CRA E-Bulletin

The Corporate and Regulatory Affairs E- Bulletin

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The Corporate and Regulatory Affairs (CRA) E-Bulletin is an initiative of ASSOCHAM's Department of Corporate, Legal and Regulatory Affairs. The aim of the E-Bulletin is to provide a platform for stakeholders to bring forth the evolving dynamics of corporate and regulatory sectors, challenges and plausible way forward. The quarterly E-Bulletin shall engage with the stakeholders on various contemporary themes and market dynamics.

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About CRA E-Bulletin:

CRA, the quarterly e-bulletin, is an initiative of the ASSOCHAM's Department of Corporate, Legal and Regulatory Affairs. The aim of CRA is to provide a medium for furnishing information & data including sectoral updates and disseminate the same with an intent to engage with stakeholders in an educative and advocacy discourse. The publication focuses on contemporary themes covering a range of sectoral developments, research, innovation, and concurrent events in the field of and to meet the interest of corporate and legal fraternity.

ASSOCHAM is the country's oldest and most agile apex chamber, always evolving with the times ever since it was set up in 1920. The ASSOCHAM reaches out to and serves over 4.5 lakh members from trade, industry, and professional services through over 400 associations, federations and regional chambers spread across the length and breadth of the country. It has built a strong presence in states, and has also spread its wings in the key cities of the world. With a rich heritage of being led by stalwarts of independent India, like JRD Tata, Nani Palkhivala, H.P. Nanda, L.M. Thapar, A.N. Haksar and Raunaq Singh, among others, the ASSOCHAM has shown the ability to transform itself to the contemporary Corporate India and of late has emerged as the 'Knowledge Chamber', leveraging the country's strength in the knowledge - led global economy.

ASSOCHAM Department of Corporate, Legal and Regulatory Affairs is working hand in hand with the statutory institutions and regulators such as SEBI, NFRA, CCI, IBBI, IEPFA, RBI, NISM and professional institutions- ICAI,ICSI, ICMAI, IICA, VVGNLI. These institutions are amongst the high importance organizations involved in national and international policy making process. This bulletin is another initiative to keep the readers abreast of the latest updates in the commercial laws and policy frameworks. The bulletin is made of rich literature, research work, thought provoking ideas, news and views which could be useful for the industry, regulators, professionals, government, academicians and legal fraternity.

Foreword

Mr. Deepak Sood,
Secretary General
ASSOCHAM

ASSOCHAM endeavors to serve the industry and stakeholders holistically through policy advocacy. Thus, the "Corporate and Regulatory Affairs" e-bulletin is designed to throw light on recent legal affairs and developments. This initiative brings to every table the updates, experiences, comments, news and research articles pertaining to the legal and regulatory affairs which impact corporate compliance matters.

With the advent of technology, new business avenues are opening, and so is the regulatory sector expanding its jurisdiction. As responsible citizens, each of us is responsible for knowing the laws and regulations, judgements, updates in the regulatory sector, business verticals, execution of deals etc. Launching this e-bulletin envisages raising a platform for every stakeholder to put across their thoughts, challenges, way forward and experiences to a larger extent.

The aim is to make the bulletin a comprehensive document that covers the respective quarter's significant developments on the touchstone of corporate legal and regulatory affairs. I extend thanks to all the leaders and professionals who have contributed to this edition and look forward to receiving further support in making this initiative a greater success.

I congratulate the council leadership and editorial team for shaping up the CRA e-bulletin.

Foreword

Ms. Preeti Malhotra
Chairperson, ASSOCHAM National Council of Corporate Affairs, Company Law and Corporate Governance, Past President, ICSI & Chairman, Smart Bharat Group and

I am pleased to acknowledge the first issue of the Corporate and Regulatory Affairs (CRA) which is the initiative of the Department of Corporate, Legal and Regulatory Affairs, ASSOCHAM. This academic & research initiative, manifested in the form of an e-bulletin would, I hope, over the years becomes a critical reference resource for the industry. I appreciate the concept, design, and express my gratitude to all those luminaries from the legal fraternity who have contributed to this first issue.

We are all cognizant of the significance of research and academia to business. Every business or an enterprise originates from an idea that must be backed by impeccable research and market study. No future is built without strengthening the foundation with experience highlighting the know-how of the sector, established practices, do's and don'ts extracted from case studies, market study and reports. This bulletin hopes to uncover and demystify the critical link between law and business by decoding important deals, orders, articles, and interviews with sector and market leaders. In addition, it also features significant updates on regulatory actions, amendments to the provision of commercial laws and responses of industry stakeholders.

We hope that this e-bulletin will, over time, bridge the gap between research, academia and industry for the benefit of all stakeholders, entrepreneurs and professionals. This current issue documents the critical events in the final quarter (October- December) of 2022 that witnessed some major shifts in the global business regime. The issue also offers a basic introduction of and expert views on various matters, contextualized against bills such as the Competition Act, 2022; Digital Personal Data Protection Bill, 2022; the PMLA judgement by the Hon'ble Supreme Court of India etc.

I trust and hope that the e-bulletin will, in time, feature as a 'must read' list of every stakeholder in the corporate and legal sector.

Wishing the editorial team, all the best.

And Happy reading to all readers!!

Interviews

Leader's Insight

"CCI must keep abreast with the global developments and stay attuned with emerging jurisprudence" recommends Dhanendra Kumar, the first CCI Chairperson.

In this interview Mr. Dhanendra Kumar shares his rich knowledge and experience on the competition regime in India and its evolution. Mr. Kumar highlighted various cases that shaped the competition regime in India as it stands today.

Mr. Dhanendra Kumar who joined IAS in 1968, has served the Government at Centre and Haryana State in various senior positions. At Central level, he was Secretary to Govt in several key Ministries, including Defense Production, Road Transport and Highways, and Culture and responsible for several major policy initiatives and implementation. His term as Additional Secretary in Ministry of Telecom (1998-2002) witnessed the migration policy and telecom revolution.

Mr. Kumar served as India's Executive Director (2005-09) on the Board of World Bank, Washington DC representing India, Sri Lanka, Bangladesh & Bhutan. He was the First Chairman of the Competition Commission of India (2009-11). He set up the country's market regulator, commenced enforcement and review of Combinations.

At the State level, he worked as Principal Secretary to Chief Minister Haryana and undertook development of industrial infrastructure around Delhi, including Udyog Vihar and Manesar.

Mr. Kumar is currently the Founder Chairman of Competition Advisory Services (I) LLP, a strategic consultancy firm in Competition Law (www.compad.in) and Policies, and active on global lecture circuit. He writes frequently on contemporary issues.

CCI seems to have certain limitations. Given the provisions of the Competition Act, how far can it go when it comes to taking pre-emptive action?

The Competition Act, 2002 was enacted in January, 2003 and its antitrust provisions enforced in May 2009 while merger review provisions were enforced in 2011. Certainly, the Act has limitations for the key market regulator in

the midst of changing times, evolving nature of markets, technological developments and changing business behaviour. CCI has been taking corrective measures to remain up-to-date through enforcement and advocacy, as well as various regulations from time to time. CCI is empowered to take ex-post facto enforcement for anti-competitive behaviour and abuse of dominant position, and ex-ante reviews in M&A. Some of the gaps that exist are sought to be plugged in the Competition Amendments Bill before the Parliament.

How do you compare our Indian Competition Act with the corresponding laws in other countries that have more robust competition regimes?

Indian Competition Law is considered among the best in the world. For comparison, benchmarks are generally taken with US Antitrust Law and EU Competition Law. In US, there are two agencies for enforcing Competition Law: Federal Trade Commission and Antitrust division of the Department of Justice and the key legislations being are Sherman Act, 1890 and Clayton Act, 1914. US has provision for criminal prosecution for cartels and antitrust cases are brought before the courts for adjudication.

In EU, the Directorate General (DG) Competition of the European Commission (EC) is the nodal agency for enforcement of law based on provisions of the Treaty on the functioning of European Union (TFEU) mainly Articles 101 and 102. Indian Competition Law is similar to EU, and powers of CCI derived like powers of EC. Although, EU is a mature jurisdiction and is known for quality of its enforcement. EC also cooperates with National Competition Authorities (NCAs) of the EU member nations and vice versa for competition enforcement.

When does competition become unhealthy in a digital economy?

As Indian economy is rapidly developing with digitisation, the digital economy brings its own challenges. Digital markets are borderless; and the relevant market delineation is also sometimes different. In a digital economy, data becomes extremely important. It is referred to as the new oil and used in a number of ways. In digital space, markets grow very fast with data accumulation and network effects, and sometimes trends emerged such as deep discounting, self-preferencing, search bias, data usage, exclusive tie-ups, advertising policy.

What are your thoughts on making the Competition Act more global as the markets today are global centric?

India is world's fifth largest economy, soon growing to become third, within the next few years, overtaking Germany and Japan. Our competition regime needs to be attuned to the evolving markets, globally. The recent Competition (Amendment) Bill, 2022 has been framed to make the regime updated with this end in view. For instance, under the new proposals, the provision of having substantial business operations in India will now include major global mergers within the scrutiny of CCI if the Target company has operations in India as well. The amendment in thresholds for combination review will also bring startups and digital companies under CCI's purview.

If you could brief out some interesting cases that you dealt with during your regime in CCI.

During my tenure, there were several cases which set the benchmark of competition jurisprudence in India. A few of these are:

SAIL Case - Jindal Steel & Powers Ltd submitted an information before the Competition Commission of India alleging that the Steel Authority of India Limited had an exclusive supply agreement with Indian Railways for the supply of rails, thereby leading to anti-competitive practices and abuse of dominant position. After CCI's preliminary orders, this case went in appeal to COMPAT and subsequently to Supreme Court, wherein important observations including powers of CCI, nature of the proceedings, powers of Director General etc. were elucidated, which remains as the most important piece of jurisprudence till date.

Belaire's Association v. DLF Ltd. - The DLF Case began when the owner's Association of Belaire (a DLF building complex in Gurgaon) filed a complaint against the builder for breach of Section 4 of the Competition Act which dealt with Abuse of Dominance by a seller in the market. After the evidence, the CCI pronounced DLF guilty for abusing dominant market position in Real Estate sector as it imposed unfair sale condition, etc. and imposed penalties and orders for market corrections in reality space.

MCX Stock Exchange v. NSE - The case of MCX & Ors v. NSE of India is one of the first cases on abuse of dominant position. In this case, CCI relying on the provisions of the Act and several tests, attempted to analyze whether the NSE occupied a dominant position in the market and, whether NSE resorted to abusing its dominant position and violating the provisions of the Act. CCI in its one of first judgments on abuse of dominant position, analyzed the concepts of relevant market and held NSE to be a dominant player, abusing its position in the stock exchange market, imposing a penalty of INR 55.50 crores.

Cases that shaped the competition regime as it stands today?

Apart from the cases discussed in previous question, some of the other cases that shaped India's competition jurisprudence are:

Samir Agarwal v. CCI – The Supreme Court judgment clarified the concept of locus standi before the CCI. The Court also observed that the Commission executes various functions including regulatory, inquisitorial and adjudicatory.

Excel Crop Care v. CCI – Supreme Court in this case decided on the relevant turnover for the CCI to consider while imposing penalties.

Shamsher Kataria v. Honda – CCI in this case gave a landmark ruling on resale price maintenance in automobile ancillary products.

Matrimony.com v. Google LLC - CCI imposed a penalty of Rs. 136 crores on Google for search bias and abuse of dominant position online general web search services and online search advertising services market in India.

Some other cases against Google included recent orders on Playstore and Android ecosystem involved penalties of Rs 936 crore and Rs 1337 crore respectively. In these cases, CCI also ordered a serious of remedies and market corrections to Google for implementation. The matter is in appeal.

Jasper Infotech v. Kaff Appliances – CCI held that display of products at prices less than determined by the dealers also hinders their ability to compete and violates Section 3 of the Act.

How has the competition regime in India evolved so far?

Competition Commission of India (CCI) has its offices now in all four corners of the country – Delhi, Mumbai, Kolkata and Chennai. It has till date adjudicated more than 1100 antitrust cases, approved more than 900 combinations and imposed penalty of more than Rs. 17,000 crores. The law has evolved substantially from enactment in 2002 to Amendment Bill in 2022. CCI has investigated cases against all bigtech – Google, Amazon, Apple, Microsoft and Meta. It has covered major sectors including pharmaceutical, e-commerce, telecom, film distribution, cab services, blockchain, etc. Several studies have been brought out for advocacy. It has also reviewed important mergers and acquisitions which shaped India's economy including recent ones of Zee-Sony, PVR-Inox, Adani-Holcim, HDFC-HDFC Bank. Several regulations have been updated for market needs. We can expect several major changes in the regime post enactment of the Amendment Bill.

Policies that you believe should be undone or revised for a better competitive environment in India?

According to the preamble of the Act, "*keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in market, in India, and for matters connected therewith or incidental thereto*", it is important that the various amendments and evolving jurisprudence keeps in focus the main objectives, namely, economic development of the country, as also promoting ease of doing business for attracting domestic and foreign investments. CCI has taken several forward-looking measures in this regard, which are reflected in its various regulations like the green channel approval for M&A etc. In a dynamic market, however, this is a work constantly in progress.

Your thoughts on the recent Competition Amendment Bill and panel review of the same?

The Amendment Bill is a progressive legislation that will update India's antitrust regime. The amendments will also ensure our regulatory regime follows global standards. The Bill incorporates provisions like settlement and commitment, expanded powers of DG, additional lesser penalty provisions, recognition of hub and spoke cartels, lower deal value thresholds, shortened review timelines, etc.

The Bill was sent to the Standing Committee on Finance for review in August and it presented its report in December last year. While it agreed to most of the amendments, it suggested to specify the methodology of deal value thresholds, define local nexus, include cartels in settlement regime, maintaining status quo in merger review timelines, and examination of 'agents' to be in compliance with Evidence Act, etc.

What measures can be ensured to enhance inter-operational cooperation between CCI and other regulatory bodies?

Section 21 of the Act provides for any statutory authority to make a reference to the Commission, similarly Section 21A empowers CCI to make a reference to any statutory body with respect to issues concerned in the case. As decided in *Bharti Airtel v. CCI*, CCI has a follow-on jurisdiction of competition law and sectoral regulators have jurisdiction over the technical issues, like TRAI, IRDAI, SEBI, RBI etc. and the bodies do operate inter-operationally. Recently, the Central government also empowered ED to share information about economic offenders to some 15 agencies, including CCI.

Difference between CCI in 2010 and CCI in 2022.

Competition Act 2002 was enacted to replace the outdated MRTP Act 1969 which was a relic of old socialist era. The new Act sought to meet the needs of open and liberalised economy and promote competition in the market to boost static and dynamic efficiencies in the economy, promote entrepreneurship and safeguard the interest of consumers. While MRTP Act was toothless, Competition Act 2002 gave CCI huge powers.

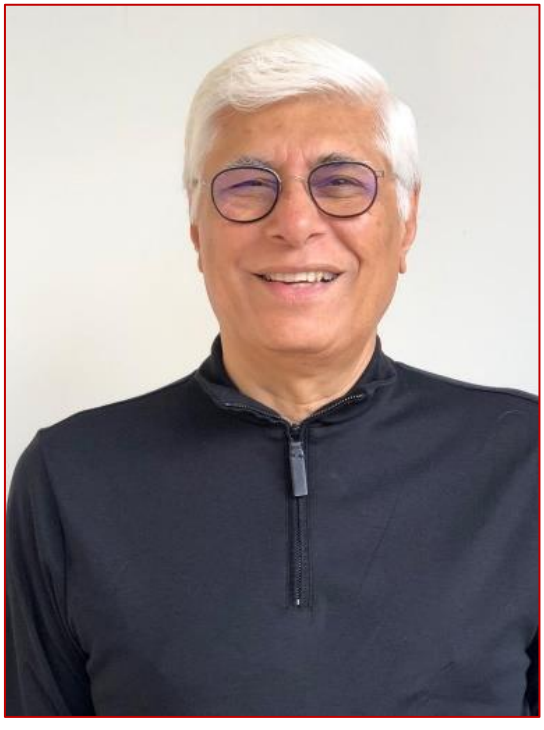
CCI of 2022 while essentially meant to achieve the same initial objectives, has to function as the market regulator in the new age market with rapid digitization, modern and disruptive technological changes and uses of big data with network effects, leading to rapid emergence of dominance.

Your recommendations towards 'vision and goal' of CCI in 2023.

CCI as the key market regulator has come a long way during the last 13 years and has won global accolades. However, with the changing contours of the market and new technological developments buoyed by modern tools like AI, cloud computing, machine learning, quantum computing, virtual reality and augmented reality, block-chain, Internet of Things (IoT), new algorithms etc. CCI must remain constantly on edge and update its tools to handle these developments to achieve its objectives. It must also keep abreast of the global developments and stay attuned with emerging jurisprudence. In addition, it should use its power of advocacy extensively for a large country like India to constantly update the various market players.

"Compliances have already become automated, future transactions will be driven by smart contracts and even much of the litigation will be AI based": Nishith Desai, Founder, Nishith Desai Associates

From building and raising an international law firm to learning and growing every day, Mr. Desai is a leader who many in the fraternity look up to. "Nishith Bhai", as fondly addressed by his entire team at NDA, shares his thoughts on leadership, capacity building and most importantly importance of research and intervention of technology in the law fraternity.



Mr. Nishith Desai is the founder of research & strategy driven international law firm, Nishith Desai Associates. A renowned International Tax, Corporate & Technology lawyer, Mr. Desai's interest spans a wide spectrum of law, society and ethics. With a keen interest in technology, he has remained ahead of the curve by actively driving legal and ethical research into emerging areas such as blockchain technology, autonomous vehicles and CRISPR gene-editing. Mr. Desai has been invited by the Government of India to help formulate a regulatory policy governing crypto-assets. He has also pioneered innovation in the Financial Services sector and advised the Government of Mauritius and the Government of India in launching their respective offshore financial centers.

What is at the core of NDA in context of establishment model and unique proposition?

At the core, NDA is a research-driven law firm providing strategic legal, regulatory and tax counsel to clients which are or aspire to be global. Our mission is to be trusted advisors to our clients and help them in complex and high value transactions or litigation, rescue them from crisis. While performing our mission we seek to experience the joy of changing the world around us – for the better.

What sets us apart, is our 'Purpose'. We're not just a unidimensional firm but a platform. We have 3-dimensional purpose- (1) We exist to innovatively deliver complex work for our clients (2) to build next generation of socially conscious lawyers and (3) to shape the future of law. All three have equal weightage. Our Mission, Vision, Values, Strategy and Structure are all built to deliver our 'Purpose'.

What are the attributes that you look for before hiring and how do you manage to retain good leaders in the firm?

We look for traits of Level 5 leadership which is about being competent, humble and inspirational and culture is very crucial component. You may like to refer our case study -Management by Trust in a Democratic Enterprise- published by Wiley in the US. The study explains the leadership model we've built over the period of time (The study is available here).

As stated earlier, more than a firm, we are a platform to create Visible Experts (for more information please refer here), a term coined by our Board of Trusted Advisors member Dr. Lee W. Frederiksen, who's a world-famous consulting and management guru.

Allow me to put it this way - NDA is about Freedom with Responsibility and Accountability. We know that professionals across all the world love freedom. Hence, our policies are framed around this principle. For example, we scrapped leave policy and individual business targets because we know lawyers enjoy research, academics and thought leadership. They like to create new age jurisprudence and apply them in cases they are working on to solve clients' problems. It makes their career fulfilling.

We have Continuing Education (CEs) class every morning between 9-10 am (which by the way I too have to attend) where we discuss current developments and leadership skills. With our focus on research and innovation, we create high value for our clients in shortest possible time. That helps us to do more in less time and balance our professional and personal lives. In addition, we have good diversity too.

Generally, 90% of our people leave office by about 6 pm. But productivity is very high. In 2023, we implemented 3 days hybrid-work policy. We have very high-quality global clients. We have policy not to poach people from other law firms and we believe that we are in the profession of law and not in the business of law. People come to us with passion and work with missionary zeal. A distinction which is blurry but important to be cautious of. Also, we have more edu-retreats and lots of fun. All these are the steps taken to create 'joy' in whatever we do.

Making leaders in any profession is critical. How does NDA crafts capacity building programs to transform its team members as a future leader?

We shape the future we want! In our CEs we train our people on inverted T model. A model, as per which one should have expertise in one or two practice areas but basic knowledge of others too. From the inverted T, now we have moved to horizontal H model, where not only the lawyers should be specialist in a practice area and broadly know the other subjects but also should have awareness of people and process management, culture, marketing and other skills to allow them to grow as a better person.

In this digital era with intervention of AI and other technologies do you also believe that AI has the potential to replace human force substantially?

