AU COURANT

JULY'22

RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

IN THIS ISSUE

PREFACE

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

In this edition, the current on-goings in various fields of law have been analyzed succinctly in the 'Highlights' section to provide readers with some food for thought. This includes brief comments on the landmark judgments of Vijay Madanlal Choudhary & Ors. v. Union of India & Ors., Principal Director of Income Tax (Investigation) v. Laljibhai KanjiBhai Mandalia, and National Research Development Corporation and Anr. v. Mak Controls and Systems Private Limited, along with a short synopsis of the decision of Competition Commission of India ordering investigation against BookMyShow for abuse of its dominant position.

Major happenings in various fields of law such as alternate dispute resolution, business and finance, competition law, insolvency law, international trade law, intellectual property rights law, mergers and acquisitions, securities law, taxation and TMT Law have been recorded in the 'News Updates' segment to keep the readers abreast of latest legal developments.

The 'Interview' segment contains an exciting and insightful discussion with Mr. Anupam Shukla (Partner at Pioneer Legal) on the topic of 'Increasing Scope of Technology Law and Growing Importance of Data Protection Law in Transactions'.

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 two Call for Comments invited by the Securities and Exchange Board of India on the proposed framework to regulate online bond platforms, and the proposed framework for platforms providing execution-only services in direct plans of mutual funds are discussed.

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

HIGHLIGHTS

"TWIN CONDITIONS FOR BAIL ARE NOT UNREASONABLE": APEX COURT UPHOLDS SECTION 45(1) OF THE PREVENTION OF MONEY LAUNDERING ACT

On 27 July 2022, the three judges' bench of the Apex Court headed by Justice AM Khanwilkar in the case of Vijay Madanlal Choudhary & Ors. v. Union of India & Ors. upheld the Constitutional validity of "twin conditions" for bail under amended Section 45 of the Prevention of Money Laundering Act, 2002 ("PMLA Act"). The bench also observed that money laundering is one of the heinous crimes, which not only affects the social and economic fabric of the nation but also tends to promote other heinous offenses, such as terrorism, offenses related to the NDPS Act, etc.

Prior to the 2018 amendment in the said provision, instead of 'under this Act', the relevant part of section 45(2) read as 'punishable for a term of imprisonment of more than three years under Part A of the Schedule'. On 23 November 2017, in Nikesh Tarachand Shah v. Union of India & Anr., the Supreme Court declared Section 45(1) of the PMLA unconstitutional, insofar as two further conditions for release on bail are concerned, for violating Articles 14 and 21 of the Constitution. This subsequently led to an amendment in section 45(2) of the PMLA Act which replaced "the scheduled offence" with offences "under the [PMLA]". This was then challenged in the present case wherein a Special Leave Petition (Criminal) was filed before the Supreme Court on 9 May 2018 and the on 27 October 2021, the hearing was commenced.

The bench dismissed the petitioners' assertion that the crime of "money laundering" would only be attracted by projecting or representing the in-question property to be untainted property, upholding the legality of Section 3 of the Act. It would mean that the mere possession of 'proceeds of crime' is also an offence of money laundering. The bench ruled that in order to give full effect to the abovementioned provision and include "every" process or activity indulged in by anyone, the word "and" in section 3 must be interpreted as "or". The bench opined that Section 3 is widely worded with a view to not only investigate the offence of money- laundering but also to prevent and regulate that offence. The apex court also upheld the constitutional validity of the provisions of Sections 5, 8(4), 15, 17, 19, and 45 of the PMLA.

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The bench further noted that though the twin conditions provided under Section 45 restrict the right of the accused to the grant of bail, it cannot be said that the conditions provided under Section 45 impose an absolute restraint on the grant of bail. The discretion vests in the court, which is not arbitrary or irrational but judicial, guided by the principles of law as provided under Section 45. The bench also highlighted that similar twin conditions have been provided in several other special legislation, validity whereof has been upheld by the Supreme Court as being reasonable and having nexus with the purposes and objects sought to be achieved by the concerned special legislation. For instance, Section 43(D)(5) of the Unlawful Activities (Prevention) Act. Read More

-By Raghav Sehgal, Copy Editor

HIGHLIGHTS

COMPETITION COMMISSION OF INDIA ORDERS INVESTIGATION AGAINST BOOKMYSHOW FOR ALLEGED ABUSE OF DOMINANT POSITION

Recently, the Competition Commission of India ("CCI") called for an investigation against Big Tree Entertainment Private Limited ("BookMyShow") for an alleged violation of Section 4. Showtyme (Complainant) contested that BookMyShow was abusing its dominant position by establishing an agreement-bound relationship with various cinemas which was exclusive hence restricting Showtyme from offering similar services to users. High convenience fee from cinema enthusiasts was the second contention. Post the submission of the reply by BookMyShow, the CCI depended on reports available in the public domain to deduce its findings on the dominance aspect. The CCI prima facie observed BookMyShow as dominant in the market.

Consequently, on the first contested allegation, The CCI observed that these exclusive agreements between BookMyShow and cinemas restricted theatres from accepting the same service from an organisation providing similar services. This, in furtherance, foreclose possible competition in the market as rival organisations have to bare additional costs to persuade the cinema theatres to give up their exclusive agreement with a platform that visibly holds dominance in the market.

The CCI's observation on the second issue relating to monetary gains was necessarily discussing the fact that payments made to theatres for the online intermediary service, as in the filed reply by BookMyShow, was prima facie showing its attempt at dissuading theatres to connect with any other platform rival to it. Concerning the convenience fee allegation, CCI expanded on its position and expressed how the Commission isn't in the scope of power to act as a regulator of price or determine the ideal cap for an acceptable fee. The Commission also made observations on the data gathering conducted by BookMyShow. This came after the disclosure of BookMyShow saving data related to customer activities like payment methods to serve them better in the future. This bulk of data on repeat customers could ideally lead to monopoly prices in the future and consequently, the CCI stated for an immediate investigation on this matter as well.

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Therefore, in the light of the aforementioned observations, the CCI directed a probe into these issues correlating to BookMyShow under Section 26(1) of the Competition Act, 2002 which allows the CCI to probe investigation against any organisation with a prima facie case and decided that the interim relief sought by Showtyme would be dealt with separately. The case is titled Vijay Gopal v. Big Tree Entertainment Pvt. Ltd. (BookMyShow) and others. Read More

By Shereen Moza, Associate Editor

HIGHLIGHTS

DELHI HIGH COURT: ARBITRATION AGREEMENT SURVIVES EVEN AFTER THE EXPIRY OF PRINCIPAL AGREEMENT

The Delhi High Court in National Research Development Corporation and Anr. v. Mak Controls and Systems Private Limited held that even where the principal agreement is non-existent, the arbitration clause contained therein would still apply. In the instant case, the petitioner, National Research Development Corporation, and the respondent, Mak Controls and Systems Private Limited had entered into a scheme agreement for the development of GPS called the 'Programme Aimed at Technological Self Reliance' Scheme (PATSER Agreement). Under this Agreement, the respondent was provided financial assistance for the development of the GPS and a royalty agreement was also entered into between the parties, for laying down the payment obligations of the respondent. As per this, the respondent was required to pay a specified amount as Royalty to the petitioner every year for the product manufactured and sold by the respondent. Respondent was responsible to pay Royalty under the Agreement upon start of commercial sale of the product by the respondent and was to continue for a minimum period of 5 years from the date of commencement of the commercial sale of the product. However, the respondent failed to pay royalty and the petitioners issued a legal notice to the respondent, thereby invoking the arbitration clause.

The respondent denied its liability to pay, which led the petitioner to file a petition for the appointment of sole arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996. The respondent maintained its stance on the lack of liability to pay royalty on account of the lack of commercial production and sale of the product. It also contended that the PASTER agreement expired in 2014 and thus, the claim for payment also expired, and as such, no dispute existed. It further argued that since the principal agreement did not exist, the arbitration clause contained in it also did not apply. It was contended that the petitioners failed to take any action between 2014 and 2019 and based on Section 43 of the Limitation Act, 1963 petition filed was barred by limitation. On the other hand, the petitioner contended that despite the expiry of the PATSER Agreement, the respondent was still responsible to pay Royalty, in the manner as provided under the Royalty Agreement.

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The Court denied the claim of the respondent about the expiry of the arbitration clause. It noted that in precedents such as Everest Holding Limited v. Shyam Kumar Shrivastava and Ors., the Court had rejected the plea that termination of the joint venture agreement (containing the arbitration agreement) leads to the impossibility to refer the dispute to arbitration. This had also been noted by the Supreme Court in Reva Electric Car Company P. Ltd. v. Green Mobil where it had been observed that in view of the provisions of Section 16(1)(a) of the Arbitration and Conciliation Act, the arbitration agreement would survive even on the termination of the agreement or the contract containing the same. The Delhi High Court thus rejected the contention of the respondent. It noted the claims of petitioners about payment of liability and held that several aspects need to be ascertained which can only be done by the Arbitrator after the parties have produced evidence. Hence, the Court ruled that the issue of limitation and arbitrability was not conclusive against the petitioners. Read More

By Srishti Kaushal, Senior Editor

HIGHLIGHTS

SUFFICIENCY OR INADEQUACY OF REASONS TO BELIEVE CANNOT BE LOOKED INTO WHILE CONSIDERING VALIDITY OF SEARCH & SEIZURE U/SEC 132 INCOME TAX ACT: SUPREME COURT

The Hon'ble Supreme Court of India in Principal Director of Income Tax (Investigation) v. Laljibhai KanjiBhai Mandalia restated the principles in exercising the writ jurisdiction in the matter of search and seizure under Section 132 of the Income Tax Act.

