMARKS



This guest post under the RFMLR Blog Series on Evolving Landscape of Intellectual Property Rights is authored by Drishtana Singh (Independent Legal Practitioner and Consultant practicing at the High Court of Punjab and Haryana) and Manan Parmar (Corporate, Commercial and Immigration Law Advisor, SMA Legal, Chandigarh).

1. INTRODUCTION

Trademarks are any mark, logo, or sign capable of distinguishing the products and services of a particular source from another. The essential feature of a trademark is continuity and perpetuity. This allows the consumer to build long-standing associations with the brand or service provider. However, markets across the world are rapidly changing, growing and evolving with transient consumer behaviour. All this is majorly attributable to a wide spectrum of choices available to the consumer, and vast and readily accessible information about the same. This dynamism has resulted in the growth of innovation in brand marketing that challenges the conventional norms which require a trademark to be static, unchanging and symbols that develop familiarity with time.

Contextually, fluid trademarks are a result of this phenomenal dynamism where they are an increasingly popular marketing tool. Fluid trademarks tend to engage the consumer and attempt to maintain their interest in the brand. A fluid trademark can be understood as a variation to an already established trademark, lending it a dynamic character that continues to evolve alongside the brand. This allows the trademark to grow and adapt in these fast-changing times.

Fluid marks vary from simple decorations (such as Google's Doodles), reinterpretations of the mark in different media channels (such as the Absolut Vodka Bottle mark) or even to background switching (such as the well-known Nickelodeon wordmark).
The different ways in which a traditional trademark can be represented as a fluid trademark are:
- by ornamenting the trademark,
- changing background of the trademark,
- filling a frame like the icons of the television channels,
- employing moving designs,
- adopting multiple and ever-changing designs.

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For instance, when referring to the ever-changing Google doodles, it does not mean that every google logo is different. What it means is that the basic outline and essence of the Google logo is preserved, while creative liberty is taken in changing the structure and form of the logo. Strategically speaking, such liberties are taken keeping in mind the need to capture the consumers' attention as well as to build on the socio-cultural impact of Google as an enterprise in the modern world, amongst Google's many such endeavours.

Similarly, when reference is made to the reinterpretation of the 'Absolut' vodka bottle mark in different media, we understand it as the creative liberty given by the company to various artists to use the signature bottle in an effort to promoting artistic opportunity and liberty.

Aside from the impact of the brands and their logos on the socio-cultural environment, some brands have also resorted to modifying their logos in order to send across social messages, such as prevention during this deadly pandemic. Brands such as Zara, Audi, MasterCard, Mercedes, McDonald's and Volkswagen, to name a few, have made alterations in their logo to signify social distancing as a preventive measure to battle COVID-19.

2. KEY CHALLENGES TO THE ENFORCEABILITY OF FLUID TRADEMARKS

In the constant race for recognition, success and branding innovation, brands often employ various ways to engage the consumer. However, the legal enforcement of these fluid trademarks is yet to be tested. It cannot be denied that the concept of fluid trademarks has found great success and popularity in this day and age of technological revolution. Under Indian law, there is no legislative protection or precedent to rely on nor has there been any dispute of such nature to necessitate the formulation of protections to that extent. In fact, a quick browse through the list of Google's registered trademarks is surprising. Not a single Google Doodle has been registered as a trademark. Thus, the idea of fluid trademarks itself is not yet a legal concept and the key challenges thereto are listed out below:

1. Absence of Protection Mechanisms: On analysing the international frameworks (such as bilateral and multilateral treaties, conventions and agreements, for instance, the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS"), among others), and national legislations (such as the Indian Trademarks Act, 1999; the Canadian Trademark Law; the Lanham Act, 1946 and Anti-Cybersquatting Consumer Protection Act, 1999 (USA), among others), it can be safely concluded that there is no concept of or any explicit protection provided to fluid trademarks. Furthermore, there are hardly any judicial precedents laid down yet, to provide protection for such trademarks. Therefore, the absence of international and domestic legal mechanisms for the protection of fluid trademarks remains one of the key challenges to the usage and enforcement of fluid trademarks.