Indeed, Chat GPT like technologies will reduce dependency on white collar workers. Compliances have already become automated, future transactions will be driven by smart contracts and even much of the litigation will be AI based. Lawyers' role will move to crisis management, strategic advice and ethical issues. Talking of *Imaginarium AliGunjan* – it is our special initiative, dedicated towards stimulating and cultivating the imagination. It is an apolitical platform for world leaders and global thinkers - to discuss, debate and find solutions to the big challenges faced by the planet, in a collegial and

constructive manner, putting aside narrow self-interest. And hence, if you have an idea to change the world for better – let's sit together and ideate on how we can give a happy world to our younger generations. For more, you may visit https://aligunjan.com/.

In the world where everything with a high value price tag is valued, partners focus on heavy briefs and long billable hours, how do you manage to simultaneously brew research which does not carry monetary value?

We invest hugely in research (Please see compilation of our papers here) and innovation in the legal field. We have become kind of a venture capitalist in the domain of research in the emerging areas. We do long term trend assessment and forecasting about technological, social, political, and economic developments and visualise today the furry of strategic, legal, tax or ethical issues. We invest significant time, money and energy in doing this so that when the time comes, we can help our clients and regulators take necessary steps.

What is the journey of Nishith Desai Associates

I don't want to bore you with a long list of our practice areas. Suffice it to say that we have been priceless to be recognised globally as prominent law firm by various research guides, Financial Times Asia's most innovative law firm continuously for 5 years. Our dream has been to be a 'role model' for other law firms globally. Ultimately, we aim to be a socially conscious organisation. I am humbled to say that it has been satisfying and fulfilling journey.

You have been a mentor, Guru and an inspiration to many. Who made what Nishith Desai today is?

I learned a lot from Nani Palkhivala - a colossus of the Indian bar, my true mentor.

ASSOCHAM being an industry representative works closely with government, industry bodies, corporate houses, law firms, students etc. Any thoughts and message to our stakeholders?

ASSOCHAM is a legacy organization. One can always re-invent oneself. We all should find our new age purpose, create new vision and mission aligned with sustainable growth.

"Ad hoc arbitrations are losing sheen and institutional arbitrations are the way forward": H. S. "Bobby" Chandhoke, Senior Partner, DSK Legal

The interview features the doyen of dispute resolution in India with more than 30 years of rich experience. A leader, a mentor, a jack of all the trades who happens to also master a few of his trades. Mr. Chandhoke in the interview speaks about his journey, his experience, his thoughts on various facets of law and law firm.

A seasoned commercial disputes specialist, Mr. Chandhoke has over 30 years of experience in handling both ad-hoc and institutional commercial arbitrations, including those conducted under the ICC, SIAC, LCIA and DAC rules.

Mr. Chandhoke has been involved in several domestic & international Arbitrations as the lead counsel, and has extensively dealt in matters of interim reliefs, emergency reliefs as well as recognition and enforcement of foreign awards has advised clients in relation to various aspects of Bilateral Investment Treaties & Agreements, including arbitration. He served as an expert witness in widely reported investment arbitration against India.

As a litigator, he has handled cases in almost every area of the law, including landmark cases, and his engagements are often multi-jurisdictional in nature.

Mr. Chandhoke has been ranked as a leading lawyer by Chambers & Partners, Asialaw Profiles, Legal500 and Who's Who Legal. He's also recognized as a Legal Icon by IBLJ A-list consisting of top 100 lawyers.

You are widely regarded for your sharp business acumen, a litigator who is appreciated for taking a 360 degree view of issues and a doyen of arbitration. What made "Bobby Chandhoke" that the legal fraternity knows today?

What I have learnt is every part of your journey contributes to who you are and what you become. I have had the good fortune of being part of a small family business for close to 9 years (immediately after my Class XII exam), graduating in commerce, pursuing law, joining the Territorial Army as a commissioned officer and serving for close to two years, followed by setting up a cable

TV business and then becoming a lawyer. None of the experiences I gained have gone waste. My business taught me the practical aspects of accounting and how to deal with a wide variety of people, the army experience instilled discipline with many management skills and all these skills I have tried to bring to the table as a lawyer and partner in a law firm.

As a first-generation lawyer, one does face challenges but you must approach these challenges with passion, a hunger to learn, honesty and integrity. As far as my future plans are concerned, they are as simple as they always have been, i.e, to remain a lawyer at heart and work hard for my clients who have trusted me with their matters and in addition try and help all colleagues on the way, as best as one can without expectation.

Hard work is a must have for everyone, but you need the blessings of the Almighty, your family, your friends, and peers as well as the clients to move ahead in life. And I have been truly blessed in this regard.

Retaining good leadership is an important task that seems to be a sour nerve lately in most of the tier one firms. What is your way forward to it?

To be a good general, you must first be a good soldier. So, try and lead by example and try to always remain ahead of the curve. A fellow colleague will leave you if they feel that you have nothing fresh/new to contribute. So, keep your knowledge current.

What may one look at while hiring is, if he/she is a good team player? Do they have the hunger and passion for law? A rocket scientist is no good if he/she is not a team player.

2022 has been a year of some major changes for you and your team. What were the challenges and how did it craft out for you and the people who chose to join you?

Change is the only constant in life. Sometimes you have to make hard choices. Yes, there are perceived challenges in any transition, but nothing that can't be overcome with team spirit and bonding.

Our change is working out well and we are blessed to be in the company of likeminded people. The Gita says "*All Glory Comes From Daring To Begin*", and team is merely following this.

How has the face of arbitration changed or evolved post pandemic?

Well, for all practical purposes, we have learnt that VCs are an effective way of conducting arbitrations including cross examinations and final arguments. So "Green" arbitrations may be the way forward. There is now a greater stress on written arguments, and the oral arguments are becoming concise. Courts are by and large not interfering with the awards passed. Ad hoc arbitrations are losing sheen and institutional arbitrations are the way forward. Mediation is one area which will increase in the times to come.

Is there a scope of arbitration in regulatory sectors such as competition law, power, insolvency etc in your view?

Arbitrations are normally the product of disputes in a commercial agreement. These are certain areas of practice which are sanctioned/regulated by law irrespective of the commercial agreements. Hence arbitrations in those areas, where there are sectoral regulators, may not be feasible unless the respective legislation itself provides for it under specific circumstances.

What are your thoughts on focus areas where the legislative/ administrative/ judicial needs to stress more to make ADR the first instance platform for resolving disputes?

I would say ADRs should be stressed in disputes involving state/ government/ PSU's/ banks/ financial institutions. This will save the exchequer a lot of money which may assist all citizens in the grander scheme of things. However, to do this, it ought to be ensured that bonafide and honest attempts by a public servant to settle disputes is not met with criticism or a CVC action and at the same time some "status quo/standstill" type of provisions should be brought into effect so that no party takes advantage of the time it takes in the ADR process.

How is your relationship with your clients. How do you engage with them?

Very difficult question to answer! While I believe I have a good relationship with all the clients, it is difficult to guestimate what they think of me! My approach to a client is again very simple which is an honest, truthful and an empathetic response to their problems. I believe a client need to be informed of the truth (howsoever bitter it may be). Rather than agreeing with what it may want.

Every lawyer's aim is to be a trusted advisor, and mine is no different. Be available, be honest, render informed advice, read the clients brief well, respect your client and his work this is my mantra for a good client relationship.

Conventionally the teams in various law firm work on "incentive or fear-based model", however, with the brief research that we could do, it appears that your team works on "discipline and respect for their leader" based model. How do you manage to build a team as strong as it is today?

I would like to think that our teams work on a mutual respect model. One needs to respect an intern and his/her views as much as one would a senior partner. Ours is an open-door policy, with no hierarchy coming in the way of a discussion. All views on a matter are welcome and must be at least discussed and "logiced" out, though the buck will stop with the senior most member. Merit, hard work and loyalty to the team/Firm must be rewarded, and that too publicly.

ASSOCHAM being an industry representative works closely with government, industry bodies, corporate houses, law firms, students etc. Any thoughts for our readers?

I believe no industry, or its leader wants to fall foul of the law. In many areas, the lines are grey and here it is imperative that the legislator or the regulatory body must come out with guidelines and a definite path forward. There are newer areas of law evolving and not only the students and the lawyers, even the judiciary need to be kept abreast of these changes and the practical aspects relating thereto. So ASSOCHAM can play a role in bringing all stakeholders together to discuss areas where it is felt there needs to be clarity in the law, or even a change in law, so that representations may be made and consistently followed up. Media too can play a good and positive role in this.

Interviews

Lawyer's Insight

"The most important attribute of a successful partner is the ability to internalise pressure without passing it to the team and lead from the front": Siddharth Srivastava, Partner, Khaitan & Co.

A seasoned Partner with diverse experience in banking and finance. An Alumni of Columbia Law School, Mr. Siddharth gives his valuable insight on various developments in IBC and its interface with other legislations.

Siddharth Srivastava is a Partner in the Banking and Finance / Restructuring and Insolvency practice group in the New Delhi office. Over the past years, he has extensively worked for leading banks and financial institutions and advised clients on syndication, debt restructuring, project finance and structured finance matters. He has also advised clients in the sphere of insolvency resolution process in various capacities such as counsel to resolution professionals, representative of financial creditors and operational creditors and advisor to investors / bidders.

We would love to hear about you and your journey so far.

My journey in the field of law started from the National Law Institute University, Bhopal (NLIU) where I completed my B.A LL.B. (Hons.). Post completion of my course in NLIU, I worked with ICICI Bank Limited and the IL&FS Group, in the initial days of my legal career. After working for a couple of years, I decided to pursue Masters of Law (LL.M.) from the Columbia Law School, New York. I returned to India after LL.M and worked with Luthra & Luthra Law Offices, Delhi primarily in the banking & finance, project finance and infrastructure projects practice. After a fruitful stint at Luthra, I got the opportunity to lead the Banking & Finance practise at Linklegal. During my stint at Link, I also established the restructuring & insolvency practise at the firm. In Feb 2020, I joined Khaitan & Co. as an equity partner to focus on banking & finance, project finance, restructuring & insolvency, private credit and debt capital markets practice.

You have many tiles, awards, recognitions under your name. What sets your practice apart from your counterparts?

First, I would like to show my gratitude to all my clients who have always appreciated my work and made it possible for me to be distinguished

and recognised. I am also thankful to my seniors and mentors for all the guidance and opportunity given to me. Last but certainly not the least, a big thank you to my solid team which has stood by me all these years and have provided continuous support.

In my view, the most important aspect for growth of any lawyer is the comfort and the confidence that one can give to their clients. In this regard, timely and consistent delivery of quality work is essential. Further, considering the work-flow, efficient prioritisation of work is another vital quality that aids in effective management of work.

Having said that, I feel what really sets me apart from others is my ability to connect with the client and understand his business requirements. Also, I strive to give clear instructions to my team regarding the deliverables. This helps me offer the best possible strategic advice to the client.

Can you tell us about some of the major challenges that you encounter in the legal regime along with a way forward?

Legal practice is an ever-evolving practice as it is constantly changing and developing. It is therefore important for lawyers to keep themselves updated on all latest legal developments relating to their practice. Further, being a transactional lawyer, it is pertinent to have know-how of not just the legal aspects of a transaction but to also be privy and known to broad business-related issues in the transaction. This helps in one getting not just a better understanding of the transaction but also in ensuring efficient and effective servicing of Clients.

The most challenging deals of your career? And what sets them apart from any other deals?

I would say my first insolvency deal where I was acting as the counsel for resolution professional was perhaps the most challenging one. What made the deal even more interesting, was the fact that it was one of the first insolvency deals in the market (being one of first of RBI's dirty dozen matters). We created practices and provided opinions on matters which had no precedent. It was a great learning experience which ultimately paved way for future matters.

How has your experience been working under the tenets of the IBC, 2016?

Considering the advent and development of Insolvency and Bankruptcy Code, 2016 (IBC) in the past few years, I got the excellent opportunity of working on various big-ticket insolvency matters in India. I have had the opportunity to advise resolution professionals, liquidators, bidder/resolution applicants, lenders, etc. in various matters. Working on IBC matters has been an exciting experience considering that insolvency related laws have been evolving and requires one to be fully aware of and updated. The most enriching experience about working on IBC matters has been the process of understanding and being involved in IBC practice since its inception and to see the jurisprudence develop over the years.

What was the most difficult leadership challenge you have faced while working amid the covid crisis?

Most challenging task as a leader during covid crisis was to keep the team motivated. It was extremely important during that time to be mindful of the mental health of the team and give them enough comfort and space. I believe I was able to provide the team enough support to help

them navigate through difficult time while working on matters.

The IBC regime in India has evolved tremendously in a short span. What is more that can be done towards government agenda of ease of doing business.

India's position on the global Ease of Doing Business Index has drastically improved over the years since the inception of IBC regime. The IBC regime coupled with other existing recovery regimes provide multiple avenues to the lenders to explore for recovery of their debts.

However, one of the major challenges encountered by lenders while exercising their rights under the various enactments is the delays of courts/ tribunals including DRT and NCLT in disposing of matters resulting into erosion of asset value of the borrowers, even though the said regimes provide for timebound and speedy enforcement mechanisms. In this regard, as a way forward, it is pertinent that the government ensures that relevant courts and tribunals are strengthened enough (in terms of infrastructure and capacity building) and made more efficient to handle such matters swiftly. Timely resolution of assets and effective enforcement of rights of creditors is the need of the hour to give a further fillip to India's ranking in ease of doing business.

Your thoughts on business landscape in India on global scale.

India is amongst the fastest-growing economies in the world. Despite the repeated COVID-19 pandemic waves, India showed a strong economic performance to overcome the United Kingdom as the 5th largest economy in the world. India's Gross Domestic Product (GDP) is growing exponentially and is expected to surpass $7 Trillion by 2031. It is also predicted to become the world's third largest economy within this decade.

The momentum to India's economy is expected to be driven by exponential growth in various sectors. The impetus in the manufacturing sector could be attributed to Government's increased focus on tax reduction, infrastructure development and investment incentivization. Similarly, energy sector has benefitted from the targeted focus of the Government by introducing schemes towards achieving domestic renewables capacity target of 500 gigawatts (GW) by 2030 and the net zero emissions by 2070, etc.

Your thoughts on Interplay of competition law and IBC.

The interplay between competition law and IBC is critical. The provisions of IBC clearly provide that that in case a resolution plan contains provision for combination, the resolution applicant shall be required to obtain approval of Competition Commission of India ("CCI") under the Competition Act, 2002 prior to approval of said resolution plan by the committee of creditors.

The intent of the lawmaker in having the above provisions in IBC is well understood as it is important for CCI to ensure that there is no abuse of dominance by the parties because of such combination under a resolution plan in terms of IBC. While at the time of insertion of the above proviso, there were certain concerns specially with respect to timelines considering IBC is a timebound process and CCI approvals may take time even beyond approval of resolution plan by the committee of creditors, the Government has introduced the 'Green Channel' approval criteria, by way of which, combinations meeting certain criteria are deemed to be approved upon filing of a valid short form (Form-I) with the CCI. In such a case, notifying parties are required to self-assess that the Green Channel criteria have been met

and accordingly file valid and complete Form-I, along with relevant declarations. Upon receipt of such filings CCI shall issue 'acknowledgement' considered as 'deemed approval' of CCI.

The Government has also introduced the Competition (Amendment) Bill, 2022 ("Bill") seeking to amend the Competition Act, 2002, to inter alia regulate mergers and acquisitions based on the value of transactions (more than Rs. 2,000 Crores) and to reduce the timeline for CCI approval from 210 days to 150 days on such transactions.

The above efforts of the Government shall aid in aligning the requirements of IBC vis-à-vis the Competition Act.

Finally, what makes a good partner in a law firm?

It is a balance of everything. A good partner and leader should be commercially savvy with razor sharp legal skills whose larger goal is to grow the practise while giving abundant opportunity to the team to grow and develop independently. Most importantly, one of the most important attributes of a good partner is the ability to internalize pressure without passing it to the team and lead from the front.

"The amendments in both Competition Act as well as the IBC show that the legislators are aware of the roadblocks and are aiming to provide an impetus to growth": Nipun Vaid, Partner, Saraf & Partners

Vaid, the incredible lawyer that she is, shares nuances of M&A and Competition Law. Carrying a dynamic experience on her shoulders she speaks her thoughts on women participation in the fraternity and her journey as a lawyer.

Nipun advises clients on a broad range of commercial transactions, particularly on cross-border and domestic mergers, acquisitions, joint ventures, strategic alliances, restructuring including SARFAESI and IBC regulations, private equity investments and associated regulatory work. She has represented clients across a wide range of industries and different stages of transaction including venture capital, private equity, strategic investments as well as exits through unlisted and listed routes. Her work experience includes strategic advisory and assistance with deal discovery, due diligence, drafting, negotiation, transaction closing and post-closing advisory, general corporate advisory on operational issues, dispute resolution strategy and advise, exits, and restructuring.

From interning under Justice D.Y. Chandrachud to becoming a partner, you have a wide experience. We would love to hear your journey.

I am a first-generation lawyer. The curriculum at NLSIU encourages students to explore the various forms of practice of law through internships which was very helpful in gaining first-hand experience across fields and in gauging my interest in them. Following graduation, I worked as a management consultant with The Boston Consulting Group which provided a comprehensive insight into the mind of the management of a company. I chose to focus on the M&A and Private Equity space as a lawyer since it provides a good mix of legal and business exposure and expects the counsel to think of the business as a whole when considering legal concerns.

What are your trades and specialization?

I have primarily worked in the M&A and Private Equity practice area including transactions under the IBC and the SARFAESI Act. This profile usually requires the counsel to evaluate concerns across specialised practice areas such as intellectual property, antitrust, labour laws, sector specific

compliances as well as having a view on current and future litigation proceedings and risks.

How was 2022 for you?

2022 was very memorable for me. It was extremely inspiring to see Saraf and Partners come into existence and realize the vision set by Mr. Saraf. Over the last 12 months, it has raced to the top to establish itself as one of the top tier law firms in India and a trusted advisor to its clients and I am extremely proud of my colleagues who have all worked very hard to make this happen.

You are an alumni of NLSIU. It's one of the places where "law & literature" found its significance in India. Do you also have inclination towards literature or art? Also do tell us about your law school days.

Both NLSIU and the Indian legal community in general have a wonderful mix of hobbies and interests that encourages a balance between study and practice of the law and refinement of one's interests beyond that. NLSIU hosts and participates in a variety of events ranging from moot courts, literature fests, debates, cultural and art fests, music fests, and theatre such that there is something for everyone and it's very hard to sit back and not participate. At NLSIU, I was an active member of the "Cul Comm" and following graduation have maintained an interest in reading and painting. In terms of literature, not only does one develop a habit to read as a lawyer but the NLSIU community further pushes it since there are many prolific writers with interesting takes on matters ranging from law to movies to fiction to general politics which are always a good read.

While the admission of girls in law college might reflect decent numbers, the representation suffers at KMP and other senior positions in law firms. What are your thoughts on the same?

Longevity of career for women is a concern across most professions. Generally, the legal community in India has been fairer than other sectors to women when it comes to compensation and access to opportunities. This is why we see a good balance between the genders at law schools. Over the last few years, I have also observed an increased recognition by employers that women do not need vastly different set-ups in order to achieve the desired balance in their responsibilities. As a result, small but more thoughtful changes are now being made (such as flexible working hours, remote working, on-site child care options, ability to move from client facing to internal roles and vice-versa etc.). I am hopeful that these will result in meaningful support and thereby a sustained retention of women in all stages of the workforce.

You have an extensive experience in M&A and IBC. What are the major challenges that you feel should be addressed by the government and how?

The potential for delay in completion of legal proceedings continues to be a big concern. Whether it is the CIRP or mergers or even relatively straightforward approvals from regulators, there is always a bit of uncertainty on timelines which can act as a dampener on deal enthusiasm. I think the recent IBC amendments have attempted to address some of these concerns by highlighting the need to get assets into the hands of the successful RA faster and with maximum value preservation. The re-jigging of timelines to this effect has been a good start and I hope we see it culminating into faster conclusions. The momentum can be further built

by increasing strength of the NCLTs so that they can take on additional matters not just under the IBC but in general under the Companies Act as well.

M&A & Competition law go hand in hand. They also have a major impact on how business is conducted in India. With "ease of doing business" as a prime goal of MCA, what are the way forwards to current challenges, if any.

Someone recently described competition law as the life-force of an economy, and I agree with that sentiment. It basically defines the landscape within which all businesses operate and the CCI has definitely made strides towards creating a more level playing field. The Competition Amendment Bill, 2022 is a step in the right direction but needs rethinking on some of the proposed changes. Additions such as reduced timelines for approvals, cognizance of unique challenges of a primarily digital business and relaxations for transactions in the listed company space are definitely a positive move for "ease of doing business". However, changes such as inclusion of transactions with value exceeding INR 2000 crores for entities having substantial business in India will not be effective without a more strictly defined scope of "value of transaction" and upfront clarity on what constitutes substantial business in India. Similarly, more practicalities need to be considered before expanding the scope of "Anti Competitive Agreements" to clarify what active participation means. Without these clarifications there is potential for delays in investments as parties either engage in long discussions on applicability or adopt a "wait and see" approach.