The bench comprising Justices Hemant Gupta and V. Ramasubramanian observed that "The sufficiency or inadequacy of the reasons to believe recorded cannot be gone into while considering the validity of an act of authorization to conduct search and seizure."

The court was considering an appeal against the judgment of the High Court of Gujarat whereby the warrant of authorization issued by the Principal Director of Income Tax (Investigation) under Section 132 of the Income Tax Act, 1961 was quashed.

The bench made the following observations after considering the facts and the concerned precedents. The recording of opinions and justifications for beliefs is an administrative process rather than a judicial or quasi-judicial one. The authorized authority must have access to the information based on the available evidence, and any opinions must be legitimately and honestly formed. It can't just be a facade. Any superfluous or unrelated information would make the belief or satisfaction invalid. The authority must possess information that would allow it to reasonably conclude that the subject of the summons or notice has omitted or refused to deliver the books of accounts or other documents requested, or that the subject will not produce the requested books of accounts or documents. Such a person is in possession of any money, bullion, jewellery, or another valuable article that represents either wholly or partly income or property which has not been or would not be disclosed. In the event that the competent authority's belief is contested, such justifications may need to be presented to the High Court. In that case, the Court would be permitted to review the justifications for the belief, though not their sufficiency or appropriateness. In other words, the Court will look at whether the documented reasons are genuine or just a pretext, and whether any superfluous or irrelevant information has been taken into account. Such justifications are included in the satisfaction note to appease the court's judicial conscience, and no part of the satisfaction note shall be incorporated into the order.

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In a writ petition, the Court cannot consider whether such justifications are sufficient or not. It is not a matter for the courts to decide whether the justifications that led the competent authority to act were sufficient. Because the Court does not function as an appeals court but merely evaluates the decision-making process, the significance of the reasons for the creation of the belief is to be evaluated by judicial restraint as in administrative action. The Court won't review whether or not it is enough or sufficient.

With regard to the explanation inserted by the Finance Act, 2017, such reasons to believe as recorded by income tax authorities are not required to be disclosed to any person or any authority or the Appellate Tribunal. Applying these principles to the facts of the current case, the bench held that the High Court was not justified in setting aside the authorization of search. Read More

By Vanshika Samir, Associate Editor

NEWS UPDATES

ALTERNATIVE DISPUTE RESOLUTION

1. THE SUPREME COURT STATED THAT UNDER SECTION 34 OR 37 OF THE ARBITRATION AND CONCILIATION ACT, A COURT CANNOT CHANGE THE ARBITRATOR'S AWARD

A Supreme Court bench comprising Justices Indira Banerjee and AS Bopanna has observed that a Court cannot modify the Award passed by the Arbitrator, under Section 34 or 37 of the Arbitration and Conciliation Act, and the Court can only set aside the award and remand the matter.

The National Highways Authority of India had appealed in the Supreme Court against the judgment of the Karnataka High Court which upheld the award passed by the Arbitrators. The Arbitrators in their Award have increased the compensation of land acquisition. The appeal was against this Award, and the contention raised was that the Award passed by the Arbitrator is erroneous. **Read More**

2. THE ISSUE OF ARBITRABILITY IS WELL WITHIN THE POWER OF THE COURT: SUPREME COURT

A Supreme Court bench comprising Justices MR Shah and BV Nagarathna has observed that despite the insertion of subsection 6A in Section 11 of the Arbitration and Conciliation Act, the Courts have the power to decide on the issue of non-arbitrability under Section 11 of the Act.

The Supreme Court disagreed with the Delhi High Court while passing the above observations. Indian Oil Corporation had filed an appeal in the Delhi Court High wherein the High Court had ruled that after insertion of subsection 11(6)(A) the scope of inquiry of the Court is confined to only ascertaining whether or not a binding agreement exists, and had allowed the application filed by the respondent and referred the parties to Arbitration. **Read More**

3. CAS DENIES APPEAL FILED AGAINST THE VERDICT OF RUSSIAN FIFA BAN

ollowing Russia's invasion of Ukraine, FIFA and UEFA suspended the country's clubs and the national team from all competitions in February. Subsequently, six appeals were filed against the verdict, but all were denied recently by the Court of Arbitration for Sport (CAS). The Russian Football Federation is now planning to file an appeal with the Swiss Federal Supreme Court.

CAS has said that the Russian-Ukraine conflict has created unprecedented circumstances and FIFA and UEFA have responded accordingly by the authority granted to them under their respective statutes and regulations.

FUR has rejected the ruling and may opt to appeal to the Federal Supreme Court of Switzerland alongside filing an appeal to CAS for compensation for losses incurred by the FUR as the result of the ban by UEFA and FIFA. **Read More**

4. PARIS COURT HAS ALLOWED MALAYSIA'S APPEAL TO TEMPORARILY STOP SULU SULTANATE'S 'HEIRS' FROM ENFORCING THE ARBITRATION AWARD

Malaysia's request for a suspension order to temporarily prevent the implementation of an arbitration judgment in favor of the Sulu Sultanate's "heirs" in the US$14.9 billion legal dispute between the two parties to The Paris Court of Appeal (CoA) has been granted. It has held that no ruling is to be enforced until a final decision is made by the Court. The basis of the ruling was that the decision made by the Arbitrator can impair Malaysia's sovereign immunity, which can hurt their interests.

The legal controversy arose after Sultan Jamalul Kiram II's "heirs" and "successors-in-interest" filed a claim against the Malaysian government in an international arbitration hearing in Madrid, Spain. The claim is based on an agreement signed in 1878 between Sultan Mohamet Jamal Al Alam, the Sultan of Sulu at the time, and Baron de Overbeck and Alfred Dent, under which the Sultan of Sulu granted and ceded in perpetuity sovereign rights over certain territories in North Borneo that are now part of Sabah, Malaysia. **Read More**

5. IF AGREEMENTS FORM ONE COMPOSITE TRANSACTION, THE ARBITRATION CLAUSE CAN BE INVOKED AGAINST DISPUTES UNDER ANOTHER AGREEMENT

A single bench of the Karnataka High Court comprising of Justice Suraj Govindaraj has held that a party can trigger the Arbitration Clause contained in one agreement with respect to the disputes arising with another party under another agreement if both agreements refer to one another.

The petitioner and the respondent entered into an agreement under which the respondent was to provide gateway services to the petitioner which had an arbitration clause.

The petitioner then entered into an agreement with a Bank which utilized the services of the respondent. However certain dues were not cleared by the Bank, and hence the respondent set off that amount from the petitioner's account. The petitioner sought to invoke the arbitration clause, but the respondent said there is no privity of contract for invoking the same. Read More

By Aditya jain, Junior Editor

NEWS UPDATES

BANKING AND FINANCE

1. YES BANK IS A PRIVATE ENTITY, NOT AMENABLE TO WRIT JURISDICTION: GUJARAT HIGH COURT

The Gujarat High Court vide its order dated 13 July 2022 in the case of Universal Hospital LLC v. M/s Yes Bank Limited has held that Yes Bank Ltd is a private bank and is not amenable to writ jurisdiction under Article 226 of the Constitution. The High Court observed that private financial institutions, carrying out commercial activities or business would not come under the scope of 'State' as defined under Article 12, although they are performing public duties. It highlighted that such private financial institutions do not receive any financial assistance from the Government, and no state protection is offered to such institutions. The bench further made it clear that mere investment by the State Bank of India, having a shareholding of 30% in Yes Bank, cannot be termed as a 'State'. The Court further held that merely because the Reserve Bank of India lays the banking policy in the interest of the banking system as provided under Section 5(c)(a) of the Banking Regulation Act does not mean that the private companies carrying on the business of or commercial activity of banking, discharge any public function or public duty. **Read More**

2. PRINCIPLE OF PROMISSORY ESTOPPEL APPLIES AFTER CUSTOMER ACTS ON BASIS OF BANK'S ONE TIME SETTLEMENT SCHEME: GUJARAT HIGH COURT

The Gujarat HC on 08 July 2022 in the case of M/s Harekrushna Infra Projects Pvt ltd & 1 other(s) v. State Bank of India has observed that once a customer acts on the basis of an offer made by a Bank under its One Time Settlement scheme, the principle of promissory estoppel applies and the latter is estopped from acting to the detriment of the former. The Court made this observation in the context of an Article 226 petition seeking the issuance of a no-due certificate to the Petitioners and further release of the charge in its favor with Statutory Authorities such as the Registrar of Companies, Central Registry of Securitisation Asset Reconstruction, and Security Interest of India, Land Revenue Authorities or any other authority. It was further sought that the proceedings pending against the Company under Sec 14 of the SARFAESI Act be declared illegal, null and void ab initio. The Court decided in favor of the petitioners and also declared the said proceedings against them by the Respondent State Bank of India as null and void. **Read More**

