



AU COURANT
RGNUL FINANCIAL AND MERCANTILE LAW REVIEW



JANUARY 2024

PREFACE

It gives us immense joy to share with our readers the February edition of our monthly newsletter, "Au Courant". In this edition, the current on-goings in various fields of law have been analysed succinctly in the 'Highlights' section to provide readers with some food for thought.

This includes a brief comment on the closure order passed by the CCI in information against Madhav KRG and Punjab Pollution Control Board, termination of \$10 Bn deal between Sony and Zee, and the US SC decision in Apple v. Epic Games.

Major happenings in various fields of law such as Technology Law, Banking and Finance, and Intellectual Property Rights Law have been recorded in the 'News Updates' segment to keep the readers abreast of latest legal developments.

This edition also features an interview with Mr. Bishwajit Dubey, Advocate and Former Partner at Cyril Amarchand Mangaldas on the topic "Real Estate Insolvency: Legal Insights and Challenges."

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



HIGHLIGHTS OF THE MONTH

HIGHLIGHTS



CCI closes case against Punjab Pollution Control Board

The CCI vide order dated 16.01.2024 dismissed information against Madhav KRG Ltd (OP-1) and Punjab Pollution Control Board (OP-2) (collectively, OPs). OP-1 was stated to be in the business of extracting zinc out of the pollution dust; while OP-2 was stated to be the state pollution control board that has been entrusted with the task of implementation of environmental laws in the State of Punjab. The Informant alleged that OP-2 mandated all steel induction furnaces to install Air Pollution Control Devices (APCD) as the process produced dust containing around 40% zinc. This dust, treated as hazardous waste by OP-2, had limited buyers, with OP-1 being a dominant player permitted to purchase it.

The Informant contended that OP-1 (facilitated by OP-2) exploited its dominant position by buying pollution dust from induction furnaces at a low price, resulting in undue profits. The Informant sought Commission directions to reclassify pollution dust, enable market-driven prices, and prayed for legal actions and penalties against OP-1 for alleged violations of Section 4 of the Act. However, the Commission observed that the entry of two new players and the documented increase in procurement prices from Rs. 8 to Rs. 25 per kg indicated a competitive environment. Furthermore, there was no specific allegation against OP-2 for violating Section 4 of the Act. Consequently, the Commission closed the case under Section 26(2) of the Act. [Read more](#)

HIGHLIGHTS



Mega-Merger Fails: Termination of \$10 Bn Agreement between Sony and Zee

On January 22nd, Sony confirms that it has served a termination notice to Zee Entertainment, ending the proposed \$10 billion mega-merger between Sony's Indian operations and Zee Entertainment. The Sony-Zee agreement aimed to establish India's largest entertainment company, armed with the financial backing to compete against global players like Netflix Inc. and Amazon.com Inc. Additionally, it would also position itself against local conglomerates such as Reliance Industries Ltd.

In December 2021, Sony and Zee had signed definitive agreements to merge. The merger would have entitled Sony to a 50.86% stake of the combined company against a 3.99% and 45.15 percent stake of the founders of ZEE and the other ZEE shareholders respectively.

The agreement was made under the condition that if the merger did not occur within 24 months after they were signed, called the 'End Date', the parties would opt for an extension of the 'End Date', during the 25th Month, after which if no extension was determined, any party could end the agreement by sending a written notice. The merger did not happen by the End Date, and accordingly, even the discussion fell through, thus Sony sent a written notice to ZEE, terminating the merger agreement.

The rumours of it having ended were cleared up by ZEE which was still highly optimistic about the merger, but Sony confirmed that the plans for the merger had ended. [Read more](#)

HIGHLIGHTS



VS



The US Supreme Court upholds Apple v. Epic decision

The US Supreme Court allowed a court order to take effect that could loosen Apple's grip on its lucrative iPhone app store, and potentially affect billions of dollars in revenue a year. The justices rejected Apple's appeal of lower-court rulings that found some of Apple's app store rules for apps purchased on more than 1 billion iPhones constitute unfair competition under California law.

The appeal stemmed from an antitrust lawsuit filed by Epic Games, maker of the popular Fortnite video game. Epic lost its broader claim that Cupertino, California-based Apple was violating federal antitrust law, and the justices also rejected Epic's appeal. But in turning away Apple's plea, the court lifted a hold on an order to allow app developers throughout the US to insert links to other payment options besides its own within iPhone apps.