With new competition amendment bill in place and ever evolving changes in the IBC, how does 2023 looks to you?

It looks to be a good year for Indian businesses. The government had set a very high target for the economy by 2025 and I think we are all geared up to reach as close to it as possible. Business laws generally see frequent revision in all growing economies and India is no different. The amendments in both Competition Act as well as the IBC show that the legislators are aware of the roadblocks and are aiming to provide an impetus to growth. In general, to future proof laws as well as cover for all potential scenarios especially in case of complex business areas such as IBC and Competition Act, the statute will necessarily begin with a wide wording and then achieve refinements via industry inputs, amendments, clarificatory notifications and judicial decisions. We are at that stage with the IBC and Competition Act and it seems that the legislators are listening. Therefore, I am confident that we will end up with a much more tightly constructed amendment that achieves its purpose.

Any concluding thoughts and message to our readers?

The challenges presented by the last few years have forced all of us to reconsider traditional business models and adapt. This ranges from moving away from globalization to localisation from supplies to automation to increased recognition of the boost provided by remote working to employee morale. This is a good time to re-evaluate business set-ups and existing contracts and arrangements to see if there are changes that need to be made to capitalise on some of these advancements including re-thinking procurement, employee set-ups, marketing access and digital presence.

OP-ED

Fair enough: should digital platforms contribute towards Internet Service Providers' network investments? Internationally, 2022 has been an important year in the 'fair share' debate

-Sean Kennedy, Andrew Williams-Fry and Chiara Garbellini, DT Economics

At the beginning of 2022, the European Commission (EC) committed to developing a so-called 'fair share' regulatory framework for the European Union, looking to make digital market players benefitting from the digital transformation contribute towards the cost of internet connectivity. Shortly after that, leading European telecoms operators Telefonica, Vodafone, Deutsche Telekom and Orange co-authored a letter supporting the EC's commitment and urgently calling upon legislators to introduce rules at the EU level. This view was later supported in a public statement by a much wider group of European telecoms operators. Following that, a report commissioned by the European Telecommunications Network Operators' Association (ETNO), proposed that content and application providers (CAPs) be required to negotiate a 'direct compensation' fee with internet service providers (ISPs).

This debate is growing internationally, and precedents are being set for other markets. In 2016, South Korea implemented new rules for IP Interconnection requiring ISPs to charge for the traffic they receive (a 'sending party pays' system). This, combined with the absence of net neutrality regulations, allowed ISPs to charge these costs to local CAPs. In parallel with the ongoing litigation between Netflix and SK Broadband, several draft bills which seek to extend these rules to international CAPs are currently being debated in the country.

However, the debate in Europe seems to be shaping up differently. In October 2022, the Body of European Regulators for Electronic Communications (BEREC) published a preliminary study on the ETNO proposal and the UK regulator Ofcom issued a consultation on its review of net neutrality. Neither found evidence that a direct compensation mechanism would be justified given the current state of the market.

Why is this becoming so critical now?

Since the 2010s, firms such as Facebook, Amazon, Apple, Netflix, Google and Microsoft (so-called 'Big Tech') have been growing dramatically in popularity and have transformed the ways in which billions of people worldwide communicate, connect, shop and entertain themselves. This has also had transformational impacts on the telecoms sector, most notably since mobile data surpassed voice traffic globally in 2009 and has been growing at double digits annually since.

Network providers have been supporting this evolution by upgrading their networks from the legacy copper and 3G-based solutions of the early 2010s, to more advanced networks including fiber to the home (FTTH) and 5G. However, with data demand pressures increasing, substantial additional investments are needed. With Big Tech firms now estimated to account for almost 57 percent of network traffic (according to application and network development company Sandvine), there is an emerging question as to

whether they should contribute towards this spend.

A proposed framework for economic assessment

Different arguments in favour and against regulatory intervention in the market in the form of a direct compensation mechanism have been put forward by ISPs and Big Tech firms respectively (see Table 1).

Table 1. Arguments for and against a direct compensation mechanism

For intervention (ISPs' arguments)	Against intervention (Big Tech arguments)
▪ Players in the market face asymmetric bargaining power: increasing consumer demand for data and traffic volume from Big Tech squeeze the ISPs' business model ▪ ISPs face ex ante regulation and have limited flexibility to increase retail service prices (unlike Big Tech so far) ▪ Compensation by Big Tech will advance Europe's connectivity goals, eg FTTH and 5G full coverage by 2030	▪ Big Tech firms are investing heavily in international network infrastructure (eg subsea cables) ▪ Big Tech effectively drive the revenues of ISPs by increasing demand for data ▪ A direct compensation mechanism is a threat to net neutrality principles

As the debate progresses, regulatory authorities are also grappling with a number of key questions, which will need to be addressed with more detailed analysis (see Table 2).

Table 2. Key questions to consider as part of the debate

Key area	Questions
Economic impacts	▪ What are the potential harms from the current situation?
Evidence	▪ Who causes traffic? Is it CAPs or ISPs' consumers? ▪ Does additional traffic create incremental costs for ISPs? ▪ Do CAPs 'free ride' on ISPs' investment?
Existing regulation	▪ How would any intervention on 'fair share' be squared with existing net neutrality rules?
Interventions	▪ How would any solution work in practice?

What happens next?

No intervention in the context of the fair share debate has been agreed in Europe yet, and initial views from Ofcom and BEREC seem to be leaning towards the status quo. Furthermore, a report commissioned by BNetzA in Germany identified a decline in diversity of online content and other expected detrimental effects to consumers within the South Korean market. This may not make the South Korean approach on this issue desirable in other markets.

In addition, there are less interventionist measures that could be considered, such as enhanced collaboration between ISPs and CAPs,

aimed at optimising network efficiencies and reducing data wastage (and costs) as a result.

International parties are following developments on this issue closely and await key milestones in the following months, including responses to the Ofcom consultation early next year and a consultation from the EC in the first half of 2023. This will further inform the direction and potential outcomes of this debate.

About the Authors:

Sean Kennedy, Partner with DT Economics, is a telecoms regulatory specialist with over 26 years of wide-ranging international commercial and regulatory experience in public and private sectors. He has published extensively on telecoms public policy issues and has held senior roles at CEG-Europe, KPMG, Mott Macdonald, Ovum, Orange (UK) and Vodafone (in Australia, New Zealand and the UK). He also worked for the Treasury in New Zealand and Australia. Sean is a Board Director and Treasurer for the International Institute of Communications.

Andrew Williams-Fry, Associate Partner with DT Economics, is a regulatory economist and adviser on government, public policy and consumer affairs. He has 20 years of experience as a regulator and consultant. He has held senior executive roles at Thames Water, Gatwick Airport, NATS air traffic control and Mastercard, developing corporate and regulatory strategy. He has advised on regulatory and competition issues in financial services, aviation, payments, water, rail, crypto currencies, road transport, postal services and utilities sectors, as well as merger clearance and anti-competitive abuse cases and regulatory appeals. Andrew is currently a Board Member of the UK Government's Regulatory Policy Committee and an adviser to the Office of Rail and Road, the UK transport regulator.

Chiara Garbellini, Principal Consultant with DT Economics, advises clients across industries, with a focus on network companies operating in the payments, telecoms and energy sectors. She has worked directly with company boards and their advisors to respond to regulations and policies. Chiara also previously worked as an Economist at GSMA, where she provided internal economic consulting and research on a variety of public policy and regulatory issues, particularly in the areas of spectrum and mobile money.

Leveraging Corporate Governance for building sustainable MSMEs

- *Dr. S.K. Gupta, MD, ICMAI Registered Valuers Organization Group CEO*

Abstract

Corporate governance (CG) is the term used to describe a set of internal policies, rules, and procedures that a business regularly adheres to in order to make sure that it functions in a fair, equitable, and proper manner for the benefit of the business, its management, and its stakeholders. It is virtually always considered in relation to large publicly traded firms. However, it is imperative that MSME's should also follow sound CG principles and procedures. One of the reasons is because, in the majority of the countries, they are responsible for creating jobs and serving as major economic engines. However, a lot of SME companies do not always pay attention to the ideas of CG. The majority of them even lack the framework and understanding needed to create and advance it. This paper addresses how CG relates to MSME businesses. It explains the processes involved in establishing good CG architecture in MSMEs, such as well-designed and implemented policies, procedures, and processes, risk management systems, strategic planning, transparency, and disclosure, etc., and provides guidance for implementing CG structures and mechanisms in MSME's.

The Perspective

The MSME (Micro, Small, and Medium Enterprise) sector forms the backbone of the Indian economy, providing employment to approximately 120 million people and accounting for 45 per cent of overall exports. With 20 per cent of such enterprises being based in rural India, it is also seen as a major driver for rural entrepreneurship and economic inclusivity. The MSME sector is characterized by limited resources, which also makes them vulnerable to various business risks. It has been established in research studies on MSMEs that understanding the crucial roles of effective leadership and robust CG is necessary for a business to succeed. Although improved CG of MSMEs is unquestionably a key component of their success and is favorably associated with both growth and long-term sustainability, it is not a solution to every issue that MSMEs encounter.

Corporate Governance

Corporate Governance is a very broad concept. It involves running the company ethically while upholding the interests of all stakeholders. Corporate governance has grown in importance around the world during the last few years. There is growing awareness that good corporate governance not only reduces the risk of crises but also supports long-term economic growth by improving business performance and facilitating access to outside finance. No matter the size of the business, whether it is a proprietary, partnership, or private limited company, corporate governance is equally important.

By putting in place an appropriate CG system, MSMEs are able to attract more investment, highly skilled employees, and build long-term, mutually beneficial partnerships. The global

trend toward using CG solutions in MSMEs is growing. Such a strategy aids MSMEs in adopting not only distinct CG policies or procedures, but also facilitates overall attractiveness of MSMEs to investors and stakeholders, as well as enhance its potential for growth and the ability to withstand competition. A good CG structure takes time to implement. It requires deliberate, purpose and action driven activity.

Literature Review

Dube et al (2011), while small businesses lack governance and competency, large businesses have CG in place. Majority of the SMEs studied did not have a board committee, while some MSMEs did not have an idea about what a board committee was and very few MSMEs had external directors as researched by David (2015). Mahmood Shahnawaz in their study "Corporate Governance and Business Ethics for SMEs in Developing countries: Challenges and Way Forward" analysed the challenges faced by SMEs in developing countries. The Main challenges faced by the SMEs are access to domestic and international capitals, increase in globalization and dynamic Business Environment. The implementation of Corporate Governance will ease the processes of transparency, accountability and disclosure of timely material information. The paper provides a framework for implementing CG and guidelines for introducing it in MSMEs. In their study "Corporate Norm in MSME," Dube et al. (2011) examined the viability of establishing CG in the MSME sector and offered workable options based on the findings. The Study emphasized that the sector needs to be informed and an awareness has to be created about the future benefits of implementing CG.

Corporate Governance: A key imperative for MSMEs

A crucial element of corporate value generation strategy is corporate governance. MSMEs must begin running their businesses according to a set of guiding principles of corporate governance. Research studies demonstrate that well-governed businesses exhibit noticeably better long-term financial success and develop more quickly and sustainably. MSMEs may utilise greater governance as a primary value proposition to draw in investors. MSMEs should focus on the following key issues:

- **Strategic development:** Adopting a long-term strategy, making investment decisions, succession planning;
- **Control environment**: Formation of control mechanisms and accountability system for the implementation of strategic goals;
- **Formation of favourable relations with stakeholders:** Recognition of stakeholders, identification of their expectations and integration into the strategy.

Good corporate governance means the MSME board is providing an independent perspective as well as oversight to make sure that the interests of the stakeholders are being appropriately balanced with the day-to-day actions and judgments of the management team.

Dimensions of CG for MSMEs

It is important to note that today's MSME's are tomorrow's big corporations. Long term sustainability cannot be achieved without good corporate governance. By implementing Good Corporate Governance, MSMEs can be transformed from 'informal organizational form' to 'formal organizational form'. Following are the key dimensions good governance for MSMEs:

- **Transparency:** Transparency of financial statements through separation of company and personal finance, transparency of rights and obligations of employees,
- **Accountability:** Human resources function, marketing function, financial function and operation function
- **Responsibility:** business legality, waste management and Product Certification,
- Independency: Profitability and autonomy in managing the business,
- **Fairness:** Equal opportunity in a company career and a fair compensation system.

Implementing CG Mechanism in MSMEs

The MSMEs: small is beautiful.. Small may be beautiful, but small is not strong

Company culture is impacted by the "tone" of the top management, which in MSMEs is typically the owner. It is crucial to see how top management responds to constraints like budget control or earnings expectations. Therefore, top management (and the owners) should not only understand the company's long- and medium-term strategy and risk appetite, but they should also send out clear signals that they fully support the governance mechanisms, including the policies, and procedures in place, as well as the employees' honesty, integrity, and professionalism.

One size does not fit all, but the following are the recommended practices for progressively improving CG practices in MSMEs while bearing in mind that the implementation of good corporate governance is a gradual process.

- Corporate governance helps every business to scale in the most structured format and drives the company's growth. It is important to inculcate a careful composition of experienced board of directors with a common vision beneficial for both the company and the investors.
- MSMEs Partners' and shareholders' rights and obligations should be clearly set out.
- Delegation of authority should be formalized in writing defining the role of the management and specifying matters reserved for shareholders and the board of directors.
- Succession planning should be aligned with the MSMEs business objectives, growth and potential exit strategies of owners.
- All shareholders should be treated equitably and companies should establish clear lines of communication with their shareholders.
- An effective engagement mechanism to gauge the views of shareholders should be established.
- MSMEs may wish to set up an "advisory" board with no formal decision making powers but which offers its expertise and networks to guide and support the business
- A formal board of directors should be established with formal procedures.
- MSMEs should consider appointing independent board members
- New directors should undergo a tailored induction program
- The role of the board should be defined in clear terms. it should be ensured that it has the resources and receives the information it needs to fulfil that role.

- A professional MSME board with independent non-executive directors, meeting on a regular basis, should be responsible for monitoring and evaluating management's performance
- MSME Boards should undergo regular performance evaluation process and regularly review the composition of the board
- MSMEs should follow credible accounting practices from day one and utilize a reputable independent accounting firm to prepare a complete set of financial statements
- MSMEs should formally evaluate the effectiveness of the external audit and formulate policies on preserving the independence of the audit function
- MSMEs should establish a formal process for identifying significant business risks and the management should adopt formal control mechanisms.
- MSMEs should consider establishing an internal audit function.

Listed MSMEs and Corporate Governance

BSE launched operations of its SME Exchange platform with the first listing ceremony of BCB Finance Ltd on 13th March, 2012. By assuring regulation and organisation in an otherwise unorganised sector, the Bombay Stock Exchange (BSE) fosters an investor-friendly environment for MSMEs and increases the potential for SMEs to acquire funds from the public. CG requirements are outlined in Clause 52 of the Listing Obligations and Disclosure Requirements: Audit committee provisions are the same as for listed companies; Report of corporate governance to be included in annual report; 1/3 of the Board of Directors must consist of independent directors; 1/2 if the chairman is not independent. For the top 1,000 listed companies, SEBI requires the creation of risk management committees; however, there are no regulations in place for small enterprises. With limited resources at their disposal, many small businesses may view the setting up of risk management committees as an unnecessary burden. However, this is a short sighted approach, which leaves them vulnerable to risks and ill-prepared to face the challenges that can arise in pursuit of their business goals. While banks and investors are more inclined to favor organizations with a strong ERM framework in place, the implementation of ERM can increase their chances of raising money.

Conclusion

MSMEs are crucial to the economies of developing nations. The majority of SMEs still lag behind in terms of awareness among the enterprises regarding corporate governance. A strong corporate governance framework would result in transparency, improved business environment and protection of the investors. Implementing corporate governance structures calls for a strong commitment of the MSME owners and top management. Recognition of good governance principles and procedures is vital for the future sustainable growth of MSMEs. It is imperative that Indian MSMEs must adopt and implement CG structure and practices.

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CBDC: Powering the Next Generation of Innovation in Payments

-Shilpa Mankar Ahluwalia, Partner & Head Fintech, Shardul Amarchand Mangaldas

CBDC: a global discussion

Countries and central banks across the world have been working towards developing an optimal framework for the issuance and operation of a central bank digital currency (CBDC) that meets the requirements of their individual economies.

There have been several pilot projects and discussions across countries aimed at addressing some of the important issues that need to be tackled when designing a CBDC framework. While each country will naturally make its own design choices, a big advantage of a globally coordinated effort is inter-operability. Inter-operable CBDC platforms and operating systems across countries will allow for a completely new wave of innovation in cross-border payments.

Answering some fundamental questions

But first, let's answer two key questions: (i) what a CBDC is, and (ii) how is it different from physical paper currency and private cryptocurrencies.

A CBDC is essentially a digital form of paper currency. It has all the features of currency: sovereign backed, trusted, settlement finality, liquid but is issued in a digital only form. A CBDC is issued directly by the central bank of a country (much like paper currency), but because of its digital format, it eliminates the costs and risks associated with dealing in paper-based money.

The Reserve Bank of India (RBI) has indicated that, as is the case for physical currency, it will be the issuing agency for the eRupee, but banks and other intermediaries will be authorized to manage the operation, account keeping and verification of transactions.

Users will likely hold CBDC via a digital wallet maintained with an intermediary bank and transact directly from such wallet. How is this different from using a pre-paid wallet that many of us in India use today? A pre-paid wallet enables digital payment transactions but is represented by physical currency at the back-end. Any transaction from a wallet (as is used today) to another wallet or bank account will need to be settled between the banks of the payer and payee. Although today such a payment transaction is instant, there is a certain cost, time and risk associated with the settlement process. A transaction in CBDC, say between two CBDC wallets, is completed and settled simultaneously (given that there is no physical cash settlement that needs to match the payment transaction). This feature has the potential to lower costs, and effectively removes all settlement risk.

Also, a CBDC cannot be compared with a private cryptocurrency and the two operate in completely different spaces. A CBDC is a digital form of legal tender and has sovereign backing. A private cryptocurrency is not linked to any specific asset or commodity, operates on a decentralized blockchain and can potentially have multiple use cases. A CBDC cannot and

should not be viewed as a substitute for a private cryptocurrency.

The CBDC pilot in India

Both the Government and the RBI have supported the issue of an Indian Rupee CBDC (eRupee). In October 2022, the RBI released a Concept Note on Central Bank Digital Currency discussing a broad framework for the launch of India's first digital currency or eRupee.

The RBI has outlined several policy guiding principles that it will adhere to when developing an ecosystem for the eRupee. Three principles that stand out are: (i) the eRupee will, to the extent possible, mirror and strive to be as close to "cash" as possible; (ii) the launch of the eRupee will have minimum disruption to the banking & financial markets; (iii) financial inclusion is a key driver.

The RBI has indicated that the eRupee will be available for both retail (eRupee-R) and wholesale (eRupee-W) use. Many central banks in other countries have limited the initial use case of a CBDC to wholesale only (given that a retail launch requires much more planning and infrastructure). India is one of the first large economies to announce the launch of a retail CBDC.

The eRupee-R will be available to individual users for everyday payments can help power the goals of digitization of payments and financial inclusion. The eRupee-W will be used by banks for inter-bank settlements and has the potential to significantly reduce transaction costs by eliminating all settlement risk.

The RBI has launched a pilot for both eRupee-R and eRupee-W. The pilot for eRupee-W was launched in November 2022 where the use case was limited to settlement of secondary market transactions in government securities. The pilot for the retail segment (eRupee-R) was launched in a closed user group for customers and merchants.

The RBI has indicated that the eRupee will likely be inter-operable with the UPI payment rails, to be able to seamlessly integrate with the existing digital payments ecosystem.

Next generation of innovation

India has already seen tremendous innovation in digital payments (powered largely by the United Payments Interface (UPI) architecture), which is why, a question often asked is what is the real utility of a CBDC for India? A CBDC does have several benefits and use cases different from digital payment transactions that are backed by physical currency. These include lower settlement costs and lower settlement risk given the complete movement away from cash; elimination of costs linked to printing, management and transportation of paper money; and pushing the goals of financial inclusion.

The eRupee also has the potential to revolutionize cross-border payments (allowing for cheaper and faster transfers across borders). Today, cross border money transfers are expensive and take time which increases the degree of exchange and settlement risk. A CBDC based cross-border payment product could potentially solve for each of these risks allowing for real-time, cost-effective payments with zero settlement risk. This however requires integration with CBDC systems across multiple jurisdictions and will need some amount of

coordination among central banks across the world.