3. NEGOTIABLE INSTRUMENTS ACT DOES NOT CLASSIFY CHEQUES AS BEARER OR ACCOUNT PAYEE; JURISDICTION LIES WHERE CHEQUE IS DELIVERED FOR COLLECTION: GAUHATI HC

The Gauhati HC recently on 29 July 2022 in the case of Nadress Tu v. The State of Assam has made it clear that in offences made out under Section 138 of the Negotiable Instruments Act (NI Act), the territorial jurisdiction of the Court will be where the cheque is delivered for collection. Section 138 of the NI Act deals with punishment for the dishonour of a cheque. The observation was made while dealing with a revision petition against the order of the trial court dismissing the Petitioner's complaint on the ground that since the cheque is a bearer cheque, the court within whose jurisdiction the accused has an account has the jurisdiction. Disagreeing with this proposition, the High Court held that a cursory perusal of Section 142(2) NI Act makes it abundantly clear that no classification of cheque, as bearer or cross cheque/account payee cheque, is made thereunder. Accordingly, the matter was remanded back to the court below with a direction to proceed with the same in accordance with the law. **Read More**

4. RBI UNVEILS RUPEE SETTLEMENT FOR INTERNATIONAL TRADE

The Reserve Bank of India (RBI) vide its circular dated 11 July 2022 has put in place a mechanism to facilitate international trade in rupees (INR), with immediate effect. However, banks acting as authorized dealers for such transactions would have to take prior approval from the regulator to facilitate this. The main aim behind the introduction of such a mechanism is to promote the growth of global trade with emphasis on exports from India and to support the increasing interest of the global trading community in INR, it has been decided to put in place an additional arrangement for invoicing, payment, and settlement of exports/imports in INR.

All exports and imports under this arrangement may be denominated and invoiced in rupee (INR) and the exchange rate between the currencies of the two trading partner countries may be market-determined, RBI said in the notification. Indian importers undertaking imports via this mechanism will make payment in INR which will be credited into the Special Vostro account of the correspondent bank of the partner country, against the invoices for the supply of goods or services from the overseas seller. Indian exporters using the mechanism will be paid the export proceeds in INR from the balances in the designated Special Vostro account of the correspondent bank of the partner country. Read More

By Tarpan Soni, Junior Editor

1. CCI APPROVES ₹12,325 CR ACQUISITION OF CITIBANK'S INDIA CONSUMER BUSINESS BY AXIS BANK

The Axis Bank's acquisition of Citibank's consumer business has taken a step closer as the Competition Commission of India (CCI) granted its approval to the ₹12,325 crore deal. Citibank's consumer businesses cover loans, credit card wealth management, and retail banking operation in India. Through the acquisition, Axis Bank will gain access to the large and affluent customer franchise of Citibank including a credit card portfolio, wealth management clientele, and meaningful deposits along with a strong consumer lending portfolio. CCI through its Twitter account confirmed the approval of the acquisition.

Through this deal, Axis Bank will be acquiring 3 million unique customers of Citibank India to enhance Axis Bank's presence in the key identified growth segments. Further, Axis Bank's cards balance sheet would grow by 57% with an additional 2.5 million Citibank cards making it one of the top 3 card businesses in the country. In its statement, Axis Bank claimed that the wealth and private banking portfolio will add great value to the Axis Burgundy business, further accelerating its growth ambition in that segment. **Read More**

2. RUSSIA FINES GOOGLE $34 MILLION FOR BREACHING COMPETITION RULES

Russia's competition watchdog fined Alphabet's Google 2 billion roubles for abusing its dominant position in the video hosting market. The fine is the latest multi-million dollar fine as part of Moscow's increasingly assertive campaign against foreign tech companies. The Federal Antimonopoly Service (FAS) held Google responsible without providing additional details. Moreover, the federal agency had placed a time gap of 2 months for paying off the fine.

Russia has slapped Google's Russian subsidiary with numerous fines in recent months. Earlier this month, a court ordered Google to pay a fine of $358.7 million over the

non-removal of content as asked by the Russian government. Since Moscow has launched its special military operation in Ukraine, it has also accelerated attacks on western tech companies at home in a push to exert more control over the online space, including support to domestic players to oust western rivals. **Read More**

3. £70 MILLION IN FINES FOR PHARMA FIRMS THAT OVERCHARGED NHS

Competition and Markets Authority's Investigation into Pfizer and Flynn pharma has come to a head with a 70 million pound fine. The UK antitrust authorities claim the companies exploited a loophole to massively hike prices. The UK's CMA confirmed the companies de-branded epilepsy drug Epanutin to avoid regulations, leading to initial price hikes between 780% and 1600%. Prices surged, even more, when Pfizer supplied the drug to Flynn which then jacked up prices by more than 2000% than previously established prices.

The companies exploited their dominant positions to charge the NHS excessive prices and make more money for themselves, leading to the erosion of patients' and taxpayers' money. Earlier, in this case, the agency slapped Pfizer with an 85 million pound fine in 2016, a move that the companies challenged on the basis that the findings were without any evidence. Thus, the CMA's prior findings that the prices were an antitrust abuse were set aside by the competition appeals tribunal leading to the current re-investigation opening in 2020. **Read More**

4. UK ANTITRUST OFFICIALS INVESTIGATE MICROSOFT'S $68.7 BILLION ACTIVISION BLIZZARD ACQUISITION

The UK competition regulator announced the launch of an antitrust investigation into Microsoft's proposed $68.7 billion acquisition of video gaming giant Activision Blizzard. The probe into the acquisition would assess the probabilities of beating out the competition in the online video gaming sector. As part of the inquiry, the UK Competition and Markets Authority (CMA) is soliciting public input on the matter. Further, the CMA may decide whether a more detailed investigation is warranted or not. The agency has a September deadline to make its decision.

Microsoft has sought to anticipate regulatory scrutiny surrounding its deal that would make it the third largest game publisher in the world after Tencent and Sony. Further, it announced several commitments that will apply to its gaming business to head off any concerns that its position as a gatekeeper could give it anticompetitive leverage over game publishers or software developers. **Read More**

By Shashwat Sharma, Junior Editor

1. IBC DOES NOT PROTECT THE INTEREST OR CLAIM OF A PARTNER AGAINST ANOTHER PARTNER OR THE FIRM: NCLT MUMBAI

The National Company Law Tribunal (NCLT), Mumbai Bench in the case of Parul A Vora v. Kavya Vohra held that the Insolvency and Bankruptcy Code, 2016 (IBC) does not protect the interest or claim of a partner against another Partner or the Firm as such. The petitioner here disbursed an amount to a borrower's firm to which the respondent is a partner. Insolvency proceedings under Section 7 were initiated against the respondent when the latter refused to be personally liable for the debt. NCLT observed that since the default was committed by the Borrower Firm and not the respondent, no proceedings can be initiated against him under IBC. The petitioner may be entitled to the claims against the respondent under any other law in force that may provide legal recourse to the Financial Creditor. **Read More**

2. GUJARAT HIGH COURT STAYS IBBI'S ORDER REQUIRING RESOLUTION PROFESSIONAL TO UNDERGO PRE-REGISTRATION EDUCATIONAL COURSE FROM IPA

Gujarat High Court in the case of Sunil Kumar Agarwal v. Insolvency and Bankruptcy Board of India (IBBI) has stayed the order passed by the Disciplinary Committee of IBBI requiring a Resolution Professional (RP) to undergo pre-registration educational course from the IPA of which he is a member vide the order dated 20 July 2022.

IBBI suspended Authorisation for Assignment of the RP along with directing him to undergo a pre-registration educational course from IPA of which he is a member after the RP appealed before the NCLAT seeking expunging of the remarks made by the Adjudicating Authority. High Court in view of the matter stayed the order of IBBI which requires the petitioner to undergo a pre-registration educational course from the IPA of which he is a member. **Read More**

3. NCLT MUMBAI INITIATES INSOLVENCY PROCEEDINGS AGAINST FUTURE RETAIL LTD., REJECTS AMAZON'S INTERVENTION PLEA

The National Company Law Tribunal (NCLT), Mumbai bench on 20 July 2022, in the case of Bank of India v. Future Retail Ltd. has initiated the Corporate Insolvency Resolution Process (CIRP) against Future Retail Ltd. Bank of India (Financial Creditor) had provided various credit facilities to Future Retail Group, however, the account was declared NPA on 30 November 2020. The Financial Creditor filed a petition under Section 7 of IBC over a default of 856.10 crores. On account of the existence of debt and default, CIRP had been initiated against the corporate debtor and Mr. Vijay Kumar V Iyer was appointed as IRP.