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2. Rapid Unauthorized Variations: The absence of any legal framework, coupled with the dynamic nature of fluid trademarks might result in an increase in unauthorized variations by third parties. “In Spring 2019, the Organisation for Economic Cooperation and Development ("OECD") and the European Union Intellectual Property Office ("EUIPO") clarified this by updating figures on the scope and scale of IP crime, revealing that the world trade in fake goods is now worth $509 billion, or 3% of world trade. Almost 7% of products imported into Europe are now counterfeit, corresponding to €121 billion per year.” As can be seen from the trademark images (of Google, Absolut and Nickelodeon), there are no limits to a fluid trademark. If there are no laws to restrict a third party from using the basic logo in its own interpretation, the possibilities of infringement and unauthorized variations are limitless. If one were to add one more image of their own whereby the basic Google outline (or the Absolut bottle mark) is the same, but they have their own underlying message through a different drawing, what is to stop them from using that image to market their own goods or services and profit from the multinational company’s logo?
3. Loss of Core Essence of the Underlying Trademark: Excessive and random variations may weaken existing rights in the underlying mark, as well as, in the new variations adopted.

4. Cancellation Due to Non-Use: Furthermore, it might also lead to the cancellation of the original underlying trademark, due to the possibility of its non-use, as a result of constant use of its variations.

5. Confusion: Due to the constantly evolving nature of fluid trademarks, proper branding is necessary and indispensable, especially for newly established and not so popular brands. Unless the brand owner establishes its brand beforehand and prepares its customers, they may fail to recognize the brand when a new variant appears.

3. THE WAY AHEAD

To tackle the risks mentioned above, as well as, other foreseeable and unforeseeable challenges, there is a dire need for a roadmap to be drawn. Brand owners need to be very careful and ever so vigilant in using fluid trademarks. Some of the practices that can be adopted are:

1. Making Use of the Existing Protections in Place: Until new laws and mechanisms are formulated for the protection of fluid trademarks, the existing laws and mechanisms shall be made use of, in order to provide some security to such trademarks. For instance, by using the existing trademark laws, one can get protection for each variant of a fluid trademark separately. Alternatively, the protections and mechanisms for other intellectual properties can also be utilized. For example, “Copyright protects original works of authorship fixed in a tangible medium of expression, and therefore likely would cover original designs that are used to fluidize a trademark.”

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What this means is that through getting copyright protection, the original work (such as the basic Google outline, the Absolut bottle mark or the colour and letters of Nickelodeon) can be protected, barring a third party from utilizing the same. With specific reference to India, while not exactly fluid trademarks, the Trademarks Act, 1999 does provide for the registration of a Series Mark under Section 15 and Associated Marks under Section 16.

The downside with the same is that trademark registration in India is a tedious and lengthy process that involves a few months and may not be ideal in a dynamic marketing campaign. In case of violation, the aggrieved party may, under the Indian Trademarks Act, 1999, bring an action for passing off against a third party for unauthorized use of a fluid trademark.

2. Use of a Strong, Established Mark: If the underlying trademark on which variations are made is strong and has been established in the market, it avoids confusion among the consumers when a trademark is modified time and again with different variations. Underlying trademarks should be established with a history of use and consumer recognition so that the trade and general public can understand and relate to the variant form.

3. Continued Use of the Underlying Trademark: A brand owner must ensure that the basic underlying trademark is also in constant use, alongside its numerous variations, if any. This avoids the risk of weakening and/or abandonment of the original trademark. The main characteristics of the underlying mark should remain intact in the variant mark otherwise the traders and public may fail to recognize it in its variant form, thereby defeating the very purpose. Furthermore, the essential characteristics of the underlying mark should be used concurrently through other modes (e.g., product packaging, business letterheads and published materials). In fact, it would be ideal to ensure the presence of the underlying mark alongside the variable new mark wherever possible throughout the branding and marketing process so as to aid the association between the underlying trademark and the parent brand.