Almost all global financial institutions are looking at the blockchain as a platform to develop payment products. A CBDC will allow for the growth of blockchain based payment products or instruments. One such example is a securities issuance on a private blockchain linked to the eRupee, which again, has the potential to reduce costs of an issuance by minimizing the role of intermediaries and increasing certainty in settlement of transactions.

One of the most important use-cases of the eRupee will be the creation of a platform that can support innovation in financial products and payments. India is likely to be one of the first large economies to launch and operationalize a retail CBDC which places it in the unique position to be able to power the next generation of CBDC based product innovation.

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Ms. Shilpa Mankar Ahluwalia is a Partner in the banking & finance and corporate practice areas. She leads the FinTech group at the Firm. Shilpa has advised several companies on their FinTech related investments, product structuring and regulatory issues. She writes and comments regularly on FinTech related regulatory issues and has spoken at several Fintech conferences including the Mint Pivot or Perish FinTech Webinar, Global FinTech Fest organized by NPCI, FCC & PCI, VCCircle FinServ Summit, Legal Era GenNext Business & Law Conference, Mint FinTech Conclave, DLAI FinTech Summit, Financial Express Digital Currency Conclave. She has appeared on discussions hosted by the BBC India, Economic Times (Crypto TV), and the Business Standard, on cryptocurrency regulation. Shilpa has also spoken at the ET Tech – Rundown: Regulation Around Crypto and Axie Infinity & Blockchain Gaming hosted by Venture Intelligence on cryptocurrency regulation.

She was part of the committee that advised the Ministry of Finance on the Factoring Act that was notified in 2012. Shilpa has worked with USISPF to present before the FinTech Steering Committee, MoF re: impact of data localization requirements in India. She worked with the Data Governance Network spearheaded by the IDFC Institute to study data regulations in India and conduct a series of workshops for the Fintech community.

Navigating The Grey Areas: A Much-Needed Glance into Ethics in Arbitration

-Tariq Khan, Registrar at IAMC & Radhika Gupta, Student, VIPS-T

Abstract

Legal ethics are all about the conduct of the legal professionals, it includes the duties and responsibilities that are observed in a particular role. When we examine ethics in arbitration, we naturally talk about the conduct of arbitrators, but given the distinct nature of arbitration from court proceedings, we must examine the duties and responsibilities of the legal representatives and the parties as well. The basic features of Arbitration are speedy and fair resolution, confidentiality, party autonomy and neutrality, thus, ethical behaviour would be to protect these features. The ethical dilemma in this field of law arises out of the different school of thoughts of all the concerned parties of the arbitration. This article analyses legal ethics in arbitration from Indian perspective, and provides a comparative study with the Internationally acceptable rules and guidelines.

Keywords: Arbitration, Ethics, Arbitrators, Legal Representatives, Parties

Introduction

'Niti Shastra' is one of the oldest mentions of 'Ethics' found in Indian history, but the Indian legislations are yet to incorporate its precise definition. Black's law dictionary defines 'Legal Ethics' as, "Standards of professional conduct applicable to members of the legal profession."[1]. There's no straitjacket formula for defining ethics in arbitration. Common law, Civil Law and other jurisdictions may have different definitions for ethics, thus producing uniform set of rules or codes might not be suitable, but there is commonality of irreplaceable principles like principles of disclosure, impartiality, and independence.

What an "Umpire" is to Cricket, that is an "Arbitrator" to arbitration. Their primary obligation is to remain impartial and independent. Section 12 of the The Indian Arbitration and Conciliation Act, 1996 (hereinafter referred as 'The Act'), provides the grounds for challenging the arbitrator elaborated in the Fifth and Seventh Schedule, it can be perceived that, following the laid down rules to avoid being challenged would be ethical behaviour. But who can be an arbitrator? Eighth Schedule added to the Act by Amendment act, 2019 was an attempt to provide qualifications and general norms for Arbitrators. However, it was repealed under the Amendment Act, 2021 for conflicting with principles of International Arbitration.

Lack of Complete Disclosure

Factors of disclosure

In arbitration, disclosure is the key. This principle includes disclosure of time available to take up the proceeding and prior involvement with the parties, both factors affect the outcome of the award. If the Arbitrator doesn't have adequate time to wrap up the proceeding, it would be

[1] 'Legal Ethics' *Black's law Dictionary*, (9th Edn. 2009)

ethical to refuse taking up the case. Similarly, if the Arbitrator has relations with the parties previously, it affects their impartiality and may lead to biased decisions.

An arbitrator can be challenged if there are circumstances that give rise to justifiable doubts as to their independence or impartiality, therefore the arbitrator is obligated to disclose in writing about such circumstances. This stance was reiterated by the High Court of Delhi in the case of Ram Kumar v. Shriram Transport Finance Co. Ltd.[2]. The court has ruled that the arbitrator's need to provide information under Section 12 r/w 6th Schedule of the Act is a mandate, not an option. Failure to disclose would invalidate the arbitral proceedings and the resulting award because the arbitrator failed to disclose a circumstance that would have justified cause to question his objectivity.

Qualification of arbitrator

Given the dearth of arbitrators, there may be times when an Arbitrator has multiple on-going cases, but they have not disclosed their commitments. To effectively deal with the situation, an arbitrator, who might not hold expertise in a particular conflict should refrain from taking up such matters, for e.g. An Energy law case should be taken up by an Arbitrator holding expertise and/or experience in the field.

The arbitrators may need assistance of a third person who may be an expert in a particular area, but the arbitrator cannot delegate their primary duties. In the case of Usha Martin Ltd. v. Eastern Gases Ltd., 2022[3] wherein the arbitrator had delegated the task of quantifying the award to a chartered accountant, the Calcutta High Court established that the arbitrator cannot delegate their duties to another person since the parties place their trust in the arbitrator to deliver justice.

Verification of disclosure

Even though, a disclosure has been made by the Arbitrator, there is still no true determination of their impartiality if there's no retrospective verification of their unbiased beliefs. To deal with this dilemma, Chartered Institute of Arbitrators (CIArb) provides Guidelines for Interviews for Prospective Arbitrators. These guidelines allow the parties to interview the potential Arbitrator prior to appointment, this opportunity allows verification of experience, conflict of interest and prior knowledge. The obligation of the parties as per guidelines is to ensure they do not disclose the material facts and information concerned with the case, while the potential arbitrators' obligation is to ensure transparency.

Under Article 11 of the 2017 & 2021 Arbitration Rules of ICC, an 'Arbitrator Statement Acceptance, Availability, Impartiality and Independence form' has to be signed by the arbitrator, this form allows the exchange of material information while giving the parties the right to comment over any information provided by the potential arbitrator in the given time.

Ethical conduct of Legal representatives

Legal representatives have the duty to ensure their clients are well-represented and receive speedy justice through arbitration. Unethical conduct would be if a counsel acts in a manner which jeopardises the case due to delay, non-disclosure of relevant facts or failure to communicate with opposing party's legal representatives. While India has Advocates Act,

[2] Ram Kumar v. Shriram Transport Finance Co. Ltd 2022 SCC OnLine Del 4268

[3] Usha Martin Ltd. v. Eastern Gases Ltd., 2022 SCC OnLine Cal 3342

1961 as the code of ethics for legal profession, it isn't sufficient in arbitration.

Where there is a valid agreement, the arbitration agreement must be honoured, and invocation should be done on valid grounds. Usually, when a dissatisfied party approaches a lawyer with the award, the thumb-rule is to challenge the award, however, it's the duty of the lawyer to inform the clients if the challenge is based on flimsy grounds, and to avoid the practice of challenging an award on insufficient grounds. When the award is well reasoned, it's prudent to discourage the client from filing appeals and taking a pro-enforcement approach. With this approach, the Client's interests are protected since the cost of challenge is saved, the time of counsels and arbitrators is saved and gradually, India would be seen as a country with a pro-arbitration regime and would attract a wider client-base.

IBA's 2013 Guidelines on Party Representation in International Arbitration are based on the idea that party representatives should conduct themselves honourably and honestly and refrain from engaging in any actions that would result in needless delay or expense, including attempts to obstruct the arbitration process. Apart from that, into the London Court of International Arbitration (LCIA) Rules 2014 and 2020 have incorporated the general guidelines for parties' legal representatives. The Singapore Institute of Arbitrators (SIArb) Guidelines on Party-Representative Ethics 2018 provides consistent ethical standard for counsels and representatives which incorporate principles of honesty, integrity, and professionalism. Similarly, International Council for Commercial Arbitration (ICCA) Guidelines on Standards of Practice in International Arbitration 2021 provide guidelines for representatives, their relation and conduct with the all the members in the arbitration, and the quality of submissions made by them.

Ethical issues concerned with the Third-Party Funding

Third-Party Funding (TPF) has already been a controversial topic in the arbitration world, with no binding principles or legislations. They could be involved with the arbitrator, or may assert pecuniary dominance, thereby jeopardising the arbitrator's position. A few countries like Australia, Hong Kong and Singapore have recognised and regulated TPF. Hong Kong's legislation provides the definition, function, and qualification of the TPFs, also addressed the issues of conflict of interest, disclosure, and confidentiality, but Singapore's 2017 regulation only addresses the qualifications of the TPF.

The Article 11 (7) of 2021 of the Arbitration rules by International Chamber of Commerce (ICC) provides the duty of the parties to inform the arbitrator of the existence of non-party who has economic interest in the outcome of the arbitration and is a part of the arrangement for the purpose of funding of claims or defences. CIArb guidelines for Interviews for Prospective Arbitrators also include the obligation of the arbitrator to inquire about a third-party funder and to disclose their relationship with such funder.

Conclusion

Adherence to the congruent, normative ethical practices ensures that the arbitration process is fair and impartial. One thing common in all the ethical considerations is the lack of procedure, or the lack of implementation or adherence to procedure. Unethical conduct doesn't attract significant sanctions or punishment, this could be a cause for incautious conduct. The main loss

caused by unethical conduct of the arbitrators or counsels is faced by the parties wherein the procedure becomes lengthy, and they bear the cost of the process, defeating the purpose of Arbitration. The present situation calls for a detailed code of conduct, especially in India, where arbitration as dispute resolution mechanism is being adopted at an unimaginable pace. This would not only create a trustable system but also promote adoption of arbitration as the preferred mode of dispute resolution by the Indian parties and International as well.

It seems likely that continued scrutiny from higher judicial authorities will help push forward significant advancements in terms of preventing malpractice among arbitrators and counsels while ensuring speedy, fair outcomes for those seeking dispute solutions via such forums. Legal professionals should keep abreast with latest developments affecting admissibility and enforcement prospects to maintain decorum by avoiding unnecessary disagreements between privileged parties. As far as third-party funding is concerned, an entire amendment to incorporate its existence could resolve a major chunk of issues.

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Arbitrability of Financial Disputes Under Insolvency and Bankruptcy Code 2016

-Dr. Anand Kumar Singh, Assistant Professor, NLU-J

2021 marked half-a-decade existence of the 'new age' Insolvency and Bankruptcy law (IBC) in India. Despite the jurisprudence of this nascent law being at infancy stage, its evolutionary pace and expansion in critical areas has been phenomenal. The confluence of insolvency and arbitration law is one such area that has witnessed significant developments and evinced mixed responses from different quarters. Since featuring in the famous list of non-arbitrable subject matters (A. Ayyasamy v. A. Paramasivam & Ors.), the jurisprudence on Arbitrability of Insolvency disputes has come a long way.

Primary reason for the uneasy relationship between the two laws lies in the conflicting and contradictory characteristics of insolvency disputes vis-à-vis the features of arbitration. Firstly, the 'non-obstante' feature of Arbitration & Conciliation Act, 1996 (A&C 1996) as well as the 'over-riding' nature of IBC over other laws seem to be irreconcilable and has been much responsible for the prevailing confusion and inconsistencies between the two laws; Secondly, while both are 'special' laws, the erga omnes effect of insolvency disputes and the in rem nature of IBC proceedings render them unsuitable for adjudication by a private forum; Lastly, invocation of arbitration defense against initiation of Corporate Insolvency Resolution Process (CIRP) under IBC is often viewed with suspicion to be a dilatory tactic or 'moonshine' defense employed, as a measure of last resort by the defaulting corporate debtor, to avoid or at least delay the stringent and dreadful consequences under IBC.

Although the relationship is still at a nascent stage and there are too many knots and tangles to unravel, there does exist tremendous scope for its future growth and expansion. Judicial pronouncement, more frequent than consistent, continue to push the boundaries of this interface. Through a catena of decisions, the courts have confirmed that the statutory protection guaranteed to a financial creditor under IBC in a case of a default of debt would not stand hindered or impeded due to the existence of an arbitration agreement between the parties. The Hon'ble National Company Law Tribunal (NCLT) in Reliance Commercial Finance Ltd. v. Ved Cellulose Ltd., had observed that pendency of arbitration proceedings between the parties cannot be a hinderance to initiate CIRP under section 7 of IBC by a financial creditor. Again, in the matter of Mr. Dinesh Chand v. M/s Fantastic Buildcon Pvt. Ltd. & Ors., NCLT held that presence of an arbitration clause in the underlying agreement of dispute would not bar an application by financial creditor to initiate CIRP under IBC against the corporate debtor. This position was also confirmed and re-iterated by the Hon'ble NCLAT in Mrs. Nandhitha Vedam v. M/s. Udhyaman Investment Pvt. Ltd. & Ors., where it declared that pendency of an arbitration proceeding between financial creditor and corporate debtor cannot be a ground for rejection of an application under section 7 of IBC if there is a 'debt' and corporate debtor has defaulted in payment of debt to financial creditor. Through these judgements, the courts have emphatically rejected contractual waiver of statutory rights in case of insolvency disputes.

However, several important questions were left unaddressed in these judgements. For example, the courts did not clarify as to when would a commercial claim transform into an insolvency dispute under IBC?; what would be the fate of arbitration defense raised by the corporate debtor opposing initiation of CIRP under IBC?; Whether mere filing of an insolvency petition by financial creditor would trigger section 238 to deny any possibility of adjudication of such disputes outside IBC?; What would happen to the arbitration agreement if the petition under IBC was to fail? Lack of answer to these questions coupled with the latent jurisprudence on the subject matter, allowed malevolent creditors to defile the sanctity of arbitration agreement. While the 'overriding' feature of IBC adequately safeguards the interest of financial creditors, it also presents an opportunity for spiteful creditors to harass a financially-sound corporate debtor by filing 'dressed up petitions' on arbitrable commercial claims cloaked as 'statutory disputes' only to avoid arbitration (Indus Biotech Pvt. Ltd. v. Kotak India Venture Fund-I). Therefore, in a commercial dispute concerning default of financial debt and involving an arbitration agreement/clause, the question of arbitrability of such disputes must not be dismissed upon mere filing of an application under section 7 of IBC.

Recently, the Supreme Court of India, through its judgement in the matter of Indus Biotech Pvt. Ltd. v. Kotak India Venture (Offshore) Fund & Ors., has attempted to address the ambiguities and uncertainties concerning this interface between two 'special laws'. The judgement highlights the jurisdictional extent beyond which the arbitration agreement would cease to have any force; the extent and scope of section 238 of IBC and the responsibilities of the Tribunal while simultaneously dealing with CIRP petition under section 7 of IBC and counter-application to refer the dispute to arbitral tribunal under section 8 of A&C 1996. In this judgement the Supreme court, while reaffirming the 'in-arbitrability' of insolvency disputes, declared that mere filing of a petition under IBC by a financial creditor claiming 'default of debt' would not render the arbitration agreement as nugatory. The court explained that upon filing of a claim under IBC, the Tribunal must first examine and confirm the existence of the alleged 'default' of debt by corporate debtor as per the scheme of section 7 of IBC. Only upon a confirmation of 'default' by the Tribunal, the petition would be admitted and CIRP would commence against the defaulting debtor. Thereafter, the dispute would no longer remain arbitrable. Thus, upon admission of a petition under IBC, 'in-personam' contractual claims transforms into 'in-rem' statutory disputes over which exclusive jurisdiction has been conferred by the legislature on a specialized forum, viz., NCLT. If, however, the Tribunal were to reject the claim of 'default', the petition would fail and the proceedings under IBC would not commence. As the claim would not have transformed into an 'insolvency dispute', it would be open for the defendant to request the Tribunal to refer the dispute to arbitration under the terms of agreement between the parties. The 'arbitrability' of such a contractual claim would then depend on the satisfaction of the 'four-fold' test laid down by the Supreme Court in Vidya Drolia case. Thus, the existence of a 'default' of financial debt and admission of petition under IBC is the litmus test for determining whether the IBC proceedings would oust the jurisdiction of an arbitral tribunal to adjudicate such disputes.

Significantly, the judgement has also made important observations on section 238 of IBC

which is the raison d'etre for the "overriding" feature of IBC proceedings over other laws. Denying an automatic and immediate triggering of section 238 the court clarified that unless a petition under IBC is admitted on merit, the provision would not become effective and binding. The court observed that if section 238 was to become effective on mere filing of a claim under IBC, it would automatically bar any possibility of adjudication of such a dispute outside IBC. This would result in an irreparable injury to a corporate debtor who would be unable to bind the financial creditor to the terms of arbitration agreement. Therefore, until the 'default' is confirmed and application is admitted under IBC, it would be permissible for the debtor to oppose such a claim under IBC and also file an application before the Tribunal under section 8 of A&C Act 1996 requesting to refer the dispute to arbitration. In such a scenario, the tribunal would first decide the application filed by the financial creditor under IBC and accordingly also decide the fate of counter-application filed under section 8 of A&C Act 1996 by the respondent debtor.

This is a historic judgement which has sought to demystify the confusion surrounding the arbitrability of commercial disputes against which a petition is filed under IBC. The judgement is a significant step to safeguard the statutory process under IBC from the menace of 'dressed-up claims' while also preserving the sanctity of arbitration agreement by denying any escape to such mischievous applicants from arbitration. Significantly, the judgement preserves the arbitrability of contractual/ commercial claims until these are admitted as insolvency disputes under IBC by the Tribunal upon completion of its enquiry. Thus, the arbitrability of such commercial claims must not be summarily denied upon mere filing of a petition under IBC. This would ensure that the Tribunal seized of the matter does not apply the law mechanically. Instead it must first proceed to enquire about the existence of the claimed default of debt and if the answer is in affirmative then, with the admission of petition and commencement of CIRP, the question of arbitrability of such dispute would also extinguish. However, if the enquiry produces negative result then the Tribunal must examine the real intent behind such filing of application and allow an application for reference of the dispute to arbitration. This judgement, therefore, by allowing arbitrability of financial claims to exist in a state of suspended animation till the admission of petition under IBC attempts to strike a balance between the statutory protection accorded to a financial creditor under IBC and the legitimate expectation of a 'pro-arbitration' bias from courts by denying parties to frivolously avoid arbitration.

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Articles

What to expect from Indian Competition Law in 2023

-Rahul Rai Partner, AXIOM5 & Shruti Aji Murali, Associate, AXIOM5

Abstract

The CCI made sustained efforts to rein in Big Tech in 2022. It penalized MakeMyTrip, OYO and Google, and is investigating Amazon, Flipkart, WhatsApp, Apple, Zomato and Swiggy, among others. In 2022, the Standing Committee also issued comments on the Competition (Amendment) Bill, 2022 and evaluated competition concerns relating to Big Tech. In this context, the authors identify a few trends for 2023 – first, the CCI considers online and offline markets to be distinct, even though business realities may differ; second, the CCI's analysis of the multi-sided nature of platform markets appears somewhat internally inconsistent; third, an increasingly visible trend is the use of the CCI as a forum to settle business rivalries. For tech companies, the authors recommend assessing potential competition impact in the very design of their products or services, as the CCI's approach appears to question some of the very fundamentals of digital platforms.

Keywords – Big Tech, Platform Markets, Competition (Amendment) Bill, Digital Competition Bill

2022: A Year of Strife for Tech Platforms

In 2022, the most visible trend in Indian competition law was the Competition Commission of India's (CCI) sustained efforts to rein in Big Tech. In October, the CCI issued its decisions imposing significant penalties on Google in two separate investigations (Google Play and Android). Two other investigations against Google are ongoing. The CCI also penalized MakeMyTrip-GoIbibo (MMT-Go) and Oravel Travel Stays Limited (OYO), for among other things, an exclusivity arrangement that resulted in other hotel franchises being delisted from MMT-Go's popular travel platform. As expected, Google, MMT-Go and OYO have each contested the CCI decisions in appeal.

The CCI continues to conduct inquiries into other digital platforms - Amazon, Flipkart, WhatsApp (Meta), Apple, Swiggy and Zomato, to name a few. It has also been at the forefront of various legislative and policy efforts targeting Big Tech. In August 2022, the latest draft of the Competition (Amendment) Bill, 2022 (2022 Bill) was published – it has been steadily making its way through Parliament.