While deciding on the matter, NCLT rejected the intervention plea by Amazon on grounds that Amazon is not a stakeholder in respect of Corporate Debtor and hence has no locus standi. **Read More**

4. NCLT NOT A DEBT COLLECTION FORUM; OPERATIONAL CREDITOR'S APPLICATION TO INITIATE CIRP MUST BE DISMISSED IF THE DEBT IS DISPUTED: APEX COURT

On 15 July 2022, the Supreme Court in the case of SS Engineers v. Hindustan Petroleum Corporation Ltd. held that an application made by Operational Debtor for initiation of Corporate Insolvency Resolution Process (CIRP) must be dismissed if the debt is disputed. An application was filed by the appellant under Section 9 of the Insolvency and Bankruptcy Code (IBC) against HPCL Biofuels Ltd. which was accepted by NCLT. However, in appeal, the Apex Court noted the pre-existing dispute between the parties. The bench observed three conditions that need to be fulfilled before accepting an application under Section 9 of IBC.

These conditions (i) whether there was an operational debt exceeding Rupees 1,00,000/- (ii) whether the evidence furnished with the application showed that debt exceeding Rupees one lac was due and payable and had not till then been paid; and (ii) whether there was the existence of any dispute between the parties or the record of the pendency of a suit or arbitration proceedings filed before the receipt of demand notice in relation to such dispute. **Read More**

By Shivi, Copy Editor

NEWS UPDATES

INTELLECTUAL PROPERTY RIGHTS

1. EPIDEMIC SOUND SUES META FOR RAMPANT THEFT OF ITS MUSIC TRACKS

Epidemic Sound has sued Facebook and Instagram parent company Meta for storing, curating, reproducing, and distributing its music without authorization to the tune of upwards of 80,000 infractions per day. The company says that as a result of Meta's actions, Epidemic's music is available across millions of videos that have been viewed billions of times. Epidemic sound describes itself as a global music label and publisher with a catalogue of over 38,000 music works across 160 genres that are designed to be used in video content, television and film producers, podcasts, music streaming platforms, and other media.

The court documents filed by Epidemic Sound state that Meta has been using its work without proper attribution or license on at least hundreds of its copyrighted works across both Facebook and Instagram. It describes the theft as rampant and on a massive scale and accuses Meta of offering the music productions company's work through a music library that any user can access and allows them to download, stream and incorporate it into video content for free without license or authorization. **Read More**

2. COURT ORDERS PAYPAL & ALIPAY TO FREEZE VPN COMPANY'S FUNDS IN PIRACY LAWSUIT

A Federal court in Virginia has granted a temporary restraining order that requires PayPal and Alipay to freeze the assets of VPN provider "VeePN". The order was requested by several filmmakers, who accuse the VPN of promoting the piracy app Porco Time, and advertising on the notorious torrent site YTS.ms. VPN services are generally seen as neutral intermediaries. However, some VPN providers have gone a step further by marketing their services directly to online pirates. This is also what the Panamanian company "VeePN" did.

Earlier this month, several movie companies including Voltage Holdings and Screen Media Ventures filed a complaint against VeePN at Virginia federal court. The filmmakers were joined by Hawaiian company 42 Ventures, which is owned by anti-piracy lawyer Kerry Culpeper who registered trademarks such as Popcorn Time. The order requires various companies to freeze VeePN-related funds while the lawsuit is pending. This also applies to PayPal and Alipay, two of the payment processors used by the VPN. District Court Judge Anthony Trenga concludes that the rightsholders satisfied all four factors that are necessary to issue a restraining order. This includes the likelihood that their initial claims could lead to a win at trial if the case goes forward. **Read More**

3. SHEIN FACES $100 MILLION LAWSUIT OVER COPYRIGHT INFRINGEMENT

Shein, a Chinese apparel giant has captured the market for bargain-seeking Gen-Z shoppers by offering huge varieties of cheap apparel every day. Along the way, it has been racked up with multiple copyright complaints from big brands and boutique designers. Shein is valued at more than 100 billion dollars and backed by big investors such as Sequoia Capital China and General Atlantic.

Its rise has seen a growing number of lawsuits that allege the company is profiting from other people's designs. Shein or its Hong Kong-based parent company, Zoetop Business Co., has been named in the past three years as a defendant in at least 50 federal lawsuits in the U.S. alleging trademark or copyright infringement, according to public records. Plaintiffs range from small-time designers operating out-of-home studios to retail giants including a unit of Ralph Lauren Corp. and sunglasses maker Oakley Inc., court records show. **Read More**

By Shashwat Sharma, Junior Editor

1. SOUTH AFRICA LODGES COMPLAINT AGAINST THE EU IN WTO

The first ever WTO dispute settlement case has been initiated by South Africa against the European Union. The complaint is concerning the strict measures imposed by the EU on the country's citrus fruits imports. The EU has introduced amendments to its phytosanitary requirements for imports of citrus products related to the pest Thaumatotibia Leucotreta, popularly known as the false codling moth.

South Africa has claimed that the EU measures appear to be not in line with the provisions of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures and the General Agreement on Trade and Tariffs. The Country has requested consultations with the EU and the same has been circulated to the WTO members. **Read More**

2. US SENATE HAS PASSED CHIPS ACT TO BREAK RELIANCE ON ASIA

The US has passed an Act to provide a package of subsidies for the American semiconductor sector. The Senate has voted in favour of the CHIPS Act, a bill that allocates USD 52 billion in different incentives for chipmakers to build and operate plants in the US.

The urgency for such legislation has been long seen, however, the recent Chinese aggression against Taiwan has once again brought the issue into the spotlight. The Pandemic too caused a shortage in the chip supply chain, which saw over a USD 200 billion loss for the global automotive industry. Both private and public institutions can apply for federal grants of up to USD 3 billion under the package. **Read More**

3. EU TAKES LEGAL ACTION AGAINST BRITAIN FOR THE BREACH OF BREXIT RULES

AEU has accused the UK government of not complying with the Brexit rules and breaching the Northern Ireland Protocol. The UK Government has failed to deliver its commitment to carry out EU-ordered custom checks on goods crossing from Northern Ireland as alleged by the EU. This can imply huge fines on the UK by the European Court of Justice. The UK is obliged to pay any fines levied, and if it fails to honour the judgment, the EU has the power to suspend parts of the post-Brexit Trade and Co-operation Agreement that ensures tariff-free trade between Britain and the EU.

The Agreement reached in 2020 allows Northern Ireland to follow many EU rules, and hence checks are carried out on the British goods entering Northern Ireland to ensure that they meet the EU standards. **Read More**

4. US-MEXICO ROW OVER ENERGY POLICIES

The US has accused the Mexican Government of unjust energy rules that favour the Mexican state-owned power and oil firms over their American counterparts. The major contention is a 2021 revision to Mexican legislation that the US claims provides Mexico's state-owned utility Federal Electricity Commission an unfair advantage over energy from private enterprises and greener sources such as wind and solar. The US also objects to a 2019 law that provides only the state oil and gas firm Petroleos Mexicanos additional time to comply with harsher environmental criteria.

If the two nations cannot achieve a deal after 75 days of discussions, the US can ask a dispute resolution body to intervene under the US-Mexico-Canada Agreement, which could result in sanctions against Mexico if the US succeeds. **Read More**

5. THE US INTERNATIONAL TRADE COMMISSION REMOVES TARIFFS ON RUSSIAN FERTILIZER IMPORTS

The US ITC has voted to remove import duties on urea, ammonium, nitrate, and fertilizers from Russia to ease shortages and price increases in farm outputs. The ITC decision overturns a Commerce Department decision that stated Russia, Trinidad, and Tobago were unjustly subsidizing UAN exports. This nullifies the previously imposed United States combined taxes of up to 132.6 percent on Russian urea nitrate fertiliser solutions. The United States purchased $262.6 million in urea ammonium nitrate fertilisers from Russia in 2021.

Farm organizations have praised the ITC's decision, noting that fertiliser prices are already putting a hardship on the farm business, and such tariffs can worsen the food shortage around the world. Read More

By Aditya Jain, Junior Editor

NEWS UPDATES

MERGERS & ACQUISITIONS

1. SONY COMPLETES $3.6 BILLION ACQUISITION OF BUNGIE

Japanese giant Sony has closed the $3.6 billion acquisition of Bungie, the developer of destiny and the original creator of the hugely popular Halo franchise. The company has confirmed the agreement to acquire Bungie has closed and is now part of the PlayStation family. The Sony-Bungie acquisition evaded antitrust scrutiny while Microsoft's $68.7 billion acquisition of Activision Blizzard is facing formal investigation in the US, UK, and South Korea.