4. Modification to the Policies Pertaining to the Use of a Trademark: If a brand owner permits third-party use of its trademark and/or any of its variations, it shall formulate/amend the terms of use accordingly, to protects its own interests.

5. Timely Vigilance: Brand owners should, time and again, make sure to conduct trademark searches in order to ensure that their trademark or its variations are not being used to their own detriment, in an unauthorized and unlawful manner. Furthermore, a brand owner should always be vigilant in all aspects and take actions against any sort of infringement or violation of an intellectual property right.

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4. CONCLUSION

Charles Dickens was right when he said that "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness...". Today, in the global economic scenario, on one hand, the opportunities for business growth and brand establishment are unique and endless, while on the other hand, counterfeit products comprise about 3% of the world trade. The need for a comprehensive legal framework to protect the interests of businesses and brand owners is higher than ever before. Time and again, the Indian courts have held that an impugned trademark need not be an absolute replica of the original in order to establish a case of infringement. The one claiming infringement has to establish a substantial degree of resemblance between the original and the impugned trademark as per established laws.

One avenue that can be explored for protection is tacking on. This doctrine of tacking on is fairly recognized in the American courts and it allows the user to claim priority on a mark based on the first use of a similar but technically distinct mark. This is effective as the time and money invested in the previous trademark can then benefit the new one. However, the standards for tacking on are very strict and is only allowed if the marks are virtually identical. The US Supreme Court has determined that tacking is a question of fact to be resolved by a jury, under the guidance of careful jury instructions that make the standard clear. The Courts have held that the standard is "exceedingly strict" and tacking is only allowed only when the earlier mark and the revised mark are so similar that they convey the "same commercial impression" and the consumers would regard both as the "same mark". It is evident that tacking is only useful in cases where the new mark is similar to the old. Although the term is not popular in the Indian trademark scenario, it has the scope of legislative development as it allows the goodwill created by the old trademark to be carried on to the new one resulting in the true fluidity of the trademark.

Legislation is always a step behind innovation; however, it is innovation that marks the growth of legislation. While there exist legal remedies that may be creatively explored should a dispute of such nature arise, these existing protections lack the dynamic foresight in this growth and vision-oriented economy. While we wait for the lawmakers to lay out these protections in letter and spirit, reliance on the above-mentioned suggestions and the implementation of the same would go a long way in the protection of fluid trademarks.

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More from the Blog

A CASE FOR THE TRIPS VACCINE WAIVER

This post is authored by Esha Goyal, a fourth-year student of B.A. LL.B. (Hons.) at National Law School of India University, Bangalore. This blogpost aims to examine the legal validity and broader consequences of this proposed TRIPS waiver. The author argues that the proposed patent waiver on COVID-19 vaccines arises within the ambit of WTO-TRIPS frameworks. Further, it has been discussed that the waiver neither imposes any undue costs on member nations nor does it hamper further pharmaceutical development. Read more.

PARTY AUTONOMY TO CHOOSE FOREIGN GOVERNING LAW: AN INDIAN PERSPECTIVE

This post was authored by Tanish Gupta and Shubham Gandhi, third and fourth-year students of B.A. LL.B. (Hons.) respectively at Dharmashastra National Law University, Jabalpur. The authors attempt to explore the position of Indian arbitration law regarding this right of Indian parties and make a case for how the same is allowed, both in principle and statute. Read More.

CALL FOR COMMENTS

I. CONSULTATION PAPER FOR REVIEW OF NET WORTH CRITERIA OF TRADING MEMBER / CLEARING MEMBER / DEPOSITORY PARTICIPANTS

The Securities and Exchange Board of India (SEBI) has published a consultation paper for the revision of net worth requirements for Trading Members (TM), Clearing Members (CM), and Depository Participant (DP) in a circular dated September 27, 2021.