The Standing Committee on Finance for 2022-23 (Standing Committee) was tasked with reviewing the 2022 Bill and issued its report in early December 2022. The Standing Committee appears to have adopted a balanced approach. It has accepted most of the proposed changes, while mandating that the CCI issue regulations to clarify important substantive and procedural aspects of the new rules.

Two weeks later, the Standing Committee issued a second report, which related to "Anticompetitive Conduct by Big Tech Companies" (Big Tech Report). The Big Tech Report largely mirrors the European Union's Digital Markets Act (DMA) in calling for a Digital

Competition Act to regulate competition issues in digital markets in India, rather than through the traditional enforcement route (investigations after alleged anti-competitive conducts have occurred). The Big Tech Report essentially adds India's voice to the growing chorus of ex-ante (prior to the fact) regulation of the digital economy – albeit while contradicting the Standing Committee's own position in its earlier report on the 2022 Bill which demanded that abuse of dominance cases also be evaluated based on "effects" on the market.

From a business perspective, the CCI's position on platforms and online businesses is becoming clearer.

Lessons for 2023 – Where do we go from here?

For one, the CCI is clear that online and offline channels of distribution comprise distinct segments, are complementary to each other, but not substitutes. This may not reflect business realities for online businesses since they must still compete with offline brick-and-mortar stores every day across various segments to attract customers. Nevertheless, in the context of competition law, it is now a foregone conclusion that the CCI is likely to consider market strength and competitive dynamics in the online segment as being distinct from offline markets.

Another lesson from the CCI's evaluation of platform businesses (in the MMT-Go/OYO case), is that the CCI is likely to evaluate conduct on each side of the platform separately. While this tracks with the CCI's existing approach to analysing vertical restraints or abusive conduct, it is not entirely consistent with the functioning of platform businesses. Platform businesses are multi-sided by definition - which means that the platform evaluates demand, supply, pricing, and incentives from all sides of the market in making business decisions. For instance, the US Supreme Court in evaluating incentives offered by American Express to use its credit card network, thought it appropriate to consider the platform, as a whole, when deciding whether AmEx's conduct was anti-competitive. This is precisely because a platform operator is influenced (or constrained) by the behaviour of users on both sides of the platform – looking at only one side of the platform would likely present an inconsistent or incorrect picture. Interestingly, in the MMT-Go/OYO case, while the CCI evaluated the platform's conduct vis-à-vis hotel operators in isolation, it noted the inter-connected nature of the platform when computing the penalty on MMT-Go in particular - considering its entire revenue, rather than only the earnings from hotel operators on one side of the platform. For platform businesses, this presents a deck heavily loaded against them – with the CCI zooming in on one side of the platform at times (which allows it to come to a finding of dominance), while using a more expansive approach when it comes to computing penalties.

Another trend that is increasingly visible is the use of the CCI as a forum to settle business rivalries. The Competition Act allows any individual or company to bring complaints (or "information") to the CCI, and indeed, the CCI on its own can initiate inquiries of its own accord. Of late, some of the headline-grabbing competition cases have involved complaints from competitors/business partners. For instance, one of the informants in the CCI's Google Play decision was Match Inc, which runs Tinder, OK Cupid and other matchmaking apps that are listed on Google's app marketplace. Naturally, Match has an interest in negotiating better terms with Google in this regard. Similarly, the

investigation into e-commerce players Amazon and Flipkart has been brought by the Delhi Vyapar Mahasangh (DVM), which comprises "…many Micro, Small and Medium Enterprises ('MSME') traders which rely on trade of smartphones and related accessories", according to the CCI's order initiating the investigation. . As a representative of India's brick-and-mortar trade, DVM's members certainly have the most to lose as e-commerce corners an ever-larger share of retail in India. DVM's success in securing initiation of investigations against Amazon and Flipkart and Match's success in securing a decision against Google is likely to embolden others to approach the CCI.

2022 holds important lessons for businesses that have or are looking to use digital platforms to assess competition law risks at the design stage of their products or services. The discussion around regulating Big Tech, at the most fundamental level, relates to central aspects of the digital platform business model itself. Business practices that may be kosher in traditional business models may attract scrutiny from competition regulators simply because the scale and scope of their impact could be exponentially larger. This is because tech-based businesses generally have the potential to grow more quickly. Businesses would do well to consider the impact of their terms of engagement with stakeholders (whether other businesses or the end consumer) to mitigate the risk of scrutiny by the CCI.

Conclusion

The developments last year make it clear that competition law has and will continue to play a significant role in the regulation of Big Tech in India. Likewise, it has not been without controversy - some have argued that competition regulators should be less heavy-handed when regulating tech companies, precisely because of the rapid pace of technological change and the complex nature of the industry. It will be important for the Indian Government and the CCI to carefully consider the form and manner of intervention and ensure that competition law is applied in a way that aligns priorities with the broader economic policy goals of the country.

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Rahul is one of the two co-founders of Axiom5 Law Chambers- a boutique competition law firm. Rahul co-founded Axiom5 after spending close to 15 years at leading Indian firms and the chambers of senior counsel. He led the competition law team at AZB & Partners in Mumbai from 2012 until 2019 and then spent three years as a counsel with the Chambers of Mr. Gopal Subramanium, former Solicitor General of India, developing the skills necessary to lead high-stakes antitrust litigation.

Rahul's practice focuses on antitrust investigations, contentious competition litigation, and strategic merger control. He has advised and represented clients on a number of complex cartels, abuse of dominance, and

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Shruti built her career as a competition lawyer at two of India's foremost competition law practices, where she gained experience in merger control, having handled several multi-jurisdictional transactions from start to finish. She has also actively contributed to competition policy developments through advocacy efforts via leading industry associations and engaged in extensive research for the Competition Law Review Committee in 2019. She continues to keenly study global developments in the regulation of digital markets and the intersection between competition law and privacy regulation. Shruti's interest in breaking down complex issues into simple parts has stood her in good stead over her eight years of competition law practice, having worked in sectors as varied as oil & gas, airlines, sports, automobiles, and more recently, app ecosystems.

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Key Amendments in Companies Act, 2013 and related rules

- *CA Deepa Agarwal, Partner with S.R.Batliboi & Co. LLP*

The objective of this article is to provide an overview of the key amendments made to Companies Act, 2014 and related rules for provisions related to maintenance of books of account and audit trail.

➢ MCA amends rules pertaining to maintenance of books of account by companies

Book-keeping requirements for companies in India have been tightened with the amendment made on 5 August 2022 to the Companies (Accounts) Rules, 2014. The intent of the amendment seems to provide ready access of relevant information to the stakeholders including the regulatory authorities even if such books are maintained in electronic form in servers located outside India. ICAI has also issued an announcement in this regard which provides a comparison between the erstwhile and revised requirements.

The regulator has issued this amendment possibly with an objective to eliminate situations wherein multi-national companies may refuse or limit the access to financial data/books of account of Indian entities stored in servers outside India.

Amendment

The Companies Act, 2013 (as amended), requires companies to prepare and keep books of account, other relevant books and papers and financial statement for every financial year at their registered offices. The mode of keeping books of account and other books and papers in electronic mode has been prescribed under the Companies (Accounts) Rules, 2014 (as amended).

The amendments made to the Rules are as follows:

- Availability of books of account: The books of account and other relevant books and papers maintained in electronic mode should always remain accessible in India so as to be usable for subsequent reference. Earlier there was no specific requirement for always ensuring such books of account/ papers accessible in India.

- Maintenance of back up: Back-up of books of account and other relevant books and papers maintained in electronic mode (including at a place outside India) **are now required to be kept in servers physically located in India daily**, instead of periodic basis.

- Service provider: In case the service provider is located outside India, the name and address of the person in control of the books of account and other books and papers in India **should also be intimated to the RoC on an annual basis at the time of filing of financial statement**.

Companies would need to comply with the revised requirements from the effective date of the amendments i.e., 5 August 2022. No

transitional provisions have been specified in the section or in the rules.

Auditor's reporting requirement

The auditor is required to report as to whether proper books of account have been kept by the company [Section 143(3)(a)] and also state any qualification, reservation or adverse remark relating to the maintenance of accounts and other matters connected therewith [Section 143(3)(h)]. The auditor should consider the amendments while reporting under this clause. The applicability date is also important i.e., where financial statements include periods from the effective date of the amendments, the auditor would need to consider these amendments while providing an audit opinion. For example, auditors of companies whose accounting year end would end on December 2022 would need to consider the revised requirements for issuance of the audit report.

Analysis

Back-ups of the books of account and other books and papers of the company maintained in electronic mode are required to be retained on a sever located in India on daily basis instead of back-ups on a periodic basis (as provided earlier). It has not been explicitly mentioned about the manner of back up i.e. whether daily back up is required for books of account and other books and papers containing the cumulative information upto the date of the back up or information recorded during the day of the backup. Daily back up of the information accumulated till date of the backups would lead to creating multiple copies of same set of information. Further, storage of such information can involve significant cost for the company. Hence, this proposition doesn't seem to be aligned the objective of the Rule 3 to the Accounts. MCA or ICAI may issue a clarification on this matter.

The documents which qualify as books of account and other books and papers as defined under Section 2(12) and 2(13) of the Companies Act, 2013 are required to be backed up by the company on a daily basis.

As per Section 128(5) of the 2013 Act, books of account of every company relating to a period of not less than 8 financial years, immediately preceding a financial year together with vouchers relevant to any entry in such books of account are required to be kept in good order. Since Rule 3 of the Accounts Rules has been enacted pursuant to Section 128 of the Act, all requirements applicable to maintenance of books of account under Section 128 would also be applicable to electronic records maintained under Rule 3.

Thus, back-up of the electronic records maintained under the proviso to Rule 3(5) should also be maintained for at least preceding 8 financial years, in line with the aforesaid requirement under Section 128(5).

The amendment also requires that in case accounts are maintained outside India, the name and address of the person in India in whose control such books of accounts are, need to be disclosed. Rule 3 to the Accounts Rules do not provide a specific exception from the requirements if a company uses a service provider to maintain its books of account and other relevant books and papers. Accordingly, it is possible to argue that entire requirements under Rule 3 (including daily backups) applies even where a service provider is engaged.

This new rule clearly means that the government intends to tighten the regulatory regime around

maintenance of books of accounts in the electronic mode. Under this rule, corporate entities are required to ensure that the books of accounts and papers, when maintained in electronic mode, are accessible at all times to law-enforcement authorities for reference. It will ensure that the entities which are outside India and having operations here, cannot take shelter under the fact that their accounts are in the country of origin, therefore restricting access for Indian enforcement authorities.

➢ Maintenance of audit trail

Amendment

MCA has amended the Companies (Accounts) Rules, 2014 which requires that for the financial year commencing on or after the 1st day of April 2023, every company which uses accounting software for maintaining its books of accounts, shall use only such accounting software which has a feature of recording **audit trail of each and every transaction**, creating an edit log of each change made in the books of accounts along with the date when such changes were made and ensuring that the audit trail cannot be disabled.

Auditor's reporting requirement

Clause (g) of Rule 11 of Companies (Audit and Auditors) Rules, 2014 requires the auditors' report to state whether the company, has used such accounting software for maintaining its books of accounts which has a feature of recording audit trail (edit log) facility and also comment on whether:

i. the audit trail feature has been operated throughout the year for all transactions recorded in the software
ii. the audit trail feature has not been tampered with and
iii. the audit trail has been preserved by the company as per the statutory requirements for record retention.

The requirement was initially made applicable for the financial year commencing on or after the 1st day of April 2021 [G.S.R. 205(E) dated. 24 March 2021] however the applicability was deferred to financial year commencing on or after April 1, 2022, vide Ministry of Corporate Affairs notification dated April 1, 2021, and was further deferred by notification No. G.S.R. 235(E), dated March 31, 2022, and issued Companies (Accounts) Second Amendment Rules, 2022 to financial year commencing on or after April 1, 2023.

The reporting requirements have been prescribed for audit of financial statements prepared under the Act. Accordingly, auditors of all class of companies including section 8 companies would be required to report on these matters. As per Companies (Registration of Foreign Companies) Rules, 2014 the provisions of Audit and Auditors (i.e., Chapter X of the 2013 Act) and Rules made there under apply, mutatis mutandis, to a foreign company. Accordingly, the above reporting requirements would be applicable to the auditors of foreign companies as well.

Analysis

The term 'audit trail' has not been defined in the Act or in the rules. It can be defined as a chronological sequence of the history of a particular transaction, tracking who created/changed a record, what record, what time etc. Audit trails amongst others may help in investigating frauds, system breaches etc and can be considered as an essential tool of monitoring for organisations. Maintaining audit trails is an

integral part of any complex IT system like SAP, Oracle etc. Many organisations use it today as well because it is critical for certain applications. However, all businesses may not be fully equipped or invested in best class IT systems. Also, the cost of these IT systems does not involve only one time cost. They also include expensive upgrades, IT hardware, security systems etc. There are significant challenges in implementation of these provisions which have been discussed in the paragraphs below. Companies may have a range of subsystems supporting the main accounting software and they would need to evaluate whether such subsystems would also be covered within the meaning of the term accounting software.

Implementing Audit Trail

There are various challenges in implementation of the amended provisions which are clearly evident on the deferral of the effective date of these provisions twice. There are many complexities that companies may face while maintaining or managing an audit trail. Among them, a large volume of recorded logs could be one of the problems that may trigger challenge for small or medium-sized companies as hundreds to thousands of logs daily could be lengthy to store as they increase in size. This ultimately leads to increased storage.

The intent of the amended provisions appears to be that audit trail should capture every addition, deletion, or modification of the transactions. So, to avoid unnecessary edits, deletions, or modifications to the transaction, skilled manpower is required, which will directly increase the labour cost.

To introduce an audit trail in the system, it needs to revamp the methods of accounting, the technology-driven infrastructure, and the working methods of employees. Long-term maintenance of audit logs can prove challenging for many organizations because it can occupy extensive storage space that may not be readily available in desktop applications. Existing software might not be able to support it. It may not be easy to reconstruct the database transaction order if the old software doesn't have an audit trail.

MCA or ICAI may issue clarifications/guidance for the effective implementation of the amended/new rules.

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Deepa Agarwal, B.Com, FCA with 13th Rank in all over India and 5th Rank in NIRC. She has 21 years of experience in serving national and multi-national companies in the areas of Auditing, Accounting, Reporting, Corporate Laws and other related matters. Currently, she is working as an Partner with S.R.Batliboi & Co. LLP.

She has completed Information Systems Audit (ISA) course from ICAI in Sept 2006 and Certified course on IFRS from the Institute of Chartered Accountants of India, New Delhi in March 2011.

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Demystifying Energy Storage Systems under the Electricity (Amendment) Rules 2022

-Shivanshu Thaplyal Partner, & Rishabh Sharma, Associate, Khaitan & Co.

The Ministry of Power (MoP) amended the Electricity Rules 2005 on 29 December 2022 by notifying the Electricity (Amendment) Rules 2022 (Amendment Rules). This introduces rules on a range of areas inter alia such as applicable surcharge payable by open access consumers, timely recovery of power purchase costs by distribution licensee, subsidy accounting, resource adequacy, development of hydro power, energy storage system and implementation of uniform renewable energy tariff for central pool. The MoP has also revised the provisions pertaining to dispute resolution by enforcing a time-bound resolution of disputes by the appropriate commission.

In this article, we discuss the introduction of Energy Storage Systems (ESS), as a part of power systems, in terms with Section 2 (50) of the Electricity Act 2003 (Act), by way of the Amendment Rules.

Understanding Energy Storage Systems

The Amendment Rules provide that ESS will be a part of power systems and will be treated as a de-licensed activity. The aforesaid is at par with a generating company in line with the provisions of Section 7 of the Act. Therefore, there is now a significant incentive for private players to invest in ESS infrastructure. ESS could either exist as an independent energy storage system or network asset, or could co-exist with generation, transmission or distribution system. ESS may be owned, developed, leased or operated by a generating company, a transmission licensee, a distribution licensee, a system operator or an independent energy storage service provider.

Typically, ESS would be accorded status depending upon its application area viz generation, transmission and distribution. In case the ESS is owned and operated by and co-located with a generating station, transmission licensee or distribution licensee, ESS will have the same legal status as that of its owner, i.e., it would qualify as a part of the generation unit, transmission network or distribution network, as the case maybe. If the ESS is not co-located but owned and operated by a generating station or distribution licensee, the legal status of the ESS would still be that of the owner. It is pertinent to highlight herein that the proviso to Rule 18 (4) of the Amendment Rules specifically excluded transmission licensee from its ambit, thereby not extending the status of transmission licensee on off-site ESS owned by the concerned transmission licensee. This shows that the legislators intended to give ESS a purposive status, i.e., linking the status of the ESS with the purpose of their establishment. However, for the purpose of scheduling and dispatch and other matters, ESS would be treated at par with a separate storage element.

The developer or owner of the ESS will have the option to sell, lease or rent out the storage space of the ESS, in whole or in part, to any generation, transmission or distribution utility or to any load

despatch centre. However, the owner of the ESS may use part or whole of the storage space for buying and storing power, and subsequently selling or supplying the stored power to any third-party.

Though the independent energy storage will be a delicensed activity, if the owner, developer, tenant, lessee or user seeks to operate the ESS as an independent energy storage system, it must be registered with the Central Electricity Authority (Authority) and the capacity of such ESS will have to be verified by the Authority.

Lacunas in the ESS mechanism

Overall, Amendment Rules have laid a comprehensive ESS mechanism. However, there are still some areas that could have been addressed. The Amendment Rules allow the owner of the ESS to use part or whole of the storage space for buying and storing power, and subsequently selling or supplying the stored power. However, the Amendment Rules fail to clarify and contemplate on whether such an activity would qualify as trading of power, in terms with Section 2 (71) of the Act. If such activity were to qualify as trading of power, then a pertinent question to reckon with is the applicability of power trading related laws to ESS owners and operators, and its extent thereof.

The Amendment Rules contemplate on scheduling and despatch of power from standalone or independent ESS but does not include any provision for formulation of guidelines or procedures for scheduling and despatching of power from standalone or independent ESS. Also, it has been specified that for the purpose of scheduling and dispatch and other matters, ESS would be treated at par with a separate storage element, but the Amendment Rules have not specified or defined 'a separate storage element'.

The Amendment Rules also state that if the owner, developer, tenant, lessee or user seeks to operate the ESS as an independent energy storage system, it must be registered with the Authority and the capacity of such ESS will have to be verified by the Authority. While this is a germane step to ensure and track the sale, lease or rent out of the storage space of the ESS, the same requirement should have been made applicable to all models of ESS, including ESS co-located with generating station, transmission licensee or distribution licensee.

Key takeaways

ESS is one of the most integral emerging mechanisms in the power sector, acting as a key catalyst in all the principal stages of power generation – generation, transmission and distribution of power. ESS would be of immense use in power generation from renewable sources if it is co-located with a renewable generating station or unit, as it can aid in bridging the deviation caused between the scheduled generation and the actual generation of power due to the infirm nature of renewable energy, i.e., its dependency upon variable natural factors, such as wind speed and solar irradiation, which causes the actual generation to vary from the scheduled generation. ESS can also play a major role in maintaining grid security thereby acting as a key transmission asset. Last, ESS can also aid distribution licensees in honouring their power supply commitments in case there is a shortage of generation from contracted sources, consequently averting scheduled power-cuts.

In view of the above and in consideration to the increasing reliance on renewable energy, the

introduction of ESS, as a part of power systems, through Amendment Rules would further assist in mitigating the issues pertaining to deviation in renewable power generation and banking of power. By incorporating rules on ESS, Amendment Rules have acted in furtherance to India's commitment at 21st session of the Conference of the Parties (COP 21), in Paris 2015, of meeting 40% of total power generation requirements from renewable sources by the year 2030. A robust ESS mechanism would also address a range of pressing issues prevalent in the power sector – grid insecurity issues, grid frequency regulation, unwarranted power-cuts, emergency power back-up, among others.

This initiative from the MoP will not only boost the renewable power integration thereby providing us with clean, green and sustainable energy but would also aid in India's quest of reducing carbon footprints. However, incorporation of such rules would not solely achieve the intended purpose and it would be critical to see how the government and concerned regulatory bodies will be implanting these Amendment Rules and consequently providing a sufficient national level ESS infrastructure to cater and address the aforementioned needs and concerns respectively.

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Shivanshu Thaplyal is a Partner in the Energy, Infrastructure & Resources team. Shivanshu regularly advises on corporate/commercial matters and policy and regulatory issues.

Shivanshu's primary sector focus is Power (both conventional and non-conventional), Transport, Urban Infrastructure, Ports and Mining, with a specialisation in handling Public Private Partnership projects. Shivanshu actively advises clients on bidding for infrastructure projects as also on procurement laws in India. Shivanshu also has significant experience in corporate transactions and has represented a number of clients in domestic and transnational mergers and acquisitions, takeovers and joint ventures and corporate structuring transactions.