Apple takes a 15-30% commission on all purchases that flow through its In-App Purchase system, a system that the company currently requires developers to use exclusively. It has also barred apps from telling customers about alternative payment methods that may exist. The Apple vs. Epic decision will mean that apps will now be allowed to tell their users that other payment options are available, with a direct link to the app's website. If customers opt to use the alternative payment methods, developers will be able to collect more revenue as they won't necessarily have to pay Apple's cut of commissions. [Read More](#)

HIGHLIGHTS



ANTI-ARBITRATION INJUNCTION

Anti-Arbitration Injunction Granted in a Rare International Commercial Arbitration Instance

A court order that prevents parties from starting or continuing arbitration proceedings is known as an anti-arbitration injunction. In a rare instance, the Delhi High Court granted one in an international commercial arbitration proceeding.

The defendant was restrained from participating further in the arbitral proceedings and the interim order remains in force until May 2, 2024. The Court noted that the agreement specified India as the governing law of arbitration, i.e. where arbitration would occur. Additionally, it stipulated that the parties would be subjected to the jurisdiction of New Delhi.

The court opined that although the arbitration provision did possibly say that arbitration could be conducted in any other UNCITRAL following countries that was subject to a mutual decision of the parties, but there was no evidence of such agreement.

The Court emphasized the critical principle that the agreed procedure for appointing an arbitrator must be strictly followed, which appeared not to have been done in this case as as per Article 9, the parties refer disputes to arbitration post the failure of pre-arbitral steps. The plaintiff held the view that the proceedings before the sole arbitrator were non-est as they were not founded as per the arbitration clause. The court, prima facie, passed an injunction order in plaintiff's favour. [Read More](#)



NEWS BITS

NEWS BITS



MeitY's Advisory to Curb Deepfakes in India

The Ministry of Electronics and Information Technology issued an advisory to intermediaries (Advisory) to comply with the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules). The Advisory particularly seeks to address the growing concerns around the misinformation powered by Artificial Intelligence (AI) deepfakes. Recently, deepfakes have garnered a lot of news and attention in India.

The advisory emphasizes clear communication of prohibited content in terms of service, user agreements, and at registration/login. Platforms must inform users about reporting legal violations to law enforcement. Users should be aware of penal provisions under Indian laws for violating IT Rules. Intermediaries must maintain due diligence per Rule 3(1) by informing users about rules, and privacy policy, and not hosting prohibited content. [Read more](#)



“An e-commerce platform cannot become a haven for infringers.”: Delhi HC directs e-commerce platforms to protect the intellectual property rights of sellers

During a lawsuit by sportswear brand Puma SE which claimed that the e-commerce platform Indiamart was used by various sellers to peddle Puma's counterfeit goods, the Delhi High Court observed the ideal proclivity that e-commerce platforms must have in not just amassing profits but also protecting the IP rights of renowned sellers, or otherwise.

The court directs Indiamart to remove such infringing listings from their drop-down menus while also asking the platform to not cater to any prospective seller to register with the Puma Trademark at the time of registration. [Read more](#)



The RBI Ordered the Closure of Paytm Payments Bank

The Reserve Bank of India (RBI) mandated the closure of Paytm Payments Bank, citing "persistent non-compliances and ongoing material supervisory concerns within the bank." However, a recent report alleges the discovery of hundreds of thousands of accounts at Paytm Payments Bank that were established without adequate identification, potentially facilitating money laundering activities. The ED will probe Paytm Payments Bank, which has been told to wind up its operations by February 29 if any evidence of illegal activity is found.

[Read More](#)



INTERVIEW

INTERVIEW



**Mr. Bishwajit Dubey,
Advocate and Former
Partner at Cyril
Amarchand Mangaldas**

**He has been recognized
by Forbes as 'Top
Individual Lawyer
Insolvency' and has
advisory, litigation and
arbitration experience
of over 19 years.**

REAL ESTATE INSOLVENCY: LEGAL INSIGHTS AND CHALLENGES

1. What do you think about the concept of Reverse Corporate Insolvency Resolution Process (CIRP) as a transformative strategy for the revitalization of India's real estate sector?

The introduction of the Insolvency and Bankruptcy Code (IBC) in 2016 brought about a significant shift in corporate insolvency resolution in India. In 2019, Indian courts recognized the concept of "Reverse Corporate Insolvency Resolution Process" (Reverse CIRP), particularly applicable to real estate projects. This innovative approach allows project promoters, facing insolvency proceedings, to act as financial lenders and inject funds into the project for completion. Several judgments, including those in Flat Buyers Association Winter Hills vs Umang Real tech and Anand Murti vs. Soni Infratech Private Limited, upheld Reverse CIRP as a viable option for timely project completion, ensuring homebuyers' interests are safeguarded without compromising on financial losses.