The risk management framework of Stock Exchanges / Clearing Corporations (CCs) in India, inter-alia, prescribes a deposit-based capital requirement for their TMs/ CMs. Entry-level and continuing net worth criteria for market participants have also been prescribed by SEBI from time to time. The present laws impose a minimum net worth requirement for intermediaries that was established over two decades ago and is not based on the number of exposures or the degree of the commercial activity of the intermediary.

A review of net worth criteria was discussed in the Secondary Market Advisory Committee (SMAC) meeting held on November 26, 2020, and various proposals were made regarding the change in minimum net worth criteria for TM, CM, and SCM. In line with the decision in the SMAC, NSE was asked to submit a proposal on capital adequacy norms for TM/CM/SCM/PCM. A revised proposal of a base minimum net worth requirement as well as client business linked additional variable net worth for members was submitted by NSE. The proposals include the need for risk-based capital adequacy norms for intermediaries, which would give reasonable assurance about the intermediaries' loss absorption ability and reduction in the danger of losses spilling over to non-defaulting clients.

Any suggestions/objections or comments are sought on proposed changes in a specified format by 18th October 2021, through specified means. **Read more.**

CALL FOR COMMENTS

II. CONSULTATION PAPER ON REVIEW OF PRICE BAND AND BOOK BUILDING FRAMEWORK FOR PUBLIC ISSUES

The Securities and Exchange Board of India ("SEBI") released the Consultation Paper on Review of Price Band and Book Building Framework for Public Issues on October 04, 2021. The objective of this consultation paper is to seek comments from the public on the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 (ICDR Regulations) relating to the framework of book building concerning price band and allocation methodology for various investors like Qualified Institutional Buyers (QIBs), Noninstitutional investors (NIIs), etc.

The main concern regarding the present framework is that the price band as provided by the issuer company on the mainboard is extremely narrow and the narrow price band presents an opportunity to an issuer company to camouflage a fixed price issue as book-built issue, thus, circumventing the conditions/ regulations attached to the fixed price method especially related to allocation methodology.

The aforementioned concerns and views were deliberated by the Primary Market Advisory Committee (PMAC). PMAC felt that any change in price band and allotment methodology for NIIs and Retail Individual Investors may have wide-ranging implications, and hence, PMAC constituted a sub-group of its members for detailed deliberations. The sub-group deliberated the aforesaid concerns. The recommendations of this sub-group include a change in minimum price band in case of all public issues through book-built process, further division of NII category into two sub-categories to ensure that smaller NIIs are not getting crowded-out in the current process, and discontinuation of proportionate allotment in case of NII category and introduction of the draw of lots allotment.

Public comments are sought on proposed changes concerning Price Band and Book Building Framework in a specified format by 20th October 2021, through specified means. **Read more.**

INTERVIEW

TOPIC: TRUST AND ESTATE PLANNING

Interviewee: Mr. Sachin Bhandawat

BRIEF INTRODUCTION:

Sachin Bhandawat is a Principal Associate at Khaitan & Co with extensive practice in the field of Private Client Practice and General Corporate. As part of the private client practice, he regularly advises promoters and high net worth individuals (Indian citizens/residents as well as NRIs) on: (i) Estate & succession planning, (ii) Family governance, (iii) Corporate Social Responsibility (CSR), (iv) Family disputes, (v) Business governance, and (vi) Migration advisory. In addition to the above, he has also co-authored/assisted in writing articles and posts on CSR and philanthropy, gift tax, and estate planning through trust structures. On the corporate side, he routinely advises companies on promoter exits, business restructuring and transfers, acquisition and sale of shares, structuring investments, and general corporate compliance. He also assists corporate clients on aspects related to employee trusts.