Bungie will continue to independently publish and creatively develop the games its CEO Pete Parson confirmed in a news conference. Halo was one of Microsoft Xbox's flagship franchises, but after a few sequels, Bungie was spun out into an independent company. Sony now reinforced with Bungie's expertise in game development plans to launch more than 10 new live service games by March 2026. **Read More**

2. SPIRIT ANNOUNCES TERMINATION OF MERGER AGREEMENT WITH FRONTIER

Spirit Airlines and Frontier Airlines cancelled their agreement to merge leaving a cure for rival airline JetBlue, which had also submitted a bid to acquire Spirit. Spirit Airlines expressed disappointment to terminate the Frontier deal, which was struck between them in February but thrown into uncertainty after JetBlue made an unsolicited offer to buy Spirit this April. The termination came as the result of a vote on the Frontier merger by Spirit shareholders. Frontier said Spirit is obligated to pay for its $25 million in merger-related costs, and if Spirit enters into another acquisition in the next year, it will be owed $69 million for back out. Frontier, just like Spirit is a budget airline that went public last year. Spirit's merger with either JetBlue or Frontier would create the nation's fifth largest airline and significantly consolidate the low-cost airline industry. **Read More**

3. KOTAK MAHINDRA BANK BUYS DLL INDIA'S RS 600 CRORE WORTH ARGI, HEALTHCARE PORTFOLIO

Kotak Mahindra Bank has confirmed it has acquired the Agri and Healthcare equipment finance portfolio of Dutch lender DLL India for an undisclosed sum. The acquisition includes 582 crores of outstanding loans classified as standard and 669 crores of non-performing assets. Kotak will gain access to over 25,000 high-quality customers with the acquisition of the portfolio from De Lage Landen (DLL) Financial Services Indian Private Limited, a subsidiary of De Lage Landen International.

The operations of the acquired portfolio will be transitioned to Kotak Mahindra Bank in a planned manner over the next few months, further until the transaction is complete, the portfolio will continue to be managed by DLL India. Kotak Group's president for commercial banking D Kannan said DLL has been present in India since 2013 and the acquisition must be seen as a reiteration of its commitment to building a presence in the space. The commercial banking business of the bank focuses on meeting the banking and financial needs of customer segments beyond metro and urban centres. Read More

4. VEDANTA TO ACQUIRE 100% OF ATHENA CHHATTISGARH POWER FOR 565 CRORE

Mumbai-based Mining major, Vedanta announced its plan to fully acquire the 1200MW power plant, Athena Chhattisgarh Power for a consideration of nearly 565 Crore. In a regulatory filing, Vedanta announced to acquire 100% of the paid-up capital of Athena Chhattisgarh Power for a purchase price of Rs 564.67 Crore. Vedanta expects the acquisition to complete in the current financial year of FY23. The acquisition will fulfill the power requirement for Vedanta Aluminium Business and via vertical Integration add synergies by providing a cost advantage pertaining to Power consumption.

Athena is a 1200 MW power plant located in Jhanjgir Champa District, Chhattisgarh, India. Athena Plant is well connected to national highways and railway stations and is also located in close proximity to its water source and fuel sources. Read More

By Shashwat Sharma, Junior Editor

NEWS UPDATES

SECURITIES RIGHTS

1. SAT QUASHES SEBI ORDER ON DIVIDEND PAYMENT BY CAIRN INDIA

The Securities Appellate Tribunal (SAT) has quashed an order of the Securities Exchange Board of India (SEBI) in a matter related to the non-payment of dividends by Cairn India Ltd to Cairn UK Holdings Ltd. The tribunal has further directed SEBI to conduct an inquiry into the case within six months. SEBI, in its impugned order, had held that disposed of the Cairn UK complaint on the ground that the unpaid dividend was handed over by the company to the income-tax authorities and, therefore, it would not be appropriate for it to take any further action and, accordingly, closed the complaint. Cairn UK then moved SAT against SEBI order. In July 2019, SAT directed SEBI to reconsider the complaint for violation of the provisions of the Companies Act and LODR (Listing Obligations and Disclosure Requirement) Regulations and pass appropriate orders. Disposing of the case again, SEBI claimed that there was no violation by Vedanta and the dividend was held back since there was no clear direction from the Income-Tax department to release the dividend. However, SAT in its recent order, has again asked SEBI to reconsider its stance. **Read More**

2. SEBI ISSUES NEW GUIDELINES FOR RUNNING ACCOUNT SETTLEMENT

SEBI in its circular released on 27 July 2022 has come out with new guidelines for settlement of running account of client's funds and securities. Under the guidelines, the settlement of the running account of funds of the client will be done by the trading member after considering the End of the day (EOD) obligation of funds as on the date of settlement across all the exchanges on the first Friday of the quarter for all the clients. If the first Friday is a trading holiday, then such settlement will happen on the previous trading day.

In market parlance, the process of transferring back the unused funds of the clients to their accounts by stock brokers is called running account settlement. Under the rules, stock brokers need to reverse the unutilized funds lying in the clients' trading accounts at least once within a gap of 30 or 90 days between two settlements of running accounts as per the preference of the client. Further, for the clients, who have not done any transaction in the 30 calendar days, funds will be returned to the client within the next three working days irrespective of the date when the running account was previously settled. The new guidelines will be applicable from 1 October 2022. **Read More**

3. SEBI DEFERS IMPLEMENTATION OF MUTUAL FUND HOLDER NOMINATION RULES TILL OCTOBER 1

SEBI has deferred the implementation of rules pertaining to the nomination for mutual fund holders till October 1. The rules, which mandate investors, subscribing to mutual fund units, to submit details of nomination or opt-out of the nomination, were to come into force on August 1. Now, investors, who are subscribing to mutual fund units from October 1 will have the choice of providing a nomination or opting out of the nomination. Asset Management Companies (AMCs) will have to provide an option to the unit holder to submit either the nomination form or the declaration form for opting out of the nomination in physical or online mode as per the choice of the unit holder. In the case of the physical option, the forms will carry the wet signature of all the unit holders and if it is online, an e-sign facility will be used instead of the wet signature of all the unit holders. Besides, AMCs will validate the forms through two-factor authentication in which one of the factors will be a One-Time Password (OTP) sent to the unit holder concerned at his or her registered email or phone number. **Read More**

4. GST AT 18% APPLICABLE ON FEE AND OTHER CHARGES, SEBI CLARIFIES

Market infrastructure institutions or persons dealing in the securities market will now have to pay a GST rate of 18% on the fees and charges paid to SEBI. The new rule has come into effect from July 18 onward. The announcement follows the GST Council's recommendation to withdraw the exemption granted to services by SEBI.

All the Market Infrastructure Institutions, Companies who have listed / or are intending to list their securities, other intermediaries and persons who are dealing in the securities market, have been informed that the fees and other charges payable to SEBI shall be subject to GST at the rate of 18% with effect from July 18, 2022. It needs to be noted that stock exchanges, clearing corporations, and depositories come under the bracket of market infrastructure institutions. **Read More**

5. SEBI IMPOSES RS 3 LAKH PENALTY ON BSE FOR SECC VIOLATIONS

SEBI in its adjudication order dated 29 July 2022 has imposed a penalty of ₹3 lakh on the Bombay Stock Exchange (BSE) for violation of the Stock Exchanges and Clearing Corporations (SECC) Regulation, 2018. The matter pertains to the exchanges' acquisition of the stake in various businesses without taking necessary approvals from the regulator. SEBI conducted its investigations to ascertain if the said investments made by BSE were unrelated or not incidental to its activity as a stock exchange. As a part of the examination, the regulator found that BSE had allegedly been engaged in unrelated activities with regard to the acquisition of the stake in the companies namely – BSE Technologies, Marketplace EBIX Technology, BSE Tech Infra, BIL Reyson Futures, and Indus Water Institute. **Read More**

By Tarpan Soni, Junior Editor

NEWS UPDATES
TAXATION LAW

1. ENTERTAINMENT DUTY NOT APPLICABLE ON BILLIARDS TABLES AT MEMBERS-ONLY CLUB: BOMBAY HIGH COURT

Bombay High Court recently while quashing demand notices issued to eight elite clubs in Mumbai the Bombay Entertainment Duty Act, 1923 held that the entertainment duty is not applicable on billiards tables at a member-only club. In the case of Santacruz Gyamkhana V. State of Maharashtra and Anr., the appellant received a notice from the Collector (Entertainment Duty Branch) alleging an entertainment duty of Rs. 5000. Court in the present instance noticed that unlike a commercial pool parlour meant for public entertainment at a fee, the clubs neither allow outsiders nor benefit commercially from the activity. Therefore, billiards tables cannot be treated as 'entertainment' and consequently cannot be taxable under the Act, stated the Bombay High Court on 14 July 2022. **Read More**

2. SUPREME COURT ALLOWS 2- MONTH EXTRA WINDOW FOR AVAILING TRANSITIONAL CREDIT; DIRECTS GSTN TO OPEN PORTAL FOR TRAN-1/ TRAN-2 FORMS

On July 22, a bench comprising of Justices S Abdul Nazeer and JK Maheshwari passed the directions while disposing of the special leave petitions filed by the Union of India against the orders passed by various High Courts. The Supreme Court (SC) directed the Goods and Services Tax Network (GSTN) to allow a 2- months additional window from September 1, 2022, to October 31, 2022, for claiming Transitional Credit. TRAN- forms need to be filed within 90 days and allow assesses to carry forward pre- GST credits of the GST system. On July 22, SC in the case of Union of India v. M/s Filco Trade Centre Pvt. Ltd. and Anr. disposed of the special leave petitions and passed several directions including allowing 2-months additional window for claiming Transitional Credit. **Read More**

3.COMPENSATION WITH INTEREST RECEIVED UP TO THE DATE OF LAND ACQUISITION IS TAXABLE UNDER THE HEAD "CAPITAL GAINS": ITAT

The Mumbai Bench of Income Tax Appellate Tribunal (ITAT) on 18 August 2022 held that the compensation with interest received by the assessee up to the date of land acquisition should be taxed under the head "Capital Gains".