The process mandates that promoters possess adequate financial backing, garner support from homebuyers for possession over refunds, adhere to project completion timelines, and cooperate with the Insolvency Resolution Professional (IRP). Despite lacking legislative backing within the IBC, Reverse CIRP has emerged as a pragmatic solution for resolving distressed real estate projects, unclogging stalled developments, and mitigating litigation risks. However, its implementation requires stringent adherence to timelines, fund infusion, collaborative efforts with IRPs, and continual monitoring to uphold homebuyers' interests and ensure project completion, thereby contributing significantly to the revival of the real estate sector.

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REAL ESTATE INSOLVENCY: LEGAL INSIGHTS AND CHALLENGES

2. What according to you are the key factors/reasons that have led to the high number of real estate companies/ contractors going into the corporate insolvency resolution process in India?

The high number of real estate companies and contractors entering the corporate insolvency resolution process in India can be attributed to various factors. Firstly, the sector was largely unregulated from an investor's point of view previously, allowing for practices such as the diversion of funds from one project to another, leading to financial instability and project delays. Secondly, financial mismanagement within real estate companies, including cost overruns and misuse of funds, has contributed to their financial distress. Moreover, instances of diversion of funds raised for specific projects to purchase land parcels or other unauthorized uses, coupled with insufficient monitoring by financial institutions during project implementation, have added to the sector's woes.

External factors such as liquidity crunches and delays in obtaining necessary clearances from authorities, have further strained real estate companies. Furthermore, fraudulent practices by builders and inadequate due diligence by homebuyers have also played a role in the sector's downturn. Lastly, the practice of operating multiple housing projects under a single company name instead of establishing separate entities for each project has led to operational inefficiencies and increased financial risks, contributing to the sector's overall instability. Collectively, these factors highlight the multifaceted challenges facing the real estate industry in India and underscore the need for comprehensive reforms to address systemic issues and restore investor confidence.

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REAL ESTATE INSOLVENCY: LEGAL INSIGHTS AND CHALLENGES

3. How can the role of authorized representatives (ARs) under section 21(6A) in the CIRP of real estate companies be improved to ensure effective communication between ARs and homebuyers?

The Insolvency and Bankruptcy Board of India (IBBI) introduced the provision of Authorized Representatives (AR) under the IBBI Regulations, facilitating effective participation of various creditor classes in the Corporate Insolvency Resolution Process (CIRP). Notably, this provision doesn't define AR under the IBC. ARs are appointed to represent the mandate of creditors in the Committee of Creditors (CoC), particularly crucial in real estate matters where homebuyers constitute a significant creditor class. Despite its importance, the IBC lacks clarity on the process of changing ARs during CIRP, unlike provisions for changing Resolution Professionals (RPs). There's a need to define the role of ARs comprehensively, including their selection process, fees, and responsibilities, to ensure effective representation of creditors' interests throughout the insolvency process.

Additionally, challenges in determining the period, process, and timelines for concluding the role of ARs persist. While the AR's role traditionally concludes with the submission of a Resolution Plan to the National Company Law Tribunal (NCLT) or the initiation of liquidation proceedings, ongoing queries and meetings from creditors may extend beyond these milestones. The IBC and related regulations should outline guidelines for the orderly conclusion of the AR's involvement in the assignment, addressing concerns regarding ongoing communication and responsibilities even after significant CIRP milestones.

Furthermore, the evolving role of ARs necessitates a clear definition within the IBC framework to align with their responsibilities as representatives of creditor classes. Additionally, provisions for changing ARs during CIRP should be introduced, allowing creditor classes to replace representatives if dissatisfied with their performance. This could involve a voting mechanism among creditors to ensure a fair and transparent process. Moreover, clarifying the selection process for ARs during transition periods, along with establishing reasonable remuneration structures, can incentivize Insolvency Professionals (IPs) to undertake AR assignments more seriously, recognizing the pivotal role they play in safeguarding creditors' interests during insolvency proceedings.

4. Given the challenges faced by home buyers in achieving timely and effective resolution of their claims such as issues relating to claims submitted with delay, treatment of orders passed by the RERA, claims of landowners etc., what are the key recommendations to improve the process?

Improving the resolution process for home buyers and addressing challenges in the real estate sector demands a multifaceted strategy. Firstly, strict timelines should be set for claim adjudication, coupled with measures to expedite the process and discourage unnecessary delays.