1.The growth of Trust as a means of estate planning is moving upwards in India. But the number of Trusts in the nation is still low as compared to most developed countries. Can we consider fraud by trustees as a reason resulting in the low number of people using trust as a means for estate planning? Can a specific regulation applying to trustees resolve this issue, keeping in mind that the trustees are required to exercise their fiduciary duty under the provisions of the Indian Trusts Act, 1882?

Firstly, it is pertinent to understand how a trust structure works. Trust, as the name suggests, is a relationship based on trust and fiduciary obligations. For instance, say I am the owner of X number of shares. I can settle the same in trust, such that the legal ownership of the assets will be vested with one or more trustee(s) and they will utilize the assets/trust property for the benefit of the beneficiary(ies). The settlor will trust the trustees to use the assets for the benefit of the beneficiaries. The beneficiaries can be members of the settlor's family or any person the settlor desires. This is an instance of a private trust (and not a public trust) where a settlor trusts a trustee to use the assets for the benefit of identified beneficiaries. The trustee has to act in a fiduciary relationship and has to act in accordance with not just the Indian Trust Act, 1882 but also the instrument of the trust i.e., the trust deed.

As regards trustee liability, Section 23 of the Indian Trust Act, 1882 provides that where the trustee commits a breach of trust, he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained. Hence, the legal regime under the trust law already provides for the liability of the trustee for any breach of trust.

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In fact, I will attribute the reason why trusts are not gaining this much popularity to the taboo surrounding death and by association, estate, and succession. Talking about death or about what will happen after one passes away, is still considered to be a very confidential affair, and estate and succession planning is not discussed as much. People don't talk about it as openly and freely as they talk about any aspect of their businesses or any other aspect of their lives. However, the tide is turning fast.

Once a generation realizes that they need to transfer assets to the next generation, or the need to transfer business seamlessly to another generation, they will look for avenues and understand the need for estate planning and succession in a manner that ensures intergenerational transfer, and this taboo surrounding death is one of the principal reasons why trusts are not getting that much popularity in India. Yes, there are a few cases where the trusts may have been misused. However, I think this is more of a perception issue, and in my view, trusts are extremely beneficial structures, which are both legal and adequately regulated.

Q2. Why do you think that Estate and Succession Planning is important?

In the Indian Context, Estate and Succession Planning is gaining relevance. In the past ten years, there has been a significant rise in the number of individuals/families, which are considering Estate and Succession Planning. The COVID-19 pandemic has also, unfortunately, led individuals to hasten their planning exercise. People have started recognising the importance of estate planning. Furthermore, because of the work from home culture amid the pandemic, people managed their businesses from their homes. This culture presented business families and individuals with a unique opportunity to think about succession planning and discuss the same with their family, who were also home with them.

In addition to that, the reason that one should emphasize estate and succession planning is to ensure seamless transfer of assets and businesses from one generation to another. There have been instances where big promoters and individuals running multinationals have been involved in litigations concerning succession, which has resulted in their businesses suffering. Two individuals of the same branch of the family may have different opinions regarding the running of the business – therefore, having a clear divide and enough leeway for each individual to manage the business is advantageous and that will only happen when there is a smooth and clear transfer (from one generation to another), and the transfer does not involve any legal problems or challenges.

Finally, another key reason is estate duty. India used to have estate duty till 1985. There are discussions about the introduction of estate duty time and again, and hence, there is a need to emphasize estate and succession planning in India. Other jurisdictions like Singapore, the USA, the UK, etc. already have an estate duty and hence, the day may not be far, when the same is re-introduced in India.

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Q3.The legislations in India presently do not recognize the concept of a 'Digital Will' or any other form of testamentary disposition by electronic means. Furthermore, the 2019 report of the Steering Committee on Fintech Issues has recommended consideration of amendments permitting digital alternatives to wills and trusts by the Department of Legal Affairs. Countries like the US, Canada, Australia, Singapore & South Africa do not permit electronic signatures on wills and codicils, however, New Zealand does. According to you, how feasible can the legalization of Digital Will be for India, and what could be the possible hitches with adopting such an approach?

