RFM
Law Review

AU COURANT

APRIL-MAY 2021

RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

TABLE OF CONTENTS

RFM Law Review

PREFACE

It gives us great pleasure to introduce our monthly newsletter "Au Courant". This edition is a combined issue for the months of April and May, 2021.

In this edition, the current on-goings in various fields of law have been analysed succinctly in the 'Highlights' section to provide readers some food for thought. These include the recent changes made in Customs (Imports of Goods at Concessional Rate of Duty) rules, IGCR 2017; an explainer on the amazon vs. future group case; New Zealand to launch climate change rules for financial firms and the new The Insolvency and Bankruptcy Code (Amendment) Ordinance.

Furthermore, there is an Interview segment with Mr. Thomas Joseph, an IP and TMT lawyer, currently working as an Associate at Spice Route Legal, Bangalore about the Google LLC v. Oracle America Inc. Case.

Major happenings in various fields of law such as aviation, arbitration, competition, international trade law, securities, taxation, intellectual property, and technology, media & telecommunication have been recorded to keep the readers abreast of latest legal developments.

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

HIGHLIGHTS

IGCR, 2017 CUSTOMS RULES CHANGED

The Central Board of Indirect Taxes and Customs (CBIC) recently made changes in Customs (Imports of Goods at Concessional Rate of Duty) rules, IGCR 2017. These alterations were made through the Customs (Import of Goods at Concessional Rate of Duty) Amendment Rules, 2021.

The Custom Rules, IGCR 2017 lays down the provisions through which an importer can avail the advantage of concessional customs duty on the import of those materials and goods that are required for domestic production of goods or for providing services.

Of all the changes that have been made, a significant change fulfils the requirements of trade and industry, and allows the importers who do not possess in-house manufacturing facility to import goods at concessional rates and get the job done at other manufacturing units.

Another significant change has been made with respect to capital goods. These goods are not finished goods but are used to make finished goods. The changes allow those who the import capital goods at concessional rates to get them re-sell them in the domestic market on payment of duty and interest, at a depreciated value.

AMAZON VS. FUTURE GROUP CASE: AN EXPLAINER

The Apex Court of the land has listed the Amazon vs Future Group case for the final disposal of the hearings on May 4, 2021. The case is also being heard by a tribunal of the Singapore International Arbitration Centre. An interim order has already been passed by the emergency arbitrator in favour of Amazon. This is one of the biggest lawsuits in the Indian Business History and conclusion of the case after months of lawsuits at various courts in India and abroad could determine implications on the future of Indian retail, implementation of arbitral award and the path ahead for ecommerce in India.

Amazon vs Future Group: How the Problem Began

In September 2019, Amazon informed the Competition Council of India about its proposal to acquire 49% stakes in Future Coupons, owned by India's second largest retail chain, Future Retail. Approved by the CCI, the notice triggered three set of transactions- Amazon's acquisition of 49% of shares of Future Coupons, transfer of certain shares of the Future Retail to Future Coupons, and consequent Amazon's acquisition of stake in the Future Retail. Amazon was also provided with the 'call option' which gave it certain leverage in acquiring part or all of Future Retail's shares in future. As per the deal, Future Group was also not allowed to transact with 30 entities including the Reliance Retail. Regardless of the contract, Future Group and Reliance announced a deal as per which the latter expressed its intent to acquire the entire retail, logistics and warehousing business of the former at approximate INR 25000 crore.

Amazon then sent a legal notice to the Future Group. Having got no response from the latter, it approached the Singapore International Arbitration Centre (SIAC) in October, 2020. Lawyers of the ecommerce giant contend that approaching the SIAC was in compliance with the contract between the aforementioned parties as per which in any case of dispute, either of the parties were free to approach the SIAC. This was agreed to by the parties as it is a commonly held practice in case of cross border transactions where the parties intend to have neutral jurisdictions for dispute resolution. SIAC then granted an emergency arbitration award in favour of Amazon.

To make its case, the Future Group also filed a plea with the SIAC contending that since the contract was signed between Future Coupons and Amazon, the Future Retail should be kept out of the aforementioned deal. The SIAC however refused to accept this contention and barred Future retail from taking any additional step in the direction of disposal of its assets. In order to get it implemented, Amazon then sent a letter along with the interim order of SIAC to Indian market regulator SEBI and CCI. Future Retail then approached the Delhi High Court arguing that the order passed by the SIAC was without any jurisdiction. It also alleged that Amazon has violated the Foreign Exchange Management (Non-debt Instruments) Rules 2019 and the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Future requested the court to injunct Amazon from writing letters to SEBI and CCI.