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REAL ESTATE INSOLVENCY: LEGAL INSIGHTS AND CHALLENGES

Secondly, leveraging digital platforms for claim submissions and enhancing transparency is essential. Thirdly, officials must receive comprehensive training on real estate laws and dispute resolution mechanisms to bolster their capacity. Standardizing processes for claim handling and collaborating effectively with RERA authorities are vital steps. Encouraging alternative dispute resolution mechanisms can help expedite resolutions and alleviate the burden on formal adjudication. Fair treatment of landowner claims and consumer education initiatives are imperative. Establishing regular review mechanisms, coupled with periodic legal reforms, will ensure continuous improvement of the resolution framework. Collaboration among government bodies, regulatory authorities, and industry stakeholders is crucial for the successful implementation of these recommendations, fostering a more efficient and effective resolution process for home buyers within the real estate sector.

5. The Supreme Court in the recent case of Vishal Chelani and others v. Debashis Nanda, 2023 held that homebuyers cannot be treated differently from other 'financial creditors' under IBC merely on the ground of securing a favourable order from the authority under RERA. What are your views about this current development?

The recent Supreme Court ruling in Vishal Chelani and others v. Debashis Nanda, 2023, which stated that homebuyers cannot be treated differently from other 'financial creditors' under the Insolvency and Bankruptcy Code (IBC) solely based on securing a favorable order from the Real Estate Regulatory Authority (RERA), raises important considerations. This ruling underscores the need for consistency in treating homebuyers as financial creditors within the IBC framework, regardless of their actions or orders obtained through other regulatory bodies such as RERA. From my perspective, this development aligns with the fundamental principles of equality and fairness enshrined in the IBC. Treating homebuyers differently based on their interactions with RERA could potentially create inconsistencies and undermine the uniformity of the insolvency resolution process. By emphasizing that homebuyers should not be granted special treatment solely due to RERA interventions, the Supreme Court reaffirms the importance of upholding the integrity and coherence of the IBC.

Moreover, this ruling emphasizes the need for a harmonized approach between different regulatory authorities involved in real estate matters. While RERA plays a crucial role in protecting homebuyers' interests and resolving disputes within the real estate sector, it should operate in tandem with the insolvency framework established by the IBC.

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REAL ESTATE INSOLVENCY: LEGAL INSIGHTS AND CHALLENGES

Clear delineation of roles and responsibilities between RERA and the IBC can help avoid conflicts and ensure efficient resolution of real estate insolvency cases. Overall, the Supreme Court's decision in Vishal Chelani and others v. Debashis Nanda, 2023, reinforces the principle of uniform treatment of homebuyers as financial creditors under the IBC, irrespective of their engagements with other regulatory bodies. This promotes transparency, consistency, and fairness in the insolvency resolution process, ultimately enhancing investor confidence and contributing to the stability of the real estate sector.

6. What are the consequences for allottees of a real estate project if the corporate debtor (CD) goes into liquidation? How are those home buyers who have taken possession of the house treated in such a case?

If a corporate debtor enters liquidation, several consequences arise for allottees of a real estate project. Firstly, there is substantial erosion in value during liquidation proceedings. In such cases, those who have already taken possession of their properties should promptly register their houses in their names. Secondly, there's a pressing need to reconsider the status of homebuyers, currently classified as unsecured creditors, and treat them as secured creditors instead, aligning with the concept of reverse insolvency to enable smoother resolutions in the market. This reclassification would provide them with greater protection in the event of liquidation.

Moreover, clarity is essential regarding when allottees should be considered secured creditors, as this ambiguity complicates their position in liquidation scenarios. It's proposed that homes purchased by allottees be excluded from the liquidation estate, allowing the liquidator to complete the project and distribute any surplus among stakeholders, potentially mitigating losses for homebuyers. Additionally, alternative offers with discounts to buyers could be explored to alleviate the challenges posed by liquidation for homebuyers.

Legally, the physical possession of properties is of lesser importance compared to financial obligations. Allottees who have fully paid should secure their ownership through execution of sale deeds, ensuring their safety and security. For those who have partially paid, their intentions to fulfill their obligations should be assessed during the Committee of Creditors (COC) proceedings. The Transfer of Property Act should be considered, particularly Section 53A, which suggests that once substantial obligations are met, allottees should be treated as secured financial creditors. However, allottees who engaged with fraudulent entities before thorough verification may bear some responsibility for any damages incurred. Thus, a comprehensive framework addressing these aspects is crucial to safeguard the interests of real estate project allottees in the event of liquidation.

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