Rishabh Sharma, Associate, Khaitan & Co

An Insight Into the Concept of Placement, Layering and Integration Under PMLA And Their Consequence Thereof

- *Advocate Aagam Kaur, Partner APS Law Chambers & AOR*
Abhikalp Pratap Singh, Partner APS Law Chambers

Abstract

Section 3 of Prevention of Money Laundering Act, 2002, defines the offence of money-laundering as an act of concealing, possessing, acquiring, using, projecting or claiming proceeds of crime as untainted property. These actions engulf the stages of placement, layering and integration of the tainted property or "proceeds of crime" in the formal economy of the country. A classic example was set for several nations in the year 1991, when New York Times reported, what it called those days a "world class fraud" conducted by the Bank of Credit and Commerce International, popularly known as BCCI where assets worth 12 Billion US Dollars were seized after regulators discovered evidence of widespread fraud.4

This case set a parameter for investigating agencies all across the globe to witness the event wherein all stages of money laundering were achieved when the Bank actively sought to provide financial services to the underworld profiteers of drug trafficking, terrorism, among many others. The modus was to use shell companies, banks, corporations, and offshore financial centers to create a web of fake companies located around the world, which helped suspected criminals to move assets and evade regulator through the instruments of investments and loans.

Such events have been noticed in Indian Economy for the past few decades where the financial institutions and corporate entities have colluded to trick regulators and syphon off huge funds for illegal activities. However, the drawback of such events is most often faced by innocent third parties.

Keywords: Money Laundering, Placement, Layering, Integration, proceeds of crime

Prologue

We need to safeguard our interests, from such actions and to prevent participation in this complex maze of transactions. And for that we need to understand, the concepts of placement, layering and integration.

Placement

Placement is first step where "proceeds of crime" or ill-gotten money generated from a criminal activity is concealed into legitimate financial system. Smurfing is a common form of placement, adopted by offenders in order to evade the check of reporting. Smurfing is when money launderer disguises small amounts of money which is much below the threshold limit

[4] Steve Lohr, 'World-Class Fraud: How B.C.C.I. Pulled It Off -- A Special Report.; At The End Of A Twisted Trail, Piggy Bank For A Favored Few', *The New York Times* (New York, 12 August, 1991).

and are deposited either in Banks, or invested in companies or small parcels of lands or any form of valuables are purchased from that amount, where the transactions are safeguarded from any disclosures before the regulatory authorities. By this way for the first-time ill-gotten money is placed in legitimate economic channels.

Smurfing is found to be cumbersome since it involves numerous transactions of smaller denominations. Further, if an efficient system is in place to locate suspicious bank transactions, through reporting, the launder would not prefer banking channels and would send cash for laundering purposes, this makes it all the more difficult to be traced.

The year 2016 – 2017, saw major regulatory reforms in order to counter attack such activities. The Government of India, through Finance Act 2017, took various measures to restrain black money and as an outcome of these measures, the government-imposed restriction on a cash transaction and limited it to Rs.2 Lakhs per day in addition to the pre-existing checks. The RBI from time to time has been issuing guidelines to Banking and Financial institutions in order to strengthen, reporting of suspicious transactions. Linking of accounts and transactions to PAN and Aadhar is another such initiative which has assisted the regulatory agencies to track such dubious activities.

Layering

Moving on to the next stage being layering whereby the money launderer, separate the proceeds of crime from their source by creating layers of financial transactions which were designed to disguise the audit trail of illicit proceeds of crime, with the intention of making traceability of the proceeds of crime difficult for enforcement agencies.

Common methods of layering are by converting money into monetary instruments like money orders, bonds, letters of credit, stocks or shares and many others. Furthermore properties tangible or intangible are bought and re-sold either in domestic market or exported to other countries and proceeds are obtained in non-cash form or parked in a tax haven country. The money launderers opt for activities which are safeguarded by either corporate or bank secrecy provisions and in some cases, the protection of lawyer-client privilege is unduly utilised. In few instances counsels are designated to establish and run a company, where the proceeds of crime are then passed on and are ripe to be paid as a loan or investment to the money launderer, which obscures illegal nature of “proceeds of crime.”

Integration

Finally after which the stage of Integration arrives. By this process the stamp of legitimacy is given to the illegally obtained wealth of the launderer. The money is in this process re-enters the economy in form of a normal business earning. Paper trail for loan and mortgages are created by associates of offenders. The launderer obtains a sham loan from a front company usually incorporated in tax haven countries. This creates an illusion that the money in the company, is received by the criminal as a loan or mortgage money is legitimate. The front company is formed with laundered wealth. The launderers also avail several other benefits from such companies, while they avail loans, for example tax holidays, income tax benefits, purchasing properties for family members and many more. Another way in which the proceeds of crime gets integrated into

the economy is when properties, assets or machinery are purchased in the name of front companies from the laundered wealth and then re-sold, the proceeds of such sale are given the colour of legitimate business.

In various cases it has been observed that two or more shell companies created by the money launderer, buys and sells the same goods over the years to one an another, in order to reflect that bonafide business transactions are being conducted, thereby cheating banks and financial institutions by taking loans and defaulting in payments. After understanding these methods, we need to understand the consequences that could arise from such activities which effect third parties.

There may be instances in which the tainted property is purchased by an innocent third parties or when professionals are employed or designated to run the shell companies, which may lead to having an impact on such individuals and their assets. As under the provisions of PMLA, there is a reverse burden of proof and an adverse presumption in respect of inter-connected transactions wherein one or more transactions are proved to be involved in money laundering. In this scenario the properties of persons suspected to have participated in money laundering are attached, seized or frozen in order to ensure that the properties are not dissipated. Even persons having special knowledge of the transactions are likely to be arrested by the investigating agencies to ensure co-operation and that witnesses are not influenced or evidence is not tampered with.

Epilogue

However, there are few measures which can be taken by us as responsible citizens and professionals in order, not to be caught up between the law enforcement agencies and the money launderers. We may take the following safeguards:

Section 12 of PMLA read with Prevention of Money Laundering (Maintenance of Records) Rules, 2005, lays down several measures which can be taken by reporting entities in order to ensure proper reporting and KYC is done from time to time. The Rules mandates every reporting entity to maintain records, which includes banking company, financial institutions, intermediary or a person carrying on a designated business or professions. We should not limit ourselves to these entities as stipulated under the Act but ensure that every person other than reporting entity who is at the risk of being caught up in the wind may ensure maintaining of records of all transactions, the nature and value of such transactions, whether such transactions comprise a single transaction or a series of transactions integrally connected to each other, and where such series of transactions take place within a month. Although the provision of retention of data has been omitted from the rules, as per general caution data must be retained for at least 10 – 15 years.

All necessary information and third party interests must be verified from clients and recorded. If possible through our own independent sources. Client due diligence is a must. Every person must at all times from the time of commencement of an account based relationship identify clients, verify their identities, obtain information and intended nature of business relationship. Determine whether the client is acting on behalf of a beneficial owner and take all steps to verify the identity of the beneficial owner.

Ensure there is no risk of terror financing and or no dubious activity which may have impact on normal conduct of business. All information of suspicious transactions must be reported to Financial Intelligence Unit - India (FIU-IND) which is the central, national agency responsible for receiving, processing, analysing and disseminating information relating to suspicious financial transactions to enforcement agencies and foreign FIUs. Before purchase of any asset, an entire, due diligence must be conducted in respect of that property or asset and it's beneficial owner, in order to ensure there no tainted asset is travelled to a bonafide purchaser.

The professionals and clients should engage in work contracts stating the scope of work in order to ascertain the nature of task undertaken by the professional. The professionals can always utilise these agreements in order to defend themselves and which may act as a shield against allegations. These steps are handful of measure that are suggested by me, however we must be cautious in our day to day dealings in order to keep the investigating agencies at bay and for efficient working of our economy.

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Aagam Kaur, is an independent legal practitioner with expertise in PMLA and FEMA matters. She was a former Legal Consultant of the Enforcement Directorate. Currently, Partner APS Law Chambers and a A Grade Panel Counsel for the State of Maharashtra before Supreme Court.

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State Tax Officer (1) V. Rainbow Papers Limited: Rewriting the Clean Slate

- *Manik Ahluwalia, Principal Associate, P&A Law Offices*

ABSTRACT:

The judgment of the Supreme Court in the case of State Tax Officer (1) v. Rainbow Papers Limited ("Rainbow Judgment") has turned back the clock when it comes to the jurisprudence of the Insolvency and Bankruptcy Code, 2016. Dark clouds of the previous sins have been made to re-appear on insolvency resolved companies with statutory authorities being told that the plans not considering their claims are bad and liable to be set aside. This article in brief touches upon the jurisprudence of the insolvency law prior to the pronouncement of the Rainbow Judgment, to distinguish the Rainbow Judgment and raise an argument towards necessary re-looking of the same.

KEYWORDS:

Insolvency and Bankruptcy Code, 2016; hydra head; past dues; extinguishment of claims.

The jurisprudence pertaining to the Insolvency and Bankruptcy Code, 2016 ("IBC") has seen its share of ups and down ever since its enactment in the year 2016. Hailed as one of the most ambitious legislations enacted by the Indian Government to curb the menace of ever growing non-performing assets ("NPA"), the IBC was given thumbs up by the legal professionals and the banking sector alike.

While over the period of last six years, IBC underwent various amendments however, the same were towards establishing a smooth resolution mechanism and filing gaps or remedying mischiefs which were staggering the smooth implementation of the legislation. The legislature, the statutory authorities such as the National Company Law Tribunal ("NCLT") and the National Company Law Appellate Tribunal ("NCLAT") as well as the courts including the High Courts and the Supreme Court have been interpreting the provisions of the IBC in a manner to ensure that the intent behind the legislation remains intact. The intent of the legislation is crystal clear from the preamble, which states that the insolvency resolution must be undertaken in a time bound manner for maximisation of value of assets, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government.

CLEAN SLATE PRINCIPLE AND EXTINGUISHMENT OF PREVIOUS DUES:

As stated above, the courts have been interpreting IBC in a manner to ensure that there is a resolution of the corporate entity as against the entity meeting a corporate death in the form of liquidation. The pinnacle of this thought was seen with the enunciation of the "clean slate principle" by the Supreme Court in the case of Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta[5] ("Essar Judgment"). The Supreme Court vide the Essar Judgment in clear and unambiguous terms held

[5] (2020) 8 SCC 531

that when a resolution applicant takes over a corporate debtor it does it with a "clean slate". The Supreme Court vide the Essar Judgment further held that a resolution applicant cannot be made to face undecided claims, above and beyond what is provided for in the resolution plan upon its approval as this would amount to a hydra head popping up. The Supreme Court has further held that fastening additional liabilities post resolution will militate the entire purpose of the IBC. Thus, it was made clear that a corporate entity undergoing resolution under the IBC, upon its resolution, shall have a fresh start which will be free from past sins and dues. The step was to ensure that there are no further hurdles in the functioning of the entity after completion of its resolution process.

While the Essar Judgment made the intent of the Supreme Court clear, another landmark judgement in the direction of ensuring breakage of bonds from previous sins was given in Ghanashyam Mishra and Sons Private Limited through Authorized Signatory v. Edelweiss Asset Reconstruction Company Limited Through the Director and Ors.[6]("Ghanashyam Judgment"). While the Essar Judgment was just shy of stating that past/previous dues of a corporate entity will be extinguished upon completion of the resolution process, the Supreme Court in Ghanashyam Judgment did not mince its words and held explicitly that all past dues of a corporate entity which are not part of the approved resolution plan shall stand extinguished upon the approval of the resolution plan. The Ghanashyam Judgment essentially dealt with statutory dues and held that all the statutory dues not part of the approved Resolution Plan shall be extinguished. Thus, even the statutory dues were not spared from the ambit and scope of the IBC.

The clean slate principle and extinguishment of previous dues was lauded by the industry as being a welcome step towards implementing the IBC as per its intent and purpose. The message was thus clear, IBC shall prevail!

REWRITING THE SLATE:

While the binding nature of an approved resolution plan became a norm with High Courts around the country following the decision in the Ghanashayam Judgment and the Essar Judgment, however the judgment of State Tax Officer (1) v. Rainbow Papers Limited[7] ("Rainbow Judgment") passed by a division bench of the Supreme Court consisting of Justice Indira Banerjee (now retired) and Justice A.S. Bopanna took a complete opposite view from these above established norms.

As the per the Rainbow Judgment, the State would be secured creditor which therefore altered the priority of dues as mentioned in Section 53 of the IBC. It was further observed that since State is a secured creditor, it had no obligation to file their claims as per the mandate of the IBC as the state/statutory dues will reflect in the books of accounts of the corporate debtor concerned. The judgment further observed that any resolution plan, not taking into consideration the dues of the state/statutory dues will be deemed to be in contravention of Section 30 of the IBC. This Section provides for mandatory requirement of a resolution plan. The Hon'ble Supreme Court in the judgement not only held that the State is not bound by the approved resolution plan, but also set aside the resolution plan, which was approved by the committee of

[6] 2021 (9) SCC 657

[7] 2022 SCC Online SC 1162

creditors, the concerned NCLT and even upheld by the NCLAT. Interestingly, the Rainbow Judgment did not discuss ratios as laid down by larger benches in the Ghanashyam Judgment and the Essar Judgment. Rainbow Judgment infact failed to take into consideration even the commercial wisdom applied by the committee of creditors (which consistently has been held to be non-justiciable) while approving the plan in the said case.

The Rainbow Judgment had a rippling effect throughout the industry as there are far reaching consequences. The slate which was intended to be clean had been directed/observed to be re-written. The hydra-head, which had been feared in the Essar Judgment by Justice Rohinton Nariman (now retired), would now be popping up again. The Rainbow Judgment was seen as a complete shift from the jurisprudence of the IBC which had been established by the Supreme Court itself through various pronouncements before it.

ATTEMPTS TO DISTINGUISH:

The general industry consensus was that Rainbow Judgment is a step backwards in the IBC law jurisprudence as the pendency and primacy of statutory dues upon an IBC resolved entity would deter a prospective resolution applicant from taking part in resolution proceedings.

The NCLTs, NCLATs and even a few High Courts tried to distinguish the observations as made in the Rainbow Judgment and tried to apply the law as laid in the Ghanashyam Judgment and/or the Essar Judgment. The NCLAT, New Delhi in its recent case of Kalyan Dombivali Municipal Corporation v. NRC and Ors.[8] held that the Rainbow Judgment will not be applicable in the case before it and placed reliance on the Ghanashyam Judgment while dismissmissing the appeal. Similarly, the NCLT, Chandigarh in the case of Haryana through Excise and Taxation Vs. Mr. Anup Sood RP for M/s Anand Tex India Pvt. Ltd. held that the ratio in the Rainbow Judgment, where it was held that the definition of a secured creditor in the IBC does not exclude any Government or Governmental Authority, is not applicable if statutory/government due is an Operational Creditor, not a secured creditor.

Interestingly, a division bench of the Supreme Court consisting of Justice A.S. Bopanna refused to entertain a Special Leave Petition[9] filed by West Bengal State Electricity Distribution Company Limited which was filed against the order passed by High Court of Calcutta whereby the alleged past/previous claims of the West Bengal State Electricity Distribution Company Limited were extinguished. The order in the said special leave petition was passed on September 23, 2022 i.e. less than three weeks after Rainbow Judgment was pronounced.

In the above scenario, it does not come as a surprise that various review petitions[10] been filed before the Supreme Court against the Rainbow Judgment. The division bench headed by Justice A.S. Bopanna vide its order dated November 30, 2022, allowed the application for listing review petitions in an open court.

CONCLUSION:

It is thus evident that the Rainbow Judgment requires an urgent re-looking considering the jurisprudence, intent, and purpose behind IBC. It will be interesting to see how the Supreme Court

[8] Company Appeal (AT)(Insolvency) No. 223 of 2021
[9] SLP (C) No. 15719/2022
[10] Lead petition being Review Petition (Civil) Diary No. 32268 of 2022

reviews it's the Rainbows Judgment considering the law as laid down by larger benches in Ghanshyam Judgment and the Essar Judgment.

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Competition Amendment Bill, 2022: A Relook at the Recommendations made by the Parliamentary Standing Committee on Finance

- *Vikrant Singh, Senior Resident Fellow, CCLE & Manasi Singh, Student SLS, Hyderabad*

The Competition Act, 2002 ('Act') is set up for a major overhaul. Popularly known as the 'antitrust watchdog', the Competition Commission of India is empowered through the provisions of the Act to not only pass cease-and-desist orders against unfair conduct but also impose a penalty of up to 10 per cent of the average turnover of the contravening entities. Given the sector-agnostic nature of the Commission, it is important to critically analyse the upcoming Competition Amendment Bill, 2022 and the subsequent recommendations made by the Parliamentary Standing Committee which is likely to have an impact on the overall economic governance of the country.

Changes in the frame

A few of the major changes as introduced in the Amendment Bill include the change in the definition of 'relevant market', the introduction of a commitment and settlement scheme and deal value threshold for the approval of mergers, the introduction of a timeframe for receipt of information by the Commission and appointment of the Director General by the CCI itself with prior approval from the central government. The Parliamentary Standing Committee has not only assessed the provisions of the amendment but reviewed the overall competition jurisprudence in the country in the given time. Some of the major recommendations made by it include providing more guidance on the 'local nexus' condition in the deal value threshold, the inclusion of cartels in the settlement scheme, an extension of the IPR exemption to the application of section 4 as well and introduce an effects-based test for determining violation in the abuse of dominant position cases.

Hits and misses

The amendment is rightly timed given that the legislation is now into the thirteenth year of its enforcement. There is no secret that the Commission is scarcely-funded and therefore, the need of the hour is that there are enabling provisions in the statute for the CCI to settle various violations committed by the business entities for efficient allocation of its resources. There are a few areas, however, where the Standing Committee ought to have focused more and done a deeper analysis.

One major area of omission is looking into the possibility of the inclusion of extant provisions to regulate digital marketing entities under the Act. Similar concern was put before the Competition Law Review Committee (CLRC) as well. Even though there might be a case that the CCI may purposively interpret the existing provisions of the Act as suggested in the CLRC, the growing significance of such entities in our day-to-day lives, more popularly known as 'gatekeepers', would suggest otherwise. Inspiration may be drawn from the European Union and its member nations where the legislature has paid due attention to the growth of such entities and enacted separate legislations to maintain a regulatory check on them. The significance is

apparent from the fact that the CCI has recently passed a couple of orders where it has imposed a combined penalty of ~ INR 2,500 crore on such entities with a host of cases pending before it to be adjudicated.

Another instance is acceptance of the norm that in the case of economic legislation, detailed guidance on complex issues such as the deal-value threshold should come from the delegated legislation. There is a recent precedent to that effect where the CCI has formed a 'confidentiality ring' through a similar modus. Given that the concept of deal-value threshold is primarily incorporated to look into various acquisitions happening in the case of digital markets which would have otherwise escaped its scrutiny, what is required is that the CCI gets the requisite arm-room to manoeuvre around the dynamics of it.

The exemption granted to IPR holders under the Act also requires a relook. Given that the competition concerns are omnibus, it can be very well argued that the requirement of such an exemption clause in the very first place is dubious. Even though the legislature had initially included such a clause for exemption of applicability of section 3 of the Act, various authorities, including the Delhi HC, time and again have interpreted it to the contrary. The provisions of the Draft Competition Amendment Bill, 2020 resonate a similar position. The Standing Committee has, however, recommended that such an exemption be extended to the applicability to section 4 of the Act by paying reliance on the CLRC report.

Conclusion

The inclusion of the commitment and the settlement scheme along with the deal-value threshold to address competition concerns arising out of the mergers in the digital economy is a commendable step. The said provisions show the proactive nature of the government when it comes to adapting to ever-changing economic scenarios. It is, however, equally incumbent on the parliament to vet the provisions of the Competition Amendment Bill, 2022 in light of the evidence generated in the CLRC and the Standing Committee report. Such an exercise would go a long way in generating an overall business-friendly climate and fulfilling the goal of economic equality under the Indian constitution. Any other way is likely to counter the progress made by the government till date in order to amend the Act.

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Enforcement dimension of regulation vis-a-vis Environment, Social and Governance (ESG) considerations

- *Pooja Tiwari, Research Analyst*

Abstract:

With new transition pathways, impacts of Environment, Social and Governance (ESG) risks whether social, economical or environmental have achieved greater prominence across the globe. ESG considerations targets to ensure that the enterprises operate in a more responsible manner. It's reporting holds great importance for an enterprise as it raises transparency in corporate transactions and underpins risks management. With significant cognizance to the ESG credentials, the global audience is also now aiming to undertake strict actions towards any enterprise in its non-compliances.

In India, however, the ESG related issues cannot be considered to be rightly addressed by only introducing basic changes in either the laws or the market paradigms. Thus, with the ever-changing times, it is required to address the sustainability concerns which have a comprehensive approach. Further, to strengthen environmental protection, there should be regulations introduced enforcing the responsibility of stakeholders' as per the environment, Social and Governance (ESG) factors.