However, on March 18, 2021, the single judge bench of the Delhi high court refrained from granting an interim injunction restraining Amazon from writing to SEBI, CCI and other authorities for the implementation of the arbitral award. The judgement also concluded that Future Group had willfully violated the emergency arbitrator's order. The bench also held the applicability of the order of SIAC in India. On March 22, the operation of this judgement was however stayed by a division bench of the Delhi High Court leading to a series of cases in the Delhi HC as well as in the Supreme Court of India. The Apex Court of the land on April 19, 2021 stayed all the proceedings of the case and listed the case for its final disposal on May 4, 2021.

NEW ZEALAND TO LAUNCH CLIMATE CHANGE RULES FOR FINANCIAL FIRMS

New Zealand has become the first country to introduce a legislation that will require financial firms including banks, asset managers and insurers to report the impacts of climate change on their business. The country aims to be carbon-neutral by 2050, and the financial sector is expected to play a crucial role. Minister for Climate Change James Shaw says financial institutions can do this by assessing the environmental impacts of their investments. "This law will bring climate risks and resilience into the heart of financial and business decision making," said Mr Shaw.

In May 2019, the government introduced the Climate Change Response (Zero Carbon) Amendment Bill, which established a Climate Change Commission to advise government-led policies in response to commitments made in Paris in 2016. Prime Minister Jacinda Ardern, who returned to office last October delivering the largest election victory for her centre-left Labour Party in 50 years, had called climate change the "nuclear free moment of our generation."

The new bill aimed at financial firms is the first of its kind to be proposed anywhere in the world, according to the government. Around 200 companies will be required to make environment disclosures as a result of the bill. All banks with total assets exceeding NZ$1 billion ($703 million), insurers with total assets under management exceeding NZ$1 billion, and equity and debt issuers listed on the country's stock exchange will be required to make disclosures. "We simply cannot get to net-zero carbon emissions by 2050 unless the financial sector knows what impact their investments are having on the climate," Mr. Shaw said in a statement. Financial companies will be required to report how climate change impacts their operations and clarify how they intend to handle climate-related challenges and opportunities under the legislation. Companies will publish their first disclosure reports as early as 2023 if the bill passes.

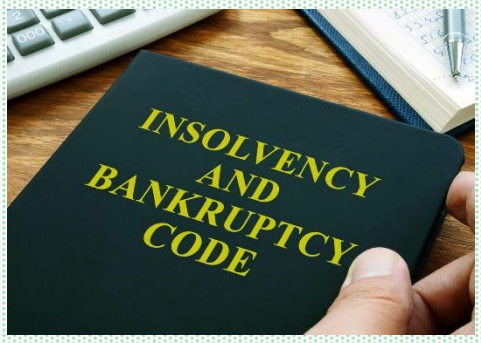
"Becoming the first country in the world to introduce a law like this means we have an opportunity to show real leadership and pave the way for other countries to make climate-related disclosures mandatory," said New Zealand's Commerce and Consumer Affairs Minister David Clark. The legislation would compel financial institutions to review not only their own investments, but also the

organizations to which they lend money, in terms of their environmental effects. Banks are being pressured to do more to combat climate change, amid a growing focus by governments and financial regulators on the climate exposures of banks and asset managers.

"Requiring the financial sector to disclose the impacts of climate change will help businesses identify the high-emitting activities that pose a risk to their future prosperity," Shaw said, "as well as the opportunities presented by action on climate change and new low carbon technologies."

In recent months, the New Zealand government has taken a range of measures to minimise the country's emissions, including promising to make its public sector carbon neutral by 2025 and mandating the purchasing of electric vehicles by government agencies.

THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ORDINANCE: GOVERNMENT INTRODUCES PRE-PACKAGED RESOLUTION PROCESS FOR MSME



The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021was promulgated by the President on 4th April 2021. The ordinance provides for a pre-packaged insolvency resolution process (PPRIP) for corporate debtors classified as micro, small and medium enterprises (MSMEs), and aims to urgently address the specific requirements of MSMEs relating to the resolution of their insolvency due to the unique nature of their businesses and simpler corporate structures. The Ordinance, in essence, has amended the Insolvency and Bankruptcy Code 2016 by allowing the Central Government to notify such pre-packaged process for defaults of not more than Rs 1 crore. The initiative is based on a trust model and follows a debtor-in-possession approach. It vests significant consent rights to the financial creditors, such that the mechanism cannot be misused by errant promoters.

The ordinance was introduced in light of the recently uplifted suspension of fresh insolvency proceedings for MSMEs which began last year from 25th March 2020 amid the coronavirus pandemic. It is being seen as a welcome move across India as it will provide for a time-efficient alternative insolvency resolution framework with multiple benefits for corporate persons classified as MSMEs by ensuring quicker, cost-effective and value maximising outcomes for all stake holders, in a manner that is least disruptive to the functioning of MSMEs and which preserves jobs. Furthermore, the initiative adopted by India is similar to the Swiss Challenge, where competitive tension is bound to exist as promoters might propose plans with least impairment to rights and claims of creditors.