Indeed, the concept of a Digital Will is not recognised in India yet, and during the Covid pandemic there were talks of whether the same should be recognised. However, it is important to understand as to why procedural requirements exist for executing a Will and the possible scope of abuse while executing a will digitally. Since a will is a document enforced after the demise of the testator, the individuals are generally subjected to a very high threshold for duties that they have to discharge. The burden of proof in executing the will is higher since the testator is no more. Therefore, when faced with a legal challenge, the executor must convince the Court that the individual, while writing the will, was of sound testamentary capacity to enter into and understand the contents of the will and after reading and understanding the same, affixed his signature in the presence of two witnesses. While digitization might be a good step forward, it leaves some scope for abuse, and enough regulations or safeguards need to be provided in terms of procedural formalities.

Q4.'Pandora Papers' have been in the news lately. As per the analysis of the 'Pandora Papers', two major reasons for the setting up of trusts have been highlighted- First, that individuals try to hide their real identities and distance themselves from the offshore entities, in an attempt to make it harder for the tax authorities to reach them; and second, to protect cash, shareholdings, real estate, and other such investments from creditors and law enforcement.

Sir, do you believe that the irregularities in the laws of trust give a haven to those evading tax? What can be the measures taken by countries, especially India, to avoid such tax evasions?

As I said before, I think the problem lies with the existing perception of trusts. Most people/ agencies/the media, just assume that if a trust is settled, there is something fishy that is going on. The same questions may not be asked, if an overseas company or other corporate structure would have been in place. To reiterate, trusts are valid structures with distinct and advantageous features and to think that they are just used for tax avoidance, is completely unfounded and not true. In fact, trusts are, in some cases considered as pass-through entities and do not, as such shield the identity of any person.

Hence, in my opinion, setting up trusts is a very legitimate way of undertaking estate and succession planning not just in India but also globally. If I own legitimate assets offshore, I would want to set up a trust offshore not to avoid taxes but to ensure that there is a smooth intergenerational transfer of assets and a clear segregation between onshore and offshore assets. Therefore, blaming trusts for tax evasion would not be fair since a company, LLP, partnership, etc, all can be potentially be used for avoiding tax. Moreover, there are sufficient disclosures provisions under the current Indian law, such as declaration of beneficial ownership, etc to ensure that trusts are not used for tax avoidance. Globally speaking, there are reporting/disclosure requirements such as CRS, FATCA etc, and there is adequate coordination between tax authorities as well as other regulatory authorities like Enforcement Directorate to approach anybody abroad for obtaining information. Tax authorities in India can approach authorities abroad to get information of the structures that Indians have set up and Indians also have to disclose such structures in their income tax returns.

Q5. When it comes to non-residential Indians, the subject of a private trust is regulated by different laws differently. While the Indian trust law considers it an entity, taxation laws do not consider it an entity. There's no clarity with regards to its position under Foreign Exchange Management Act (FEMA). With NRI's not being required to report their foreign financial interests and assets, how does the law act to ensure proper taxation of offshore trusts created by NRI's?

Beginning with the example of the Panama and Paradise Papers case itself, upon the release of these papers, it was observed that a lot of offshore structures were being set up and notices were issued by the authorities globally to check their legitimacy. However, further investigations revealed that in most cases the structures set up abroad were legitimate. For instance, the liberalized limited scheme of RBI permits individuals to remit around 250,000 dollars per financial year abroad, for a variety of capital and current account transactions. This can be used for making investments in offshore securities, including investment in shares of companies abroad. As such, legitimate assets can be created abroad. Thus, offshore structures, and especially trust structures, have the validity of the law not only in India but also in other foreign nations.