At the same time, the bench also observed that the interest paid to the assessee for any delay in payment of the compensation from the date of acquisition of the property should be taxed under the head "Income from other sources". In the case of Leila Advani v. ACIT, the appellant is a 1/3rd shareholder in the plot of land in question and received a total award of RS. 72,01,91,805. He contended that while nomenclature is of interest, it is only a component of compensation and thus subject to taxation under the head capital gains. The court held that interest merely represents the additional compensation payable to the appellant to effect the transfer at the fair market value as on the date of transfer and hence should be taxed under the head 'Capital Gain'. Read More

4. APPROVAL OF DEMERGER WOULD NOT ENTAIL THE BENEFIT OF SET-OFF UNDER SECTION 72A OF INCOME TAX ACT: ITAT

The Pune Bench at ITAT on 27 June 2022 has ruled that the mere approval of demerger of amalgamation approved by the High Court, does not automatically entitle the assessee to claim the set-off of brought forward business losses relating to the demerger or amalgamation undertaking. M/s Cummins Sales & Services Ltd. was demerged and vested with the assessee company, However, during the assessment, the Assessing Officer (AO) found that the assets of the demerger undertaking were held for sale indicating that there was no intention of the assessee to continue the business of the demerger undertaking. ITAI here observed that the mere fact that a scheme of demerger or amalgamation was accorded approval by the High Court, did not automatically entitle the assessee to claim the set-off of brought forward business losses. Read More

By Shivi, Copy Editor

1. RELIANCE JIO TO PAY RS.70 CRORE TO TATA COMMUNICATIONS: SUPREME COURT

The Supreme Court vide its order dated 01 August 2022 in the case of Reliance Jio Infocomm Ltd v. Tata Communications Ltd. & Ors. has directed Reliance Jio to pay Rs. 70 crores to Tata Communications in two weeks while hearing Reliance Jio's plea against a Telecom Disputes Settlement and Appellate Tribunal (TDSAT) order. The impugned order of the TDSAT had asked Reliance Jio to pay Rs 147 crore to Tata Telecom as cable landing station usage charges. Reliance Jio had argued that millions of users will be blocked if Tata Telecom goes through with the suspension of the user license due to non-payment of dues. Tata Telecom, however, argued that Reliance had paid Airtel the cable landing station usage charges after it took an aggressive stance, but since Tata had been lenient with them during the lockdown, the payment had been delayed. The Apex Court, deciding the matter in favor of Tata Telecom, directed Reliance to pay Rs. 70 Crores to them. **Read More**

2. UNION CABINET APPROVES THE MERGER OF BBNL WITH BSNL

In a bid to revive the state-owned Bharat Sanchar Nigam Limited (BSNL), the Union Cabinet has approved the merger of Bharat Broadband Network Limited (BBNL) with BSNL. BSNL will work as an executing arm of the government and ownership of assets will rest with the government. In April 2022, it was announced that India's flagship rural broadband project Bharat Broadband Network Ltd (BBNL), the special purpose vehicle set up to implement BharatNet would merge with Bharat Sanchar Nigam Ltd (BSNL), the national telecom service provider. The infrastructure created under BharatNet will continue to be a national asset, accessible on a non-discriminatory basis to all the Telecom Service Providers. To further improve its balance sheet, Adjusted Gross Revenues (AGR) dues of BSNL amounting to Rs 33,404 crore will be settled by conversion into equity. The government will provide funds to BSNL for settling the AGR/GST dues. BSNL will re-issue a preference shares of Rs 7,500 crore to the government. **Read More**

3. INDONESIA BLOCKS YAHOO, PAYPAL, GAMING WEBSITE OVER LICENSE BREACHES

Indonesia has blocked search engine websites Yahoo, payments firm PayPal and several gaming websites due to failure to comply with licensing rules. Registration is required under rules released in late November 2020 which will give authorities broad powers to compel platforms to disclose data of certain users, and take down content deemed unlawful or that "disturbs public order" within four hours if urgent and 24 hours if not. The new licensing system applies to all domestic and foreign Electronic Service Operators. The government can also compel companies to reveal communications and personal data of specific users if requested by law enforcement or government agencies. Read More

By Tarpan Soni, Junior Editor

INTERVIEW

INCREASING SCOPE OF TECHNOLOGY LAW AND GROWING IMPORTANCE OF DATA PROTECTION LAW IN TRANSACTIONS

Anupam Shukla is a Partner at Pioneer Legal, heading the technology law and privacy practice at the firm. He has over 10 years of experience advising on several cross-border private equity and M&A transactions. Anupam has been ranked as one of the Top TMT Lawyers in India by Asian Legal Business in 2022 and recommended as a practitioner in the PE and M&A sector in various legal rankings.

(Q1) A transaction might involve transfer of sensitive or private information from one entity to another. Hence, before a deal is closed, what are the aspects of data protection and privacy that one needs to keep in mind while carrying out the due diligence of an entity? Moreover, what are the ensuing consequences if it is found that the entity passing the data has had data leaks and what are the laws in place regarding the same?

Confidentiality of proprietary data and information being shared as a part of the due diligence becomes very critical. Usually, in M&A transactions, the strategic acquirers are also involved in similar businesses. In such cases, the target companies tend to ring-fence the more critical data and only share it post-closing. Further, companies need to note that the data which constitutes personal data or sensitive personal data should be shared for diligence only after ensuring that such disclosure is covered under the consents procured from the data principals.

INTERVIEW

(Q2) Various surveys have discussed that data breach has increased during the pandemic and this includes high risk in the domain of P/E transactions as well. Where do you see the main data privacy and cyber security risks arising in the future?What advice would you give to managers of this high-risk data on the cyber risks they face?

Data is an indefinitely replicable resource. Stolen/ leaked data often ends up for bulk sale on dark web forums available to multiple bidders. It then finds its way to those who intend to use it to harm your computer systems or for unsolicited advertisement or analytics. In a recent survey by Local Circles, 41% of Indians surveyed blamed their banking and telecom service providers for personal data breaches. A Surfshark report ranked India third globally in data breaches, with the number of Indians impacted having almost quadrupled in 2021 compared to 2020.

More and more businesses have moved a significant proportion of their activities online. This exposes them to the risks of data breaches. Businesses in India cannot wait for the regulatory requirements to catch up. Suitable security systems need to be instituted across sensitive industries to prevent such data breaches with measures such as periodic audits and internal training.

(Q3) The importance of data protection is still very niche in India. In your opinion, is there the necessary acknowledgement of this within the industry as to the need of maintaining robust data privacy systems? Is India, which is in the process of acknowledging data privacy and rewriting IT Laws, falling short on this front?

To say that India needs a robust data privacy law is an understatement. In addition to prescribing heavy penalties, privacy law would also set data security standards and mechanisms to be adopted by all organisations. As more and more facilities and services shift to digital delivery, stringent steps are required to prevent data breaches.

(Q4) Major brands and companies have dealt with a data breach that has cost millions of dollars. Major cosmetic brand, Kylie Cosmetics had a recent data breach. Similarly, Yahoo has dealt with the data breach of millions of users with their un-encrypted passwords and data being stolen as a result of which it even lost deals. There is a new variable that needs to be considered in P/E valuation too: the impact of an undisclosed cyber breach and the consequences of it. This also includes the likeliness of insider thefts. What are your views on the same and how do you advise your clients in this regard?

These days, the due diligence exercise also covers instances of data breaches or leaks, if any. Such instances are evaluated basis various factors such as the extent of the breach, type of data disclosed, age of such data, was such data in encrypted or anonymized form, etc. Basis all such factors, the acquirers evaluate the business and legal risks in the transaction. This becomes very critical as it is difficult to ascertain the potential loss which could be suffered on account of data breaches.

(Q5) The Indian Computer Emergency Response Team (CERT-In)in April this year issued certain guidelines relating to the cyber security space in India. Upon the release of these guidelines, concerns were raised by various Virtual Provided Network (VPN) Providers that following these guidelines will render their privacy-oriented business model meaningless, as they require them to log details of all the persons who access their servers. Further, there were also concerns about the mandatory 6-hour timeframe for reporting incidents and the broad definition of incidents to be reported. This has led VPN providers like Surf shark and Express VPN to exit the Indian market and shut their servers here. In your opinion, what is the correct approach that the Indian Government should have taken or can take now to ensure a seamless implementation of these guidelines?