The amendments aim to alleviate the distress faced by MSMEs while keeping in mind their unique nature of business, their importance in the economy, and impact of COVID-19 on businesses. To address the specific needs of MSMEs relating to resolution of insolvency, the central government has decided a resolution plan will be negotiated between debtor and its creditors before submitting the plan for approval to the NCLT and subsequent commencement of formal proceedings. Rs 10 lakh has been set as the minimum threshold default for initiation of resolution process by MSME corporate debtor.

INTERVIEW: MR. THOMAS JOSEPH ON *GOOGLE v. ORACLE*

MR. THOMAS JOSEPH
Associate at Spice Route Legal, Bangalore

Thomas is an IP and TMT lawyer, currently working as an Associate at Spice Route Legal, Bangalore. He has close to 7 years of extensive experience in the field of IP, media and entertainment, having worked with leading broadcasters and media houses like Sony Pictures Networks India Private Limited and Yash Raj Films Private Limited.

He is a 2013 graduate from the National University of Advanced Legal Studies (NUALS), Kochi and has a keen academic interest in Intellectual Property Law (among other facets of Technology and Media laws), evinced by his specialised LL.M in Intellectual Property Laws from National Law University, Jodhpur

1. The decade long battle between Google and Oracle has come to an end with the Supreme Court of the United States ruling that Google copying the Java Application Programming Interface (API) was a fair use of that material. While applying the fair use doctrine on copyrightable property, one of the important factors is the purpose and character of the use. Given that, how do you think the doctrine should be tested on public APIs? What is your take on the four guiding factors examined by the court in the Copyright Act's fair use provision?

The US Supreme Court, to determine if Google's limited copying of the API is fair, examined and analysed their actions in the light of the following four factors as per the Copyright Act's fair use provision:

1. Purpose and character of the use
2. Nature of the copyrighted work
3. Amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. Effect of the use upon the potential market for or value of the copyrighted work.

These four factors are the primary principles of copyright law and echo across the rest of the intellectual property field as well. They, therefore, form the bedrock upon which any judgment on

fair use must be made. One may argue that since APIs are such basic, useful tools necessary for interoperability, they should not be protected under copyright law in order to ensure maximum accessibility. Unfortunately, the court in this judgment wisely refrained from deciding upon this controversial issue.

Drawing a parallel with Standard Essential Patents (SEPs), which are basic tools and features that are necessary for the development and functioning of higher-order systems and interoperability, and are protected under patent law, I don't see why APIs should not be copyrightable merely due to the fact that their primary function is to achieve interoperability.

Furthermore, considering copyright law does not mandate a high threshold to determine whether a work is copyrightable (relying on the concepts such as 'modicum of creativity' and the 'sweat of the brow doctrine), I feel APIs would be eligible for protection under copyright law. Since public APIs are open to developers over the world to build on as creatively as they please, the fair use doctrine must be applied in this context with care. The mere fact that such APIs are publicly available, should not play any role in the determination of copyrightability or assessment of fair use.

2. The judgment is limited only to the 'fair use doctrine and no finding has been made on the question of copyrightability of APIs. Do you think declaring code from the APIs should be copyrightable at all since most of it comes from the syntax of the language that is largely not built by whoever wrote it or do you think applying the fair use doctrine on a case-to-case basis is a significantly more cogent approach?

I feel it would not be a fair conclusion to state that the code behind an API, written in a particular programming language, should not be copyrightable merely because the coder did not create that programming language. That, according to me is like saying that anything written in English cannot be copyrightable because the writer did not invent English. The fundamental concept under copyright law is that the complexity, aesthetics, or efficacy of the written material has no bearing on its copyrightability, so this argument does not stand per se. I do acknowledge the existence of several doctrines such as the doctrine of merger, that form the basis of copyright law. They, however, need to be redefined to effectively address changes brought forth by technology and the works created therefrom.

With regard to the second part of the question, I don't believe that making a choice between determination of copyrightability or assessing whether a use is fair is the right approach. I feel determination of copyrightability should always be the first step in dealing with disputes such as these; and which would subsequently warrant the need to assess the fairness of usage, only if the work is copyrightable in the first place.

3. Justice Clarence Thomas' dissenting opinion on the judgment specifically warns that usage of the fair use doctrine be applied upon this case, by allowing fair use simply because it allows new products to be created effectively redefines the idea. Is that view on the usage of copyrights valid considering the modern software industry and copyrights law as a whole?

To answer this question, I believe we need to first discuss the context of the minority opinion, that was picked up from the judgment. Justice Clarence criticized the majority for redefining what is understood by "transformative" under copyright law. What we need to understand is that the mere fact of making new physical products that carries the verbatim code is not per se "transformative". In fact, it is a term used when we refer to the process of supplementing creativity to an underlying work of an author. By simply adopting a verbatim copy of the work on a different platform wouldn't suffice the tenets of "transformativeness" and hence, would not be a valid fair use of the work. The minority noted the undisputed factual finding that Google's use of Oracle's code was not to reverse engineer a system to ensure compatibility or interoperability, but rather a simple case of copying of the "declaring code" and using it for the same function as intended by the original author without adding any creativity to it; but in a competing platform.