Concerning taxation laws and disclosure requirements, if an individual sets up an offshore trust, the law provides for a mandatory disclosure under Schedule FA of the Income Tax Act. If such an individual received any benefit from that trust, the same also needs to be disclosed under Indian laws. Thus, setting up an offshore trust is legal. There are multiple global disclosure requirements and Indian disclosure requirements as discussed previously. Hence, trust should be viewed as a more trustworthy source with a lot of advantages.

While there are some people who believe that trusts are not regulated enough, it is to be understood that flexibility is the beauty of the trust structure. However, such flexibility does not mean they are not adequately regulated. This perception that trusts are not adequately regulated creates an illusion that they are used for tax avoidance, but the same is not true.

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Q6. According to estimates, over 15 million people in India are already investing in digital currencies. The laws around the management of such assets are still at a very nascent stage in India. Given that it falls in the grey area, can cryptocurrency and other digital assets be included in the will and trusts of an individual? If so, how would they be treated?

Digital assets can be included in the wills and as such have been included in a lot of wills. There are even cases where individuals want to hand over Instagram or Twitter accounts to the members of their families. In such circumstances, the same have been included in Wills.

As far as cryptocurrency is concerned, the legal framework is not very defined. I think, some years back, RBI came out with a circular denying recognition to cryptocurrency per se, but then the Supreme Court released an order stating that it's not fair to ban cryptocurrencies, and cryptocurrency should not be denied recognition. Across the globe, there are some countries (most recently China) that have denied accepting cryptocurrencies, while there are also countries that have accepted them. Thus, a lot of mixed opinions prevail in this regard.
Personally, I think cryptocurrencies should be regulated and given recognition. Decentralization of an instrument cannot mean that they are not valid. Countries like Singapore have embraced digital currencies and passed regulations to recognize and manage them. Another example is El Salvador, which bought a huge amount of bitcoins from the market, giving them recognition. Undeniably, there are also nations that have opined that allowing such currency would create parallel economies and affect their sovereignty. In my opinion, they should be given their due share and the government should consider regulation rather than an outright ban when it comes to cryptocurrency.

Q7. There are many cases in courts that stretch over many years, like the Faridkot Maharaja case involving property worth Rs. 25000 crores in dispute, going on for 25 years, and other cases where despite the existence of a will, disputes arise. What do you think are the reasons or possible solutions for the same?

This is precisely the reason why estate and succession planning becomes important. While assets are transferred from one generation to another, their transfer is either not planned in a structured manner or not planned at all. In that case, different laws governing succession depending on the person's religious faith come into play, wherein each has its own peculiar way of transferring assets. For instance, Hindus have class 1 heirs which get priority over class 2 heirs, whereas Muslims have residuaries, sharers and distinct concepts such as those.

So, in the case of a non-testamentary succession, there are a lot of beneficiaries and different laws that govern estate and succession planning and deciding upon those generally consumes a significant amount of time in courts. So, when no such planning has been done, disputes are bound to happen as a lot of individuals tend to claim a stake in a certain property.

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In fact, even in cases wherein the property transfer has been planned, disputes tend to arise. Especially in India, in the cities of erstwhile presidential states (Mumbai, Kolkata & Chennai), the Courts still need to approve the will by way of a probate for the assets to be transferred. However, this is still way better than not having a plan at all.

In some cases, registration of Wills may also be considered. However, please note that registration is not mandatory at all and just adds a layer of protection, in case of a future challenge. It does not, as such, make a Will a public document. In fact, other good to have measures, such as video recording the signing process, medical certificate of sound health and mental state, etc can also be considered while making a Will.
In my view, while a Will is a good place to start, in some cases more nuanced planning and structuring may be required. This may include trusts, inter se/family arrangement document where all members of the family come together and set out their understanding as to how business, personal and professional assets may actually be divided and controlled, etc. Therefore, to avoid disputes as such, detailed structuring needs to undertake.

Interviewed by Jyoti Jindal (Copy Editor, RFMLR) and Raghav Sehgal (Copy Editor, RFMLR)

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