Considering the rise in cyber incidents, it is understandable that the government may want to put in place mechanisms that make redressal of such incidents more effective. Regulating VPNs is a step in that direction. However, the government should have ensured the privacy law was enacted before coming up with a regulation requiring private entities like the VPN service providers to store a massive amount of data belonging to private individuals. The PDP bill 2019 which was long awaited has recently been withdrawn by the government. This increasingly makes the approach of the government feel rushed.

(Q6) How is the cross-border transfer of data handled since most jurisdictions have varying regulation controls existing in the space of data privacy and protection? Also, when data flows from a strictly regulated data space country to one with fewer regulations, how does it impact the target companies and how is this vulnerability to data leaks being tackled in the present day?

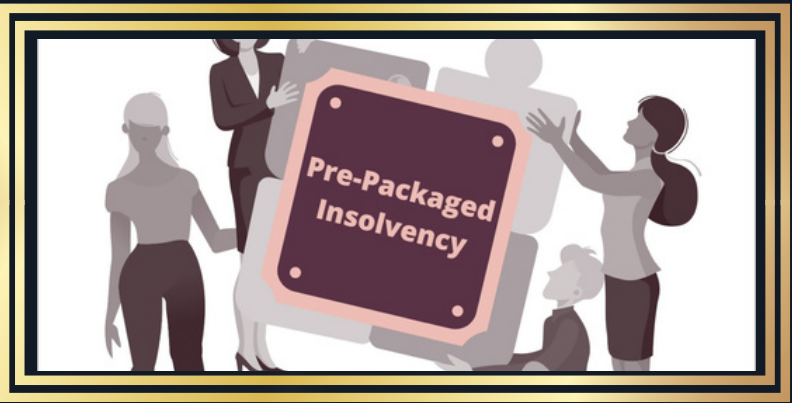
This is one area which is a great source of concern in cross-border transactions. Privacy legislations and their enforcement differs significantly from country to country. In this case, investors generally tend to perform a technical due diligence of the internal safety mechanisms implemented by the target group. Local law firms are also retained to undertake a due diligence from a local privacy compliance perspective. Any potential areas of exposure are evaluated by the PE investors, and such risks are addressed by way of indemnity and/or a corrective action before the transaction consummation.

(Q7) In the post-pandemic period, the process of due diligence has undergone quite a change and it relies less on physical or on-site meetings and more on Virtual Data Rooms (VDRs). The pandemic has shifted the process to working remotely and therefore such VDRs have become a vital part of each transaction/deal. In your opinion, what are the things that need to be kept in mind by both, the target company, as well as the acquirer company when selecting their VDR for due diligence as even a small mistake can lead to accidental disclosure of information such as sensitive intellectual property information?

The parties need to select VDRs basis individual need cases. A safe and secure infrastructure is provided as a baseline by almost all VDRs. However, for highly sensitive data, VDRs providing a higher degree of DRM restrictions on access to data, print or screenshot restrictions and other technological safeguards are adopted by the deal teams. This however has the downside of increasing the costs and making the diligence process more cumbersome and time-consuming. Finding an appropriate balance is important.

RECENT ON THE BLOG

This guest blog under the RFMLR-IBBI Blog Series Competition has been authored by Gajanand Kirodiwal, Advocate, Atlas Law Partners.



1.STRESS RESOLUTION REGIME IN INDIA:

- In India, a company in stress may resolve its stress either on its own by negotiating with its stakeholders by working out a plan to resolve stress, or it may resort to a statutory framework. There are two statutory options available to a stressed company, namely, (a) Corporate Insolvency Resolution Process ("CIRP") under the Insolvency and Bankruptcy Code, 2016 ("IBC") and (b) scheme of compromise or arrangement ("SoA") under the Companies Act, 2013. It also has **two out-of-court options**, namely, (a) the RBI's prudential framework for the resolution of stressed assets and (b) informal understanding between a debtor and creditor.

- IBC mandates and aims for the revival of a company/corporate debtor ("CD") in a time-bound manner. However, when the CD is not in sound financial health, prolonged uncertainty about its ownership and control may make the possibility of resolution remote, while reducing the enterprise value of a CD. The **strict adherence to timelines** is of essence to both the triggering process and the insolvency resolution process.

- Sections 230-232 of the Companies Act, 2013 offer SoA, which enables the company/ies to restructure their liabilities and/or capital structure to turn around the business, with the approval of the National Company Law Tribunal ("NCLT"). Under Section 230, an Application may be made to the NCLT essentially seeking approval of the scheme of compromise and arrangement between the parties. Such compromise and arrangement, has be to between the members and creditors of the company. Whereas under Section 232, schemes of a merger or the amalgamation of any two or more companies for the reconstruction of the company/ies specifying the purpose of the scheme (where the assets can also be transferred by a transferor company to the transferee company) are filed before the NCLT for approval. Additionally, the RBI provides **a prudential framework** for early recognition, reporting, and time-bound resolution of stressed assets.

RECENT ON THE BLOG

2.AMENDMENTS TO THE IBC:

- **The IBC since its inception in India has seen a host of amendments paving way for its successful application and execution. However, the Fifth Amendment to the IBC prohibited the use of the CIRP in times of COVID-19.**

- **The government looking at the market scenario and expectations started exploring the feasibility of a hybrid resolution framework having minimal court supervision on out-of-court pre-negotiated restructuring schemes. Hence, a time and cost-effective 'pre-packaged' bankruptcy scheme was thought of to aid the existing CIRP framework. It invited suggestions for the implementation of pre-packaged insolvency resolution.**

- **While the world and India were faced with the COVID-19 pandemic, the Insolvency Law Committee ("ILC") on May 16, 2020, decided to constitute a sub-committee to study the Pre-Packaged Insolvency Resolution Process ("PPIRP") for time-efficient insolvency resolution and sought its recommendations. The sub-committee submitted its recommendations on October 31, 2020, to the Government of India. On basis of the said recommendations of the sub-committee, a decision was taken to amend the IBC.**

- **Accordingly, an Ordinance was issued on April 4, 2021, making amendments to the IBC and introducing a PPIRP for corporate persons classified as micro, small and medium enterprises. The Ordinance has been thus passed by the Parliament as IBC (Amendment) Act, 2021 w.e.f. April 4, 2021.**

- **The said Ordinance introduced the PPIRP process, which is pre-negotiated insolvency to offer faster insolvency resolution of a distressed corporate/company through an agreement between secured creditors (unrelated financial creditors constitute the COC in PPIRP) instead of a public bidding process. In fact, the PPIRP is a sequel to Section 10A of the IBC where a stressed CD can itself approach the NCLT for its resolution.**

- **For PPIRP, Chapter III-A (Sections 54A to 54P) has been introduced in the IBC. Further, the Insolvency and Bankruptcy (Pre-packaged Insolvency Resolution Process) Rules, 2021 ("Rules") and Insolvency and Bankruptcy Board of India (Pre-packaged Insolvency Resolution Process) Regulations, 2021 ("Regulations") have been notified in April 2021.**

3. Pre-Packaged Insolvency Resolution Process

- **PPIRP is a process that allows the creditors as well as the debtors to work out a resolution plan for the revival of a company under stress and is unable to carry out its day-to-day operations, without getting involved in the lengthy court proceedings and approvals. In PPRIP, the promoters of the CD are allowed to participate actively and the board of directors remains alive unlike in a CIRP.**

A PPIRP includes the following steps:
a) PPIRP formally begins when an unrelated financial creditor having not less than 10% of the total debt proposes the name of an RP and is approved by 66% of unrelated financial creditors. Alongside, the majority of Directors or Partners of the CD, as the case may be, give a declaration for initiation of PPIRP within 90 days to be conducted by the approved RP. It is specifically declared by them that PPIRP is not being initiated to defraud anyone. Further, a special resolution is also required to be passed for approving the PPIRP.

b) Such RP then constitutes a Committee of Creditors ("COC") after collating their claims. After the constitution of the COC, the corporate debtor itself presents a base resolution plan which does not impair the debts of the operational creditors. Once the base resolution is approved by 66% vote of the COC, an application is filed before the NCLT by the CD for initiation of PPIRP.

c) The application before the NCLT is filed by the Corporate Applicant (including the CD) in the requisite Form provided under the Rules along with various Forms prescribed under the Regulations including a report of the RP confirming that the CD has complied with all the requirements for initiation of the PPIRP of the CD and is eligible to submit a resolution plan.

d) On the filing of such an application, the NCLT within 14 days, either admits it, if all criteria are fulfilled or rejects it when the CD does not fulfil the requirements as prescribed. The NCLT can also direct the CD to rectify the defects before admitting the application. The effect of such an admission/pre-packaged insolvency commencement date ("PPICD") is that the appointment of RP is in effect confirmed and a moratorium is declared for RP to conduct the resolution process within 90 days of PPICD. Pertinently, during the moratorium, the Board of the CD remains in existence and can conduct the affairs of the CD

e) RP then takes over and is obligated to complete the process within 90 days of PPICD. RP formally makes a public announcement of PPIRP and undertakes the resolution process which is akin to CIRP. After the public announcement, it collates all claims of the creditors received and within 7 days of PPICD forms a COC afresh based on the claims. RP also appoints registered valuers within 3 days of PPICD for forming an opinion on avoidance transactions, if any. RP may accordingly move to NCLT in case he is of the view that the CD has conducted avoidance transactions.

f) RP can otherwise call for the COC meeting and present the base resolution plan as submitted by the CD, for voting. COC may in its wisdom either approve the base resolution plan or call for other comparatively better plans if it deems appropriate. In that event, the base resolution plan goes into the Swiss Challenge mechanism, where the CD would have to either match the comparatively better resolution plan/s or face the risk of losing the CD as it goes into liquidation. The COC can also recommend for termination of PPIRP or recommend initiation of CIRP.

g) If any of the resolution plan/s is approved and meets the basic requirements of the IBC, the RP files for approval of the said plan before the NCLT.