The minority also observed that neither Google challenged the smaller court's judgments wherein they held that Google copied the primary points of Oracle's work. According to the minority, in such a circumstance, especially where Google's contribution was not "transformative" of the copied work and was intended to result in a product that competed with Oracle's potential revenue, the copying was indeed qualitatively and quantitatively substantial. In the face of a judgment wherein Google's blatant copying would be considered fair use, I agree with the minority that the approach taken by the majority redefines the concept of fair use, and not in the right direction, in my opinion.

4. Justice Stephen Breyer's majority opinion acknowledges that it is "difficult to apply traditional copyright concepts in that technological world." Is this an accurate summary of the applicability of traditional intellectual property laws on modern industries such as software, or is it an alternative approach to the application of existing law the right way?

In my opinion, I feel that the problem with the application of traditional copyright law on newer media such as software is that the laws were not written keeping such media in mind. As the fundamental properties of software and other digital literary materials differ from their physical versions, it is easy to see why such law may fall short in some situations involving traditional concepts. For example, traditional copyright law gives the right of production of copies of literary works to its author. In this, it contemplates the entire printing process that makes use of the printing press and the considerable monetary input required for the same. However, digital works can be copied with just a click, meaning that virtually anyone can create and sell copies of the work.

In my opinion, in the fast-paced technological world, it is necessary that copyright law not only be updated but also be applied to software with a nuanced approach based on the awareness of its unique properties. While I am personally of the opinion that the majority opinion in Google v Oracle is flawed, I was quite pleased to see the Supreme Court put effort into understanding the distinction between declaring code and implementing code before coming to a conclusion.

5. Market experts have discussed the detrimental effects of a ruling in favour of Google, arguing that it might harm fair competition laws in favour of large monopolists. Is the judgment in consonance with these expectations, or was the limited and specific application of fair use law useful for the same?

There has been much that has and will be written about how this case is a win for innovation because it allows programmers to copy code for the purpose of "interoperability". However, even though I see merit to this argument, a question that is raised and I see validity in is – but at what cost? Without disregarding the relevance of technical interoperability as a fundamental part of any technological revolution, I feel the "interoperability" as recognized by the Supreme Court in this judgment will put valuable, original code at risk of being copied verbatim in the future. To my understanding, the Supreme Court ruled Google's copying transformative because it was used to attract developers to build innovative software, which aligns with the objective of copyright law to enhance creativity. I read that the use of APIs by Google was to achieve "human interoperability",

rather than "software interoperability", which I believe is the case here, which unfortunately does not constitute "fair use". Additionally, the reliance on the argument that Java is used on desktop and laptop computers and Google used the code on a smartphone does not bring about transformation either, considering a smartphone is just a miniature computer.

It's very natural for a judgment of this kind to result in a disproportionate, unequal and massive overreaction by creators of all types. It is being suggested that companies now need to keep their software code secret and not release code in the public domain unless they are willing to give up all rights to it. This consequently may culminate in a snowball effect with less and less sharing of software code and reduced ability to copy, leading to a fundamental change in business models. In my humble opinion, the judgment might do far more harm than good to other copyrighted works due to the gradual detrimental effect it will inflict on the doctrine of fair use.

6. A majority of the software industry relies on open source, in that regard what might be the ramifications of this judgment on independent developers and the programming industry at large?

From what I understand, software developers have been using APIs quite freely. I feel the judgment, in that respect, will not have any impact on changing the status quo. That being said, with this judgment, software developers would exercise more caution in limiting accessing to their APIs and restricting the reproduction of the same. Before they do so, independent developers could act fast relying on the judgment to profit from the use of APIs falling within the ambit of fair use to modularly combine and recombine functionality and data for new uses, with virtually no marginal cost for each additional use of the API. As far as open-source software is concerned, the judgment has enhanced developers' freedom to innovate using widely available tools instead of building everything from scratch. For example, developers can use Android as a platform to build million-dollar applications.

7. Can software interfaces be included in the fair use definition? A legislative solution might be the suitable course of action or would it be too early to go in that direction for now?

Software interfaces, or programming interfaces, are the languages, codes and messages that programs use to communicate with each other and to the hardware. It could be the Windows, Mac and Linux operating systems, SMTP email, IP network protocols and the software drivers that activate the peripheral devices. Now, in the Indian context, Section 52 of the Copyright Act, 1957,

uses the term "computer programme", which is defined broadly in S. 2(ffc) to mean a set of instructions expressed in words, codes, schemes or in any other form, including a machine-readable medium, capable of causing a computer to perform a particular task or achieve a particular result. Therefore, as the definition of "computer programme" stands, software interfaces do fall within the its scope, and consequently within the ambit of fair use.

S. 52 gives an outline of fair use of computer programmes. It permits copying in order to use the program for which it was supplied, and to make temporary backup copies for this purpose; educational purposes; to ensure interoperability, and for any non-commercial personal use. I believe, from a bare reading of the Copyright Act, it is evident that such use of software interfaces would be permissible. The only challenge would be keeping the concept of 'fair use' in line with the developments in technology.

8. Section 52 of the Copyrights Act, 1957 provides for certain exceptions to infringement of copyright in India. What value does the judgment in Google v. Oracle hold in India's Legal Landscape?

In the Indian context, the assumption made by the US Supreme Court with respect to the copyrightability of the "declaring code" of Sun Java API would be of significant relevance. The same cannot however be said about the determination by the Supreme Court of Google's usage of the Java API as fair use. The concept of "fair use" as recognized in the US is different from the concept of "fair dealing" as envisaged under Section 52 of the Indian Copyright Act, 1957. While there is a specific exception for use of computer programmes to achieve interoperability under Section 52(1)(ab), its applicability is negated by the fact that Google's usage of the Java API was not to achieve technical interoperability. Google's use of the Java API in fact does not fall within the ambit of any of the exceptions specified under Section 52. Accordingly, the decision of the US Supreme Court in Google vs Oracle does not hold much value in the Indian legal landscape.

ARBITRATION LAW

SC ALLOWS INDIAN PARTIES TO ARBITRATE OUTSIDE INDIA

The recent judgement of PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited (Pasl Wind). Supreme Court held that two Indian parties can arbitrate outside India and also clarified that there is no undeniable harm caused to the public in permitting Indian parties from designating a foreign seat of arbitration rather it emphasized on the importance of party autonomy.

ARBITRABILITY OF DISPUTES AND PETITION U/S 7 OF IBC

The Supreme Court in Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund & Ors clarified arbitrability in cases wherein a petition for *the initiation of corporate insolvency resolution process has been filed u/s 7 of the Insolvency and Bankruptcy Code (IBC).* It observed that the trigger point is the effect of the admission of the application on determining default.

MCIA CELEBRATES INDIA'S FIRST ADR WEEK

The Mumbai Centre for International Arbitration (MCIA) celebrated India's first ADR Week, 2021 from 6th-10th April, 2021. Due to Covid-19 the all events were virtually held. The five-day virtual event included 20 sessions on various themes concerning Arbitration law and practice.

COMPETITION LAWS

CCI APPROVES BIG BASKET-TATA DIGITAL DEAL

CCI has cleared Tata group's purchase of the online grocer Big Basket. Under this deal, Tata Digital Ltd will acquire up to 64.3% of the total share capital of Supermarket Grocery Supplies Private Ltd (SGS) which functions through bigbasket.com. However, the acquisition also covers the SGS' sole control over Innovative Retail Concepts Pvt. Ltd (IRC) which is into online retailing. IRC operates the website www.bigbasket.com and other related mobile applications. The transaction involves Tata group taking stake in SGS on a fully diluted basis in one or more series of steps. Read more

CCI CLOSES A NINE-YEAR OLD CASE AGAINST IATA

A nine-year old case against the International Air Transport Association has come to end by a recent judgment by the Competition Commission of India. CCI held that there was no abuse of dominance by 'IATA' in market for account settlement services in respect of

air cargo segment in India. The complaint was filed by Air Cargo Agents Association of India (ACAAI) in the year 2012. It was alleged that IATA was involved in a number of anti-competitive practices for its Cargo Agency Conference and the Cargo Tariff Conference. Read more

CCI Orders Probe against Tata Motors Ltd.

In an order passed on May 04, 2021, the Competition Commission of India (CCI) has ordered a probe into allegations of anti-competitive practices against Tata Motors Ltd. Complaints were filed by two auto dealers who alleged that the company through its terms for dealerships abused its dominant position in the market, and is thus in violation of Sections 3 & 4 of the Competition Act, 2002. The Commission, after listening to arguments from both sides, directed the DG to initiate a detailed investigation into the matter and submit the report within 60 days. Read More

CCI Approves Motherson Group Restructuring

The Competition Commission of India on May 27, 2021 approved the internal restructuring of the Motherson Group. The Commission specified in a press release that a notice was filed by Motherson Sumi Systems Ltd. (MSSL), Samvardhana Motherson International Ltd. (SAMIL) and Sumitomo Wiring Systems Ltd. (SWS), under the Green Channel. In the new setting, MSSL's entire domestic wiring harness undertaking (DWH) will be demerged into a newly incorporated wholly-owned subsidiary of MSSL called Motherson Sumi Wiring India Ltd. (MSWIL), and an amalgamation of SAMIL and MSSL will also take place. Read more

European Union Charges Apple With App Store Antitrust Violations

The European Commission in a Statement of Objection released on April 30, 2021, has charged Apple Inc. with antitrust violations for allegedly abusing its control over the distribution of music-streaming apps, a decision which stems from a complaint filed by streaming platform, Spotify. The antitrust regulator specified that Apple had 'distorted competition' by mandating the use of Apple's own in-app purchase mechanism and limiting the ability of app developers to inform users about cheaper alternatives. This marks the first step in a broader antitrust investigation against Apple in Europe. Read more

Alibaba fined $2.8 Billion for Abusing Dominant Market Position in China

The Chinese antitrust regulator, State Administration for Market Regulation

(SAMR), on April 10, 2021 charged the e-commerce giant, Alibaba with a record fine of $2.8 Billion (18.2 Billion Yuan) for violating anti-monopoly laws. After an investigation which was initiated in December 2020, the SAMR determined that the Alibaba Group had been 'abusing market dominance' since 2015 by preventing its merchants from using other online e-commerce platforms. The regulator also ordered Alibaba to make "thorough rectifications" to strengthen internal compliance and protect consumer rights Read more

GERMANY LAUNCHES ANTITRUST PROBE AGAINST GOOGLE

The Federal Cartel Office in Germany on May 25, 2021 launched an investigation against Google Ireland, Google Germany, and their parent company Alphabet Inc., to ascertain whether they are exploiting their market dominance in their handling of data. This move results directly from new competition law provisions introduced in Germany through the 10th amendment of Germany's Act against Restraints of Competition (GWB), in January this year, that allowed scrutiny into 'large digital companies' Read more

INSOLVENCY LAW

PLEA IN SC SEEKS EXTENSION OF TENURE OF NCLT MEMBERS

At least three petitions have been filed at the Supreme Court and the Madras High Court seeking extensions for the National Company Law Tribunal judges retiring in the next few weeks. The proposed extensions are aimed at preventing bankruptcy cases from piling up. The dedicated insolvency courts are already witnessing an acute shortage of judges.

NPAS ANNOUNCED DESPITE SC BAN: 2 CONTEMPT PETITIONS BEFORE SUPREME COURT

Petitions have been filed in the Supreme Court for initiating contempt of court proceedings against RBI Governor Shaktikanta Das, Indian Banks' Association (IBA) chief executive and others for allegedly not following the top court's order and declaring petitioners' account as non-performing assets (NPAs) in a matter related to loan moratorium. The plea has cited the apex court's direction, whereby the Court had declared that "accounts, which were not NPA till August 31, 2020, shall not be declared NPA till further orders".

STATE BANK OF INDIA PUTS TWO CORPORATE NPAS WORTH RS 410 CRORE ON SALE

State Bank of India (SBI), the country's largest lender, has put up two corporate non-performing assets (NPAs) worth Rs 409.45

crore for sale to asset reconstruction companies (ARCs) as part of its ongoing efforts to make recoveries from accounts that have gone bad, according to a notification on the bank's website. SBI has sought buyers for Kamachi Industries and Tantia Agrochemicals. The bank's exposure to Kamachi Industries stands at Rs 355.93 crore and that to Tantia at Rs 53.52 crore.

BANKS' GROSS NPAS TO FALL IN FY21 ON RESTRUCTURING, WRITE-OFFS AND ECONOMIC RESILIENCE: CARE RATINGS

Gross non-performing assets (NPAs) are expected to decline in FY21 due to restructuring of accounts, loan write-offs and resilience in the economy, CARE Ratings said in a report on May 25. The rating agency expects the quantum of NPAs to fall to Rs 7.9 lakh crore at the end of FY21 from Rs 8.9 lakh crore in FY20. Several regulatory and government support schemes helped borrowers access liquidity and conserve their cash flows during the year, the rating agency said. These schemes included the moratorium on loan repayments for six months till August 30, 2020, the COVID-related restructuring scheme for large corporates till December 31, 2020, and for micro, small and medium enterprises (MSMEs) till March 31, 2021.

PSBS WILL ONLY LEAD BAD BANK, PRIVATE BANKS ALSO NEED TO SUPPORT IT: SBI MD SWAMINATHAN J

State-run lenders will take a lead in creation of the bad bank, but the sick asset resolution platform needs the support of private banks and other lenders to be successful, State Bank of India Managing Director Swaminathan J said on Thursday. If all lenders come on board, the National Asset Reconstruction Company (NARC) announced in the budget will be able to aggregate 100 per cent of a sick company's outstanding loans, which shall ultimately lead to better resolution of the asset quality stress for all.

PRE-PACKAGED RESOLUTION PROCESS INTRODUCED FOR MSME

The government has introduced a pre-packaged resolution process for Micro, Small and Medium Enterprises by amending the insolvency law. Many MSMEs have been impacted by the disruptions caused due to COVID and this move which seeks to provide a value-enhancing and quick outcome for stressed MSMEs is a welcome one. Under a pre-packaged process, main stakeholders such as shareholders and creditors try to identify a prospective buyer and then negotiate a resolution plan before submitting the plan to NCLT for formal approval. Read more

NCLAT: CIRP cannot be initiated as if by way of punishment for concealing particular fact(s)

The NCLAT while allowing the appeal filed by Shri Gyanchand Mutha, one of the shareholders of corporate debtor M/s Arkay International Finsec Limited against operational creditor M/s Aditya Birla Money Limited reversed the order of NCLT, Jaipur Bench. It held that the corporate insolvency resolution process cannot be admitted as by way of punishment for concealing particular facts with a creditor especially when the company does not fall within the definition of Corporate Debtor and Corporate Person as envisaged under section 3(8) read with section 3(7) of Insolvency and Bankruptcy Code, 2016. Read more

NCLAT: IBC to hold precedence over other laws like PMLA

The NCLAT while hearing an appeal moved by the ED against an order of the NCLT, Mumbai bench held that even if the probe agency had already attached a property under PMLA, it must vacate its claim over the assets once insolvency process commences against the same company. It observed that though there is no conflict between the provisions of the code and the PMLA, the rules and actions under the code would hold precedence over other laws and actions. Read more

International Trade Law

India & EU Agree to Resume Negotiations on FTA after 8 Years

India and the European Union announced on May 08, 2021 to resume negotiations for a balanced and comprehensive free trade and investment agreements. This decision was announced in the aftermath of a virtual meeting between Prime Minister Narendra Modi and leaders of 27 member nations of the EU, and comes after a gap of eight years in which negotiations couldn't move forward. Dialogues will also be carried out on WTO issues, regulatory cooperation, market access issues and supply chain resilience, among other things. Read more

DGFT Creates Online Facility for DFIA Scrips

The Directorate General of Foreign Trade (DGFT) in a notification issued on May 25, 2021 specified that in order to enable electronic, paperless transactions and facilitate trade, an online facility for the recording of transferability of Duty-Free Import Authorization (DFIA) Scrips is being set up. Additionally, the notification made it clear that paper copies of DFIA Scrips will be discontinued from June 07, 2021 for Electronic Data Exchange (EDI) Ports, but security paper copies of DFIA Scrips will

continue to be issued for non-EDI Ports. Read more

UK Sets Up Independent Trade Remedies Authority (TRA)

The United Kingdom on June 01, 2021 announced the setting up of the Trade Remedies Authority (TRA), an independent arms-length body. The body will be responsible for investigating "complaints from UK businesses about injury caused by unfair import practices, such as dumping and subsidies." The authority has been created under the Trade Act, 2021 which was passed in the UK on April 29, 2021. It will overtake the functions of the Trade Remedies Investigations Directorate (TRID) which undertook trade remedy investigations for the Department for International Trade (DIT), since the UK's official departure from the EU in late January 2020. Read more

G7 Commits to Adopt Electronic Transferable Records in International Trade

The G7 group of nations comprising Canada, France, Germany, Italy, Japan, the UK and the US, in a Ministerial Declaration released on April 28, 2021, committed to adopt electronic transferable records in international trade transactions. They agreed to set up a framework that will build upon the work of the United Nations Commission on International Trade Law (UNCITRAL) and promote the adoption of its Model Law on Electronic Transferable Records (MLETR). Read more

Intellectual Property Rights

Registration of Copyright Not Mandatory For Seeking Protection: Bombay HC

The Bombay High Court vide its ruling in Sanjay Soya Pvt. Ltd. v. Narayani Trading Company stated that copyright registration is not required to claim copyright protection. The Court reiterated the idea that a copyright in a work exists at the time of production, and thus work is automatically protected without the need for registration. Plaintiff had argued that the label qualified as an original artistic work under Section 2(c) of the Copyright Act of 1957.

India placed on the priority watch list for IP protection by the US

The United States has placed India and eight other countries on the Priority Watch List for intellectual property rights and compliance. US Trade Representative (USTR) stated in the "Special 301 Report" on the adequacy and efficacy of intellectual property rights compliance, India will be the focus of intensive bilateral interaction in the coming

year. According to the USTR, Patent concerns continue to be of special concern in India as long-standing issues for creative industries.

Taxation Law

New Income Tax Rules Effective From 1st April, 2021

With the beginning of new financial year on 1 April, the slew of changes announced in the Income Tax rules under presenting Union Budget 2021 are ready to take effect. These changes include reduced period for filing the belated ITR, Inclusion of dividend income in ITR, **removal of exemption for Voluntary contribution of Employee Provident Fund and** etc.