Keywords: Environment, Social, Governance, Regulations

Introduction:

In recent years, the impacts of Environment, Social and Governance (ESG) risks whether social, economical or environmental have achieved greater prominence across the globe. The ESG related issues primarily emerged in adapting or mitigating to the climate change impacts or transitioning into achieving the sustainable development goals. Further, the Covid-19 pandemic which famously is called as the 21st century's first "sustainability" crisis has accelerated the relevance of ESG considerations. The pandemic renewed the global focus on climate change, acting as a wake-up call for decision-makers to prioritize a more sustainable approach in regulatory drafting. Therefore, in new transition pathways the various actions aim is to pivot shifting around the need for good governance, highlighting impacts of climate change and protection of interest of various stakeholders in the post COVID era.

Relevance of ESG Disclosures:

As a crucial aspect of social system, the businesses functions not only for gaining their own revenues and benefits but are equally accountable to its stakeholders and to a great extent, towards the society at large who acts also its stakeholder. ESG considerations targets to ensure that the enterprises operate in a more responsible manner. When, the target of enterprises are foreseeably shifting from only developing the shareholder value to establishing long-term relations and shareholder's value that clubbed with sustained growth accounting to (ESG) performance of companies. Even when the financial investments are giving great regards to the sustainability factors including ESG. Before investments, investors look into enterprises

sustainability strategies to combat various ESG risks and their ability in managing those risks and building their business value[11].

However, it is observed that the economic actors mostly add external costs to the environment by frequently polluting it, and without paying any corresponding social costs that leads to numerous environmental problems. In absence of any stringent law or regulations, this leads to overexploitation of the environment by individuals to their own advantages. With significant cognizance to the ESG credentials, the global audience now aims to undertake strict actions towards any enterprise in its non-compliances. Since, its adoption helps in achieving sustainable development goals and maintaining regulatory framework while also enabling benefits for enterprises including: greater understanding of risks and opportunities, future-oriented thinking and upgrade integration between financial and non-financial actors. In this light, countries including Lithuania, Latvia and Russia[12] have introduced or implemented environmental regulations.

The ESG reporting holds great importance by raising transparency in corporate transactions and underpins management of risks. Moreover, reporting beyond financial disclosures and disclosing entities' social and environmental impacts provides insights about their non-financial performance measuring framework. Enterprises should therefore aim to expand their sustainability disclosures that are pertinent to their nature of the business. Some of the ESG reporting patterns suggested by guidance document on ESG disclosures include[13]:

Environmental	Social	Governance
Environmental Policy	Full time Employees	Gender diversity on Board
Environmental Impacts	Monetary and non - monetary benefits for employees	Board-Independence
Energy Consumption	Attrition Rate	Board - Separation of Powers
Energy Intensity	Training and development Hours	Voting Results
Carbon/GHG Emissions	Health care benefits	Gender Pay Ratio
Primary Energy Source	Human Rights Policy	Incentivized Pay
Renewable Energy Intensity	Human Rights Violations	Business Ethics and Code of Conduct
Water management	Child & Forced Labour	Supplier Code of Conduct
Waste Management	Gender parity ratio at Workforce	Corporate Governance

[11] ESG & Sustainability Reporting Guidance For Mongolian Companies, UNDP, https://www.undp.org/sites/g/files/zskgke326/files/2022-08/ESG%20reporting%20ENG.pdf (last viewed on 14th January 2023)

[12] Organisation for Economic Co-operation and Development, "How stringent are environmental policies? POLICY PERSPECTIVES" https://www.google.com/search?q=oecd&sxsrf=APq-WBszHf3QQhazG3V8lnj2TvYswDUSSg%3A1649410591622&ei=HwJQYqS3Jd6NseMPgZ61-A4&oq=OECD&gs_lcp=Cgdnd3Mtd2l6EAEYADIECCMQJzIECCMQJzILCAAQsQMQgwEQkQIyEAguELEDEIMBEMcBENEDEEMyBAgAEEMyDQgAEIAEEIcCELEDEBQyBAguEEMyBAguEEMyCggAELEDEIMBEEMyCwgAEIAEELEDEIMBOgcIABBHELADOgcIIxDqAhAnOgUIABCRAjoRCC4QgAQQsQMQgwEQxwEQ0QM6BQgAEIAEOggIABCxAxCDAToICAAQgAQQsQM6DguEIAEELEDEMcBEKMCOgcIABCxAxBDSgQIQRgASgQIRhgAUPEIWN0dYKQraAJwAXgAgAGbAYgBpgSSAQMwLjSYAQCgAQGwAQrIAQjAAQE&sclient=gws-wiz (last viewed on 14th January 2023)

[13] BSE, https://www.bseindia.com/downloads1/BSEs_Guidance_doc_on_ESG.pdf (last viewed on 14th January 2023)

ESG reporting in India:

In India, however, the ESG related issues problems cannot be rightly addressed by only introducing basic changes in either the laws or the market paradigms. In India, industrialization plays a significant role in promoting economic growth. In addition, being a developing nation, when faced with the choice between economic development or environmental protection, in India, the former gets preference due to the majority belief that the enterprises make an optimum choice with regard to the real economic activities.

The 'pollution-intensive' industries are elementary in bearing huge costs to the environment. It is believed by these enterprises that the implementation of environmental regulations may further lead to an increase in the cost of production[14], hence ignoring environmental protection is a comfortable choice made. Most industries who may even wish to regulate the exploitation are failing due to their lack of human capital, capital strength and advanced technologies.

The companies have also been facing increasing pressure from investors and other stakeholders to disclose their ESG risks, practices and impacts; regulators around the world are also increasingly requiring ESG disclosures. For an enterprise many factors come into play with regard to what, where and how they report about their environmental, social and governance (ESG) information. The social surroundings and regulatory interface within which the enterprise functions, its stakeholders, ethical standards and other numerous factors impacts their choice of reporting[15]. Against this backdrop, the reporting becomes uncertain and irregular for different enterprises. But, the enterprises that are ahead in sustainability management and in practice of its reporting can hold advantage over wide range of financial risk and avail key value drivers. These key value drivers help in availing numerous opportunities that include:

- **Financial Benefits:** ESG aspects (risks and opportunities) attract a diverse range of longer-term investors and forms critical part of investment decision making process. Thus, ESG reporting by an enterprise highlights their high performance that accounts to the sustainability indicators improving their potential long-term engagements in the market.
- **Risk-related benefits:** Traditional risk management tools in lieu of generating more revenues may at times overlook ESG-related risks and opportunities. Thus, ESG reporting would assist as a management tool for assessing and managing an entity's performance.[16]
- **Opportunity-related benefits:** By ESG reporting enterprises highlights their market performance on sustainability aspects that demonstrates their ethical standards and regulatory functioning towards customer engagements. It further opens up numerous market opportunities and provides with enhanced resource efficiency.

[14] Spyridon Stavropoulos, Ronald Wall &Yuanze Xu, "Environmental regulations and industrial competitiveness: evidence from China", Taylor and Francis Online https://www.tandfonline.com/doi/full/10.1080/00036846.2017.1363858 (last viewed on 15th January 2023)

[15] ESG Disclosure Handbook purpose and objectives, Gordon and Betty Moore Foundation, https://docs.wbcsd.org/2019/04/ESG_Disclosure_Handbook.pdf (last viewed on 17th January 2023)

[16] Supra No. 1

The ESG consideration has now become more mainstream as the disclosure requirements need to keep pace with this change. A few of the ESG reporting standards are highlighting in the below-mentioned table:

Table 1. Existing Reporting Standards and Frameworks

Guideline/ Framework	Objective	Strengths	Limitations	Best Use
Broad-Based Frameworks				
UNITED NATIONS GLOBAL COMPACT	Companies that commit to the 10 principles of the UN Global Compact are required to annually report on their progress and sustainability performance.	Covers environmental and social issues and human rights.	Principle-based framework does not offer specific key performance indicators for measuring performance, comparability.	Creating accountability for upholding broad-based international norms. Topics and flexible framework relevant for emerging markets and smaller companies.
ISO STANDARDS	Guidance to maximize contributions to sustainable development. Includes external communication on improving performance related to social responsibility.	Guidance on core social responsibility topics. Guidance on integrating social responsibility throughout an organization.	Reporting guidance is limited.	Reporters who want to use global best practice but want a great deal of flexibility in how they report. Topics and flexible framework relevant for emerging markets.
GLOBAL REPORTING INITIATIVE	To improve sustainability of organizations and support sustainable development. Guidelines are developed using a multi-stakeholder approach.	Reporting standards geared to economic, social and environmental disclosure for all companies. Additional targeted disclosure guidance provided for specific sectors.	Primarily used for standalone sustainability reports.	Communicating a broad range of sustainability/ nonfinancial management practices to many different types of stakeholders. Topics relevant for emerging markets.
VALUE REPORTING FOUNDATION INTEGRATED REPORTING FRAMEWORK[3]	To increase long-term, integrated thinking within companies, and improve the allocation of financial capital. Reporting is targeted to all stakeholders, but investors are prioritized.	Can help drive internal change, embedding environmental and social considerations in core operations.	Principle-based framework does not offer specific KPIs.	Reporting on value-creation processes and explaining how sustainability issues are managed strategically. Approach relevant for emerging markets.

Source: ESG reporting, UNDP

Conclusion and Way Forward:

Currently, numerous initiatives are afoot at global levels to streamline sustainability reporting standards by businesses that lead to ESG coherence. This coherence can be achieved with tan ability to adapt to the internationally laid standards and flexibility in co-construction. Thus, with the ever-changing times, it is required to address the sustainability concerns with have a comprehensive approach. Further, to strengthen environmental protection, there should be regulations introduced enforcing the responsibility of stakeholders' as per the environment, Social and Governance (ESG) factors. Universally agreed standards and thresholds for ESG information disclosure have become a much-needed impetus. The governing authorities should ascertain consideration for the stakeholder's responsibility toward the environment in response to environmental challenges posed both globally and locally.

In this regard, (October 2021) in India, the capital markets regulator SEBI proposed stringent norms for Environment Sustainability and Governance (ESG) funds[17] to ensure that these theme-based schemes remain true to their label. The suggestion provided by SEBI must be inculcated Indian regulatory regime. Stringent environmental policies will also have positive effects on economic activities ensuring innovation and competitiveness. Thus, Regulations concerning ESG hold utmost significance and their introduction compliance & supervision have become a much-needed impetus.

[17] Securities and Exchange Board of India, a Consultation Paper on introducing disclosure norms for ESG Mutual Fund schemes https://www.sebi.gov.in/reports-and-statistics/reports/oct-2021/consultation-paper-on-introducing-disclosure-norms-for-esg-mutual-fund-schemes_53500.html (last viewed on 16th January 2023)

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Intellectual Property Rights (IPRs): The Protection to Your Brainchild

- *CS Shweta Jain, IIT-Kanpur Incubation Centre, WBAF (World Business Angel Investment Forum)*

When the major reshuffling is taking place at every nook & corner of the world map and mankind is once again struggling for his wellbeing, Intellectual Property acting as a prominent driver for world economy. IP is the expression of *'human intellect'*. The outbreak of COVID 19 pressed mankind to look back at the roots and think the very purpose of existence on this planet. As we all appreciate this very fact that human brain is the treasure chest of tremendous potential & intellect which give birth to novel concept, design and innovative development in all the fields. This expression of intellect and brainpower govern to Intellectual Property Rights (IPRs), the brain child, aspiration and entreaty to be protected.

Human intellect may have its expression in any form and facade such as the artistic, literary, technical or scientific creation and then IPR automatically take a curve. The Research & Development (R&D) is the ultimate essence of human's existence and its protection is inevitable for promotion and encouragement of industrial design and development. R&D is actually the benchmark of industrial and economic progress chart of any nation. It has also been conclusively established that the intellectual toil associated with the innovation must be given worthy of importance so that public good emanates from it.

Intellectual Property [Rights]

IPR like other property right, privilege the inventors/creators or owners (of IPs) to benefit from their own work or investment made in such creation or invention. These rights have origin in Article 27 of the Universal Declaration of Human Rights.

IP Streams

IP Protection gains a significant international law dimension with the adoption of important international treaties such as TRIPS, GATT, Madrid Protocol, PCT etc. Presently, prevailing statutes, enforcing provisions and methods of dispute resolution wrt IPs are fully TRIPS-compliant in India.

- **Trademarks** – Trademarks relate to any mark, name, or logo under which trade is conducted for any product or service and by which the manufacturer or the service provider is identified.

- **Copyrights**- Copyright relates to expression of ideas in material form and includes literary, musical, dramatic, artistic, cinematography work, audio tapes, and computer software.

- **Patents** - A patent is the granting of a property right by a sovereign authority to an inventor, provides inventor exclusive rights to the patented process, design, or invention for a designated period in exchange for a comprehensive disclosure of the invention.

- **Industrial designs** - Industrial designs relate to features of any shape, configuration, surface

pattern, composition of lines and colors applied to an article whether 2-D or 3-D e.g., toothbrush, comb.

- **Geographical Indications**- Geographical indications are indications, which identify as good as originating in the territory of a country, region or locality in that territory where a given quality, reputation, or other characteristic of the goods is essentially attributable to its geographical origin.

IP Protection- Legislative Aspect

India is a signatory to the **Berne Convention** and has a very good copyright legislation comparable to that of any country. With the establishment of WTO and India being signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), several new legislations were passed for the protection of intellectual property rights to meet the international obligations.

- Trade Mark Act, 1999.
- Designs Act, 2000.
- Copyright (Amendment) Act, 2012.
- Patent (Amendment) Act, 2005.
- Besides, new legislations on geographical indications and plant varieties were also enacted like Geographical Indications of Goods (Registration and Protection) Act, 1999.
- Protection of Plant Varieties and Farmers' Rights Act, 2001.

Treaties & Protocols facilitating IPRs

Various treaties, protocols and agreements have been executed among different nations time to time specifying enforcement procedures, remedies and dispute resolution procedures. Hereinbelow prominent treaties, protocols and agreements-

1. Marrakesh Treaty:

The Marrakesh Treaty, adopted in 2013, at the World Intellectual Property Organization **(WIPO)** to make accessible the Published Works for Blind or Visually Impaired people.

2.Paris Convention Treaty:

The Paris Convention, adopted in 1883, applies to industrial property in the widest sense, including patents, trademarks, industrial designs, utility models, service marks, trade names, geographical indications and the repression of unfair competition.

3. Madrid System:

The Madrid System is a convenient and cost-effective solution for registering and managing trademarks worldwide. File a single application and pay one set of fees to apply for protection in up to 115 countries.

4. Trade-Related Aspects of Intellectual Property Rights (TRIPs):

The Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement that came into effect on 1 January 1995 is the most comprehensive multilateral agreement on intellectual property. It is an international legal agreement between all the member nations of the World Trade Organization (WTO).

5. Patent Cooperation Treaty (PCT):

The PCT is an international treaty encircling more than 145 Contracting States. The PCT helps to seek patent protection for an invention, in a large number of countries by filing a single "international" patent application instead of filing several separate national or regional patent applications.

6. Union for the Protection of New Varieties of Plants (UPOV):

The International Union for the Protection of New Selections of Plants (UPOV) is an inter-governmental organization with headquarters in Geneva (Switzerland). UPOV was established by the International Convention for the Protection of New Varieties of Plants.

General Agreement on Tariffs and Trade (GATT):

GATT was the first worldwide multilateral free trade agreement. It was in effect from June 30, 1948- January 1, 1995, ended when replaced by more robust WTO. The purpose of GATT was to eliminate harmful trade protection caused global trade depression by 65%. By removing tariffs, GATT boosted international trade, restored economic health to the world post World War II devastation. GATT grew out of the Bretton Woods Agreement. The summit at Bretton Woods also created the World Bank and the International Monetary Fund to coordinate global growth.

Procedural Aspect

A. Patent Cooperation Treaty (PCT)-

As we have discussed above Patent Cooperation Treaty (PCT) enables single "international" patent application covering more than 145 contracting countries. Hereinbelow brief procedural steps:

Stage 1- Filing-
Stage 2- Search Internationally-
Stage 3-Publication Internationally-
Stage 4- Supplementary International Search (optional)-
Stage 5- International Preliminary Examination (optional)-
Stage 6- National Phase-

Publication by WIPO- The international application along with International Search Report is published by WIPO after expiry of 18 months from the priority date of the application.

B. Madrid System

On the lines of PCT (Patent Cooperation Treaty), Madrid system enables the easiest and cost-effective solution for registering and managing trademarks upto 115 countries with single application & one set of fees. Hereinbelow the procedural steps-

a). Stage 1 – Application through your National or Regional IP Office (Office of origin) or representative-

b). Stage 2 – Formal examination by WIPO-

c). Stage 3 – Applicable examination by National or Regional IP Offices (Office of the designated Contracting Party)-

Traditional Knowledge Protection

Traditional Knowledge (TK)-

Traditional Knowledge is the knowledge that has ancient roots and is often oral. In a customary way, it transforms from one generation to other.

TK is know-how, knowledge, skills and practices that are developed, continuously and passed on from generation to generation within a community. Usually, it forms a part of cultural, social or spiritual identity for that community. Traditional knowledge can be found in various contexts like agricultural, biodiversity-related, ecological, medicinal, mechanical and technical knowledge.

IPRs provide protection to traditional knowledge and encourage ancient practices to transform

into inventions for welfare of society at large. TK gets protection by way of patent, trademark, geographical indication, trade secret or confidential information under IPR legislative regime.

TK & IP Protection – Two Folded way:

Defensive protection aims to prevent people outside the community from obtaining intellectual property rights over traditional knowledge. For example, India has compiled a searchable database of traditional medicine that can be used as evidence of prior art by patent examiners while assessing patent applications. This followed a well-known situation in which the US Patent and Trademark Office granted a patent (later revoked) for the use of turmeric to treat wounds, a property well identified to traditional communities in India and documented in ancient Sanskrit texts.

Positive protection is granting of IPRs that authorize communities to promote their traditional knowledge, control the uses and share the commercial growth derived from.

Existing Methods of protecting TK-

- International protection through treaties and conventions;
- National protection through national legislations as discussed above
- Local protection through private contractual measures.

Traditional Knowledge Digital Library (TKDY)-

In less than 2 years, in Europe only, India has got success in cancelation or withdrawal of 36 applications to patent which were based on traditionally known medicinal formulations. **The key to this success has been its Traditional Knowledge enriched Digital Library known as (TKDL), a database containing 34 million pages of formatted information on some 2,260,000 medicinal formulations in multiple languages like Sanskrit, Tamil, Arabic Urdu and Tamil.**

Bio Piracy & Bio Prospecting

Bio Piracy- (a). A situation where native & ancient knowledge about nature created by indigenous people, is used by others for profit, without permission from and with little or no compensation and recognition to them.

(b). Bio piracy operates through unfair application of patents to genetic resources and traditional knowledge.

(c). Bio piracy is the theft of genetic resources especially plants and other biological materials, example: use of indigenous knowledge of medicinal plants for patenting by medical companies without recognizing the fact that the knowledge is not new, and having ancient root to it.

Recent cases of Bio-piracy

- ✓ **Neem Patent:** US patent office granted patent on a fungicidal product derived from Neem seeds. India opposed the patent by claiming that the fungicidal properties of the Neem tree are well publicly known in India from centuries. The neem oil is used by Indian farmers as natural fungicide for crop. It was neither a novel idea nor any invention. The Patent was finally revoked by the European Patent Office.

- ✓ ***Haldi Patent***- A patent application was filed in the year 1993 by the University of Mississippi Medical Center, Mississippi for the use of turmeric powder as a wound-

healing agent. On objection of India the patent failed to be granted, as the ideas is not novel and turmeric's quality of healing wound is well documented in ancient medical textbooks of India.

- ✓ ***Basmati Patent-*** Rice Tec (US Co.) obtained a patent (US 5663484) on a type of rice produced by crossing a strain of Indian basmati rice with an American variety. The patent claimed rights in respect of basmati-like rice grown anywhere in the Western Hemisphere. It also claimed future rights on any new varieties created by crossing the new variety with existing Asian varieties. The farmers argued that an American rice producer should not be allowed to use the name 'basmati', as it is a valuable export quality of rice getting India approximately US$800 million a year. As a result of a worldwide citizen campaign against Rice Tec Basmati patents, USPTO revoked major part of the Basmati patent.

About the Author

Shweta Jain, a qualified CS since the year 2001 and in Practice since 2009. She is a B. Com and later persued Law from Law Faculty, Delhi University. She is currently pursuing MBA(Finance) from ICFAI. She is a Guest Faculty with ICSI/ICAI on CSR and Start up subjects.