4. ADVANTAGES OF THE PPIRP:

- A minimum **default of Rupees Ten Lakhs for initiation of PPIRP** has been prescribed by the Government of India as opposed to Rupees One Crore in the case of CIRP. CD, therefore, has an option to initiate the PPIRP even on default of a comparatively smaller amount.

- Preliminary work of the resolution process of the CD is completed by CD, COC, and the appointed RP before applying for initiation of the PPIRP of the CD, to the NCLT.

- PPIRP allows negotiations with all stakeholders to prepare a base resolution plan leaving almost no scope for calling fresh resolution plans before making a formal application to NCLT for approval. In fact, the CD can bring in a joint resolution applicant after consulting all stakeholders, in the best interest of the CD.

- Even during PPIRP, **a Swiss Challenge** to the base resolution plan is allowed which is enabled by Section 54K (11), thereby allowing the best possible resolution price for CD's assets

- As prescribed under Section 54D (1), 120 days is the outer time limit for completion of resolution of a CD from the PPICD, while the Board of the CD is allowed to carry out the business of CD during the moratorium period as imposed on PPICD. This ensures minimal disruption to the business and assets of the CD.

- NCLT intervention is limited to the approval of the appointment of RP, declaration of moratorium after the informal process is completed, and finally at the stage of approval of the resolution plan. NCLT is also not likely to see a bunch of objection applications against the approval of the resolution plan, as seen in CIRP cases. Thereby the NCLT is not burdened with the pendency of applications.

5. LIMITATIONS, CONCERNS AND SUGGESTIONS:

- PPIRP is currently available to a Corporate Debtor which is a registered MSME and CDs other than the MSMEs, therefore cannot apply and avail the benefits of this resolution regime. Hence, PPIRP has limited its scope and applicability and thus, a large number of corporates/companies are not included and hence are ineligible for PPIRP resolution. PPIRP's potential in case of resolution of such other stressed companies is yet to be tested. The starting point could be the inclusion of companies with a minimum annual turnover and are in default of a specific amount that may be prescribed. Such inclusions would pave way for more effective implementation and utilization of the PPIRP regime.

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- PPIRP is over-dependent on the RP since NCLT interference is minimal. Though Chapter IIIA provides for roles and responsibilities of the RP, detailed do's and don'ts for RPs are required to be put in place. Additionally, the aspects of valuation need to be clarified to ascertain the correct market value of the CD and the registered valuers can accordingly have more guidance for performing their duties.

- The PPIRP amendment also lacks clarity on haircuts to financial creditors in the resolution plan. Haircut in the context of the IBC is a difference between the amount of debt owed to a creditor by the CD and the actual amount allotted to the creditor under a resolution plan. Usually, such reductions are made by the resolution applicants to make their **resolution plans more viable** while taking over the CD as a going concern. Section 54K (4) of the IBC only provides that the debt of the operational creditors cannot be impaired and a base resolution plan which does not impair any claims owed by the corporate debtor to the operational creditors may be approved by the COC. However, no such specific provision is in place in respect of the financial creditors, and therefore a specific provision in this regard may guide the COC better while considering a base resolution plan. Such a provision will also help the CD and the resolution applicant to deal with the debts of financial creditors and structure their re-payments better under the base resolution plans.

- There is another crucial aspect of PPIRP which remains vague and unexplained. Since the PPIRP is meant only for MSMEs and for which proof of MSME registration is required to be filed mandatorily before the NCLT. However, there is no clarity as to the MSME registration date of a CD. IBC only prescribes that the CD should be an MSME on the date of initiation of the informal PPIRP process and it does not put a rider as to when a CD should have registered itself as an MSME. Hence, it needs to be clarified whether there is any bar on the CDs for initiating PPIRPs that are already incorporated and have registered themselves as MSMEs after April 4, 2021, the effective date of the amendment.

- Since the inception of IBC in the year 2016, the adherence to timelines prescribed for the resolution of CDs has been a cause of concern for all the stakeholders owing to various reasons including vacancies in the NCLTs across India. IBC as originally introduced, allowed 180 days for completion of CIRP with an extension of 90 days, which later came to be amended by the Insolvency and Bankruptcy Code (Amendment) Act, 2019 to restrict the time period of 330 days from the CIRP commencement date. This was owing to the delays on various counts. However, even this amendment has failed to achieve its objective and cases continue to breach the prescribed timelines. Now the admitted cases of PPIRP before the NCLTs are also **suffering the same fate** despite making most of the resolution process informal and having all possible approvals in place.

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- The delays caused in the resolution process directly affect the value of the asset of the CD and it is quite possible that the value may go down drastically when the resolution is actually approved. This adversely affects the prospects of the CD and also hampers the interest of the successful resolution applicant who has agreed to invest a certain amount for taking over the CD as a going concern. Presently, there are no provisions to deal with such delays and their financial implications for the stakeholders.

CONCLUSION:

In view of the analysis above, it can be concluded that the introduction of PPIRP in the IBC is a step towards progressive insolvency and bankruptcy regime. Since we have yet not seen the approval and implementation of a resolution plan under the PPIRP, many of the practical issues would arise for consideration by domain experts at an appropriate stage. However, in the meantime, the apparent issues can be considered suitably and addressed for achieving the purpose of the PPIRP including the stricter enforcement/ adherence of timelines prescribed by filling up the vacancies at NCLTs and equipping them with adequate infrastructure to handle the increasing caseload.

CALL FOR COMMENTS

SEBI PROPOSES FRAMEWORK TO REGULATE ONLINE BOND PLATFORMS, SEEKS COMMENTS FROM PUBLIC

The Securities Exchange Board of India (SEBI) has released a Consultation Paper, proposing a framework to regulate online debt platforms which are selling debt securities to Non-Institutional Investors (NIIs). Presently, such online bond platforms do not come under the regulatory purview of any statutory body. The Consultation Paper proposes that these bond platforms should be registered as stock brokers (debt segment) with SEBI or be run by SEBI registered brokers. Further, the paper recommends that the debt securities offered for buy/ sale should only be listed debt securities on these platforms. Presently, both listed and unlisted debt securities are being offered.

The paper also suggests that the transactions executed on these online bond platforms are routed through either the debt segment of the stock exchange or through the Request for Quote (RFQ) platform of the exchange. This is to ensure guaranteed settlement of transactions to the users. It has also been proposed that the listed debt securities issued on a private placement basis are locked in for a period of six months from the date of allotment of such securities by the issuer so that the debt is not immediately off-loaded to investors. The main aim of the proposed framework is to bring about regulatory oversight and common standard practices to the many online bond platforms that have come up in the last three years. Comments have been sought from the public on the proposed framework and can be sent by email to **pradeepr@sebi.gov.in** by 12 August 2022. **Read More**

CALL FOR COMMENTS

SEBI PROPOSES FRAMEWORK FOR PLATFORMS PROVIDING "EXECUTION-ONLY" SERVICES IN DIRECT PLANS OF MUTUAL FUNDS, SEEKS COMMENTS FROM THE PUBLIC

The Securities and Exchange Board of India on July 21, 2022, released a report on the framework for platforms providing "execution-only" services in direct plans of Mutual Funds. SEBI has sought comments from the public on this report. It is observed that various SEBI registered Investment Advisory/Stock Brokers have been providing execution services in direct plans of MF schemes through their technology platforms/digital platforms. However, not all investors who are executing transactions in direct plans of MF schemes through these platforms are availing of any advisory/broking services. They are rather using the platform only to execute transactions in direct plans of MF schemes. To further promote the penetration of MF sand to ensure that ease of investment comes with adequate investor protection and grievance redressal mechanism, a framework for working of these platforms may be the stepping stone towards strengthening the investors with the power of technology along with the ability to invest directly in MF schemes. An entity desirous of providing execution-only services in direct plans of Mutual Funds may be mandated to act as a registered intermediary or an entity registered with AMFI or an entity with limited purpose membership with Stock Exchanges.

To facilitate the same, SEBI has come up with three broad proposals. Comments have been sought from the public on the proposed framework and can be sent by email to eop@sebi.gov.in by 12 August 2022. **Read More**

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RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

ISSN(O): 2347-3827

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