New Amendments May Do Away With ULIP Taxation

The government passed the Finance Bill, 2021 after some amendments. Among these amendments was the one about taxation of investments into unit-linked insurance plans (ULIPs). At present, most ULIPs offer several free switches from one fund to another, even from a debt fund to equity fund and vice versa. However, after the new amendment, this facility may no longer be available.

FPIs Seek Clarification On Taxation Rules

The new definition of 'securities' under the Union Budget, 2021, is creating apprehension in minds of Foreign portfolio investors (FPIs) about interest income from investments in REIT's and InvIT's attracting up to 20% tax. Hence, the investors sought to seek clarity on the issue of investment in real estate investment trusts and infrastructure investment trusts.

TMT Law

CERT-In Advises Facebook Users Following User Data Leak

CERT-In has advised Facebook users to secure their profile information on the social networking site after it was found that the personal data of 6.1 million Indian users had been reportedly leaked online and posted online on hacking forums. The government's cybersecurity organisation has issued a warning informing user that there has been a large-scale breach of Facebook profile information namely, email addresses, profile IDs, full names, phone numbers, and birth dates on a global scale.

Delhi HC Dismisses Facebook, WhatsApp Pleas Challenging CCI's Order

The Delhi High Court (HC) has rejected Facebook and WhatsApp's petitions opposing the CCI's order ordering an investigation into WhatsApp's latest privacy policy. The Delhi High Court ruled that the pleas filed by

Facebook and WhatsApp to halt the CCI's investigation weren't valid. The court observed that it would have been reasonable for the CCI to await the results of petitions filed in the Supreme Court and the Delhi HC, however failing to do so would not render the regulator's order arbitrary.

DISCUSSION PAPER ON BLOCKCHAIN TECHNOLOGY AND COMPETITION RELEASED BY CCI

CCI has published a discussion paper titled 'blockchain technology and competition,' addressing the challenges the technology may face in terms of jurisdiction, data security and privacy, and competition. According to the paper, the decentralized and distributed existence of blockchain means that there is no centralized body in charge of everything. The discussion paper also provided guidelines for different stakeholders in a blockchain environment.

DELHI HC SPECIFIES THE PROCEDURE FOR THE REMOVAL OF OBJECTIONABLE CONTENT FROM THE INTERNET

A single-judge bench of the Delhi High Court has ruled in the case of X v. Union of India that images taken from Facebook and Instagram accounts and posted on pornography websites without the permission of such an individual constitute an offense under Section 67 of the Information Technology Act. Such an act is performed without the person's permission would be treated as a breach of privacy.

SECURITIES RIGHTS

SEBI DISPOSES OF ADJUDICATION PROCEEDINGS AGAINST AXIS CAPITAL IN SPICEJET MATTER:

SEBI disposed of adjudication proceedings against Axis Capital, saying the alleged violation of the merchant banker norms could not be established against it with respect to foreign currency convertible bonds issuance by SpiceJet India Ltd back in 2010. In an order, Sebi said the alleged violation of code of conduct specified under the merchant banker rules could not be established against Axis Capital and therefore disposed of the adjudication proceedings initiated against it.

MUTUAL FUNDS CAN IMPLEMENT NEW DISCLOSURE RULES ON RISK, PORTFOLIO DETAILS TILL SEP 1: SEBI

Market regulator SEBI on Monday gave time till September 1 for mutual funds to comply with new rules wherein they are required to share details of risk, performance and portfolio to investors only for the scheme in which they have invested. The new norms were to come into effect from June 1. Based on the representation received from industry

body Amfi, it has been decided to extend the implementation date to September 1, 2021, the Securities and Exchange Board of India (SEBI) said in a circular.

PNB Housing Finance to raise up to Rs 4,000 crore from Carlyle, former HDFC Bank chief Aditya Puri

PNB Housing Finance, the fourth largest mortgage lender in India by assets, announced that its board has approved a capital raise of up to Rs 4,000 crore, led by entities affiliated to The Carlyle Group Inc. As part of the transaction, Salisbury Investments, the family investment vehicle of Aditya Puri, senior advisor for Carlyle in Asia and the former Managing Director & CEO of HDFC Bank will also invest in the capital raise, the company said in a notification to the stock exchanges. Puri is likely to be nominated to the PNB Housing Finance Board as a Carlyle nominee director in due course, the statement said. He retired from HDFC Bank, India's largest private bank by assets, in October 2020, after helming it for 26 years since its establishment.

SEBI asks listed firms to disclose loans given to promoters in compliance report on corporate governance

SEBI has asked listed companies to make disclosure about loans and guarantees provided by them to promoter or any other entity controlled by them on a half-yearly basis in the compliance report on corporate governance. The move is aimed at bringing transparency and strengthening disclosures about such loans and guarantees, Securities and Exchange Board of India (SEBI) said in a circular. The regulator has come out with a new disclosure format in this