Her core working areas apart from Secretarial Tasks include Startup, Entrepreneurship, CSR, Legal Documentation for Investment in Start Ups etc. Presently she is working and connected with IIT-Kanpur Incubation Centre, WBAF (World Business Angel Investment Forum), BHS (the first Robotics Manufacturing Company in India), IVY League Ventures etc.

Deals

DEAL DETAILS

Innova Captab Limited | Corporate insolvency resolution process of Sharon Bio-Medicine Limited

NO	HEADINGS	DETAILS
1	Sector	Pharmaceuticals
2	Announcement Date	17-Nov-2022
3	Completion Date	17-Oct-2022
4	Name of Client	Innova Captab Limited
5	Deal Description	Advised Innova Captab Limited as a resolution applicant in the corporate insolvency resolution process of Sharon Bio-Medicine Limited. The resolution plan submitted by Innova Captab Limited has been approved with a significant majority by its committee of creditors and it has been declared as a successful resolution applicant. Further advised on a diverse range of regulatory (domestic and international), and legal issues including those related to land, pharmaceuticals and the overall paradigm of a CIRP process.
6	Team Members	The deal was led by Siddharth Srivastava (Partner, Restructuring & Insolvency/ Banking & Finance) with able assistance by the team comprising of Mohit Kishore (Principal Associate), Udita Singh (Senior Associate), Shobhit Batta (Senior Associate), Abhilash Kumar (Associate) and Shikha Mohini (Associate).
7	Role of Khaitan & Co.	Counsel for the resolution applicant Innova Captab Limited
8	Unique Feature of Transaction	This stressed asset acquisition under the Insolvency and Bankruptcy Code, 2016 was unique and highly complicated as there had been multiple attempts in the past for resolution and the creditors faced several challenges including non-implementation of an earlier approved resolution plan. This was therefore one of the most sought after acquisitions in the pharmaceutical industry.
9	Press coverage	a. https://economictimes.indiatimes.com/industry/healthcare/biotech/pharmaceuticals/piramal-cadila-among-32-companies-in-race-to-buy-sharon-bio-medicine/articleshow/93624527.cms b. https://www.livemint.com/companies/news/innova-captab-places-400-cr-bid-for-sharon-biomedicine-11661881452123.html c. https://www.marketscreener.com/quote/stock/SHARON-BIO-MEDICINE-LTD-46730407/news/Innova-Captab-Reportedly-Places-Bid-for-Sharon-Bio-Medicine-41658326/ d. https://www.moneycontrol.com/news/business/stocks/sharon-bio-medicine-up-5-on-extension-to-complete-insolvency-resolution-process-2408861.html e. https://www.marketscreener.com/quote/stock/SHARON-BIO-MEDICINE-LTD-46730407/news/Innova-Captab-Reportedly-Places-Bid-for-Sharon-Bio-Medicine-41658326/

DEAL DETAILS

SAEL Limited, Canal Solar Energy Private Limited and Universal Biomass Energy Private Limited | Issuance of non-convertible debentures

NO	HEADINGS	DETAILS
1.	Sector	Banking and Finance
2.	Name of Client	SAEL Limited, Canal Solar Energy Private Limited and Universal Biomass Energy Private Limited
3.	Deal Description	Khaitan & Co. acted as the transaction counsels in relation to issuance of rated, unlisted, secured, redeemable, non-convertible debentures aggregating to INR 740 crores by SAEL Limited, Canal Solar Energy Private Limited and Universal Biomass Energy Private Limited (collectively "Issuers") to certain Identified Investors on private placement basis. The funds raised by the Issuers shall be used to refinance the existing lenders who have funded their renewable assets (solar and biomass power plants). Varun Gupta, Chief Investment Officer of SAEL Limited led the transaction from Issuers side. Barclays were the Investment Banker for the deal.
4.	Total Consideration	INR 740 crores
5.	Team Members	The deal was led by Siddharth Srivastava (Partner) with the able assistance from Henna Vadhera (Principal Associate), Rashneet Kaur (Principal Associate) and Yash Patel (Associate).
6.	Role of Khaitan & Co.	As a transaction counsel, Khaitan & Co. scope of work included conducting due diligence of the Issuers and submission of report to the Identified Investors with our findings, preparing and finalising the transaction documents and negotiating the same with the identified investors and Issuers, preparing the corporate authorizations, advising and assisting the Issuers technical aspects such as obtainment of consents and release of security from the existing lenders of the Issuers, preparation of PAS -4.
7.	Unique feature	While the transaction itself was routine refinancing transaction in many ways, balancing the interests of the investors and Issuers in view of the financing structure and other businesses housed at SAEL Limited and providing for carve outs in relation thereto was particularly interesting. Customization of documentation interfacing the carve outs provided at SAEL Limited level also contribute to making this a noteworthy transaction.

Cyril Amarchand Mangaldas advises Morgan Stanley on USD 200 mn block trade by ANT Group in Zomato

December 14, 2022, Mumbai/ Delhi:

Cyril Amarchand Mangaldas advised Morgan Stanley India Capital Private Limited (Morgan Stanley), in relation to the sale of equity shares of Zomato Limited (Zomato)by Alipay Singapore Holdings Pte. Ltd (an Alibaba Group entity) on the screen based trading platform of the BSE and the NSE. This transaction comprised a sale of about 3% stake in Zomato Limited. Morgan Stanley acted as the Broker to Alipay Singapore.

The Capital Markets Practice of Cyril Amarchand Mangaldas advised Morgan Stanley on the transaction. The transaction team was led by team was led by **Gokul Rajan**, Partner & Regional Head Markets Practice (North); with support from **Anuj Pethia**, Consultant.

The Transaction involved the sale of 262,873,507 equity shares of Zomato Limited by Alipay Singapore Holdings Pte. Ltd (an Alibaba group entity), by way of a share sale on the screen-based trading platform of the stock exchanges.

Other Parties and Advisors to the transaction included and Latham and Watkins LLP (acted as international legal counsel for Morgan Stanley).

The transaction was signed on 29th November 2022; and was closed on 2nd December 2022.

Cyril Amarchand Mangaldas advises in relation to the IPO of Five-Star Business Finance

December 21, 2022, Mumbai/ Delhi:

Cyril Amarchand Mangaldas advised Five-Star Business Finance Limited (Five-Star) in relation to the INR 1593 crore (approx.) Initial Public Offer (IPO) of Five-Star. Five-Star is an NBFC providing secured business loans to micro-entrepreneurs and self-employed individuals, each of whom are largely excluded by traditional financing institutions. They have a strong presence in south India.

The Capital Markets Practices of Cyril Amarchand Mangaldas advised Five-Star Business Finance on the transaction. The transaction team was led by **Vijay Parthasarathi**, Partner & Regional Co-head Markets Practice, Southern Region; Rohit Tiwari, Partner; with support from **Kinjal Shah**, Senior Associate; Chinar Gupta, Associate; and **Vedansh Batwara**, Associate.

The IPO of Five-Star consisted of an Offer for Sale (OFS) of 3,36,17,061 equity shares of face value of INR,1 each ("Equity Shares") of Five-Star Business Finance Limited ("Company" or the "Issuer") for cash at a price of INR 474 per Equity Share (including a premium of INR 473 per Equity Share) ("Offer Price"), aggregating to INR 1,593.449 crore (the "Offer"). Its consisted of the following "Offered Shared" by the "Selling Shareholders":

i. 28,59,873 equity shares aggregating to INR 135.558 crore by SCI Investments V;
ii. 1,23,39,051 Equity Shares aggregating to INR 584.871 crore by Matrix Partners India Investment Holdings II, LLC;
iii. 2,07,321. Equity Shares aggregating to INR 9.827 crore by Matrix Partners India Investments II Extension, LLC
iv. 61,99,367 Equity Shares aggregating to INR 293.85 crore by Norwest Venture Partners X – Mauritius; and
v. 1,20,11,449 Equity Shares aggregating to INR 569.343 crore by TPG Asia VII SF Pte. Ltd.

Other Parties and Advisors to the transaction included Sidley Austin LLP (acted as international legal counsel for BRLM).

The transaction closed on November 17, 2022.

News

1- The Hon'ble Supreme Court of India, on November 4, 2022, in a landmark judgement in *The Employees' Provident Fund Organisation v. Sunil Kumar*, examined the provisions of the Employees Pension (Amendment) Scheme, 2014 ("2014 EPS Amendment") and upheld its constitutional validity (with certain riders). The Judgement provides some much awaited clarity in the backdrop of several High Court rulings (such as the Kerala, Rajasthan and Delhi High Courts) which had previously held the 2014 EPS Amendment to be unconstitutional. Read more: https://economictimes.indiatimes.com/wealth/invest/who-is-eligible-for-higher-eps-pension-under-epf-scheme-last-date-to-claim-supreme-court-clarifies/articleshow/95395231.cms

2- NFRA to introduce annual transparency report requirement for audit firms. The watchdog has already issued requirements to be followed by auditors and audit firms.
Read more: https://economictimes.indiatimes.com/news/economy/policy/nfra-to-introduce-annual-transparency-report-requirement-for-audit-firms/articleshow/97030705.cms

3- The Securities and Exchange Board of India ("SEBI") had, in its board meeting held on September 30, 2022, approved certain key proposals, including: (i) introduction of pre-filing of offer document as an alternative mechanism for the purpose of an initial public offering ("IPO"), and (ii) disclosure of key performance indicators ("KPIs") and price per share of the issuer company in public offering based on primary issuances and secondary transfers undertaken in the past. SEBI has now notified the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Fourth Amendment) Regulations, 2022 on November 21, 2022 ("ICDR Amendments"). Read More: https://taxguru.in/sebi/14-key-decisions-sebi-board-meeting-30-09-2022.html

4- In *Balram Singh Vs. Kelo Devi*, the Supreme Court observed that a relief of permanent injunction cannot be sought on the basis of such an unregistered document/agreement to sell. A plaintiff

cannot get the relief indirectly which otherwise he/she cannot get in a suit for for specific performance. The Apex Court further observed that in the instant case, the plaintiff by clever drafting prayed for a relief of permanent injunction only and did not seek for substantive relief of specific performance of the agreement to sell as the same was an unregistered document on which no decree of specific performance could have been passed. Read More https://indiankanoon.org/doc/197385579/#:~:text=the%20learned%20trial%20Court%20for,possession%20in%20the%20suit%20property.

5- SEBI vide notification dated December 09, 2022, has amended regulation of the Board Meeting Regulations to provide for participation of members in meetings through video conferencing or any other audio visual means. Further, Schedule I (Procedure for allowing Members to participate in Board meetings through video conferencing or other audio visual means), has been inserted to the Board Meeting Regulations. Read More- https://www.sebi.gov.in/legal/regulations/dec-2022/securities-and-exchange-board-of-india-procedure-for-board-meetings-amendment-regulations-2022_66207.html

6- The Parliamentary Standing Committee on Finance has suggested that the government extend the provisions of settlement under the Competition Amendment Bill, 2022 ("the Bill") to cartels so as to make the initiative more pragmatic. It recommended some changes to the transaction value threshold prescribed in the draft bill to prevent certain mergers and acquisitions (M&As) from coming under the ambit of the Competition Commission of India (CCI). However, it did not suggest any change in the value of the threshold set at Rs. 2,000 crores. Read More- https://www.scconline.com/blog/post/2023/01/14/analysing-the-joint-parliamentary-committee-report-on-the-competition-amendment-bill-2022/

7- The Hon'ble High Court of Delhi in National Highways Authority of India v. Lucknow Sitapur Expressway Ltd. has held that an order of the Hon'ble Arbitral Tribunal rejecting the application for impleading a party to the arbitration is not an interim award but merely a procedural order, therefore, the same

cannot be challenged under Section 34 of the Act. In the said case, the Petitioner has challenged the Impugned order of the Hon'ble Arbitral Tribunal under section 34 of the Arbitration and Conciliation Act 1996. The said order rejected the application for impleading the State of U.P. as a party to the arbitration. The Respondent contended that the petition is not maintainable for the reason that the impugned order is merely a procedural order that fails to satisfy the requirement of an award as given under section 31 of the Arbitration and Conciliation Act 1996. Read More- https://legiteye.com/in-omp-comm-4772022-del-hc-order-of-arbitral-tribunal-in-order-to-constitute-award-would-be-one-which-decides-substantive-dispute-or-question-existing-between-parties-delhi-hc-justice-yashwant-varma-22-12-2022/

8- The Central Government vide notification dated December 23, 2022 amended the Government of India (Allocation of Business) Rules, 1961 ("Amendment") to include 'Matters relating to online gaming' as a subject under the Ministry of Electronics and Information Technology. Read More- https://www.mondaq.com/india/gaming/1268798/the-game-has-changed

9- Rajya Sabha passed the Energy Conservation (Amendment) Bill, 2022 which addresses several energy efficiency and decarbonization measures across the economy. https://economictimes.indiatimes.com/industry/energy/power/energy-conservation-bill-2022-implications-and-next-steps/articleshow/96562757.cms

10- In the case of *Southern Agrifurane Industries Private Ltd v. The Assistant Director* (Directorate of Enforcement) (W.P. No. 28140 of 2022 and WMP No. 27428 of 2022), the Madras High Court held that the Court cannot act as stumbling block in central agency investigations unless there is misuse of powers. In the present case a Writ Petition was filed by the Petitioner challenging the Enforcement Case Information Report registered by the Directorate of Enforcement ("ED") against them. The contention of the Petitioner is that ED was acting beyond its jurisdiction, as the provisions of Foreign Exchange Management Act,

1999 ("FEMA") have not been made a schedule offences and the ED is indirectly conducting the investigation by taking advantage of the FIR registered in Crime No. 161 of 2022, based on the complaint given by AXIS bank and a reading of the entire complaint will show that what has been alleged against the petitioner was only contravention of the provisions of FEMA and there is no IPC offence involved in this case. The Court dismissed the petition and held that unless there is a misuse of power of investigation, or such investigation is an abuse of process of law, the Courts cannot stall the investigations conducted by the investigating agency. Read More- https://images.assettype.com/barandbench/2022-12/2a095394-ca89-49ba-a02f-5237cc0c0aab/Southern_Agrifurane_v_The_Assistant.pdf

Initiatives by the Department of Corporate, Legal and Regulatory Affairs, ASSOCHAM

VIRTUAL COLLOQUIUM

"Social Stock Exchange in India: The Next Inclusive Growth Trajectory"

Emergence, Sustenance and Governance

In view of immensely growing importance of the subject for social enterprises, ASSOCHAM Task Force for Governance in Societies, Trust and NGOs along with National Council for Social Inclusion and Affirmative Action contemplates has organized the virtual colloquium on "**Social Stock Exchange in India: The Next Inclusive Growth Trajectory"** on Friday, 7th October 2022.

National Virtual Seminar

"Harnessing the Potential of Socio-Economic Empowerment in India

Through Protected, Safe and Sustainable Investments

The vulnerability of individuals with context to their savings and investments is irrespective of demographic factors; but this is higher amongst youth, women, and senior citizens. Some of the reasons are including- a lack of financial knowledge and awareness, a plethora of information, proliferation of numerous BFSI Sector products, greed to grow faster, digital financial illiteracy, etc. Such adversities lead to the actions and outcomes of project implementing agencies

being deflated and hence it calls an advance preparation and awareness for counter actions to resolve for growth.

In this background and keeping in mind its mandate for protecting the interests of the society, ASSOCHAM National Council for Social Inclusion and Affirmative along with Association for Mutual Funds in India (AMFI) has organized an Interactive Virtual Seminar on **"Harnessing the Potential of Socio-Economic Empowerment in India Through Protected, Safe and Sustainable Investments"** from 11.00 am to 1.00 pm held on 10th October 2022.

7th International Conference Competition Law

A robust antitrust and competition law enforcement has become a necessity for domestic as well as overseas enterprises who intend to invest in India. The new age, digital markets and e-commerce initiatives are revolutionizing the economies. The innovations and technological disruptions have thrown up challenges and threats to the incumbent traditional segments of the Indian markets. Unfair business practices have prompted policymakers to consider and innovate newer policies to curb such practices harming other stakeholders. The impact and influence of such challenges e.g., are amongst others on scrutiny over mergers, data and privacy rights of businesses and consumers. Hence, an effective handling of antitrust litigation and regulatory processes have become perpetually crucial parts of business and regulatory ecosystems.

For global investors especially, in long-term investment decisions, competition laws with focus on maintaining competitive process and controlled interventions of regulators and enforcement agencies remain the preferred model. The latest development in Indian context for the ensuing conference, is the Competition (Amendment) Bill, 2022 which has been introduced in Lok Sabha on 5th August 2022. The Bill seeks to enhance the evolution of competition jurisprudence together

with addressing the foregoing changes to the extent possible strengthen the Indian industry and enabling competitiveness across various business segments.

Further, towards deliberating on various perspectives of competition law as well as creating public awareness and sensitizing the stakeholders in a co-evolving landscape across international jurisdictions, ASSOCHAM's National Council for Competition Law organized 7th Annual International Conference on "Competition Law – Enforcement in India: the past, the present and the future" on Saturday, 15th October 2022 in New Delhi.

2nd International Conference

"Money Laundering and Collective Response"

To deliberate on newer collective approaches of global stakeholders including the financial institutions, government, regulators, legal professionals, enforcement agencies, parties in trade and business, reg-tech and legal-tech experts, ASSOCHAM's National Council for Legal Affairs and Regulatory Reforms along with National Council for Internal Audit and Risk Management organized the 2nd International Conference on "*Money Laundering and Collective Response*" on **12th November 2022.**

The key highlights of ASSOCHAM conference points out that newer trend and tools have evolved in the market for facilitating laundering of money by various offenders and that the enforcement directorate should also build capacity to tackle the same.

International Conference
Whistle Blower Policy: Letter and Spirit Vs. Effectiveness

The concept or act of whistleblowing is often seen as treachery because it brings lot of bad publicity with it. However, an effective corporate governance with transparency strongly embedded in practice can avoid instances of whistleblowing and its negative impact. It is sometimes also used as a corporate sabotage tool to effect the business and share prices of the company. With this thought in mind, ASSOCHAM curated this virtual conference which was graced by eminent dignitaries from across the globe to discuss the current legislative and policy framework, best practices, challenges and way forward around the theme of whistle-blowing on **8th November 2022.**

The key highlights of ASSOCHAM conference points out that there is an immense need to sensitize the corporates and individuals on “whistle-blowing” as a tool for good governance.

THE ASSOCIATED CHAMBERS OF COMMERCE AND INDUSTRY OF INDIA (ASSOCHAM)

The Associated Chambers of Commerce & Industry of India (ASSOCHAM) is the country's oldest and most agile apex chamber, always evolving with the times ever since it was set up in 1920. The ASSOCHAM reaches out to and serves over 4.5 lakh members from trade, industry and professional services through over 400 associations, federations and regional chambers spread across the length and breadth of the country. It has built a strong presence in states, and also spread its wings in the key cities of the world.

With a rich heritage of being led by stalwarts of independent India, like JRD Tata, Nani Palkhivala, H.P. Nanda, L.M. Thapar, A.N. Haksar and Raunaq Singh, among others, the ASSOCHAM has shown the ability to transform itself to the contemporary Corporate India and of late has emerged as the 'Knowledge Chamber', leveraging the country's strength in the knowledge - led global economy. Be it education, health, manufacturing, banking-finance, international trade, energy, human resource, science and technology, entertainment or the rural landscape comprising agriculture and rural infrastructure, the ASSOCHAM has well- established National Councils in each of the segments, chaired by well-known industry leaders, academicians, economists and independent professionals. These councils deliberate extensively and share their inputs with the government.

ASSOCHAM is working hand in hand with the government, institutions of importance and national and international think tanks to contribute to the policy making process even as it shares vital feedback on implementation of decisions of far-reaching consequences. ASSOCHAM is truly an institution of eminence, ever contributing to the task of nation building.

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About the upcoming Issue
Inviting expression of interest

The upcoming issue of the CRA e- bulletin will be to celebrate the incredible women in the corporate and legal fraternity in India. The issue will set to be released in March, 2023 observing International Women's Day that is celebrated worldwide on 8th of March. The issue will be "***by the women***" and "***for the nation***"!
Expression of interest for contribution in the upcoming issue is welcomed from the amazing women working in the corporate and legal fraternity of the India.

An email comprising of expression of interest in following template may be shared at Ritima.singh@assocham.com or Vikash.vardhaman@assocham.com :

Name:
Designation:
Organization:
Bulletin vertical interested:
Tentative theme:
Abstract for article (if applicable) for 300 words.

Major verticals to be covered in the bulletin:
1- Editorial vertical (ASSOCHAM editorial team)
2- ASSOCHAM news bulletin
3- Sectoral Bulletin
4- Articles
5- Interview
6- Op-ed
7- Reports & Case studies
8- Promotional columns for corporates, law firms, educational institutions

Write your suggestions, feedback, and comments via email to santosh.parashar@assocham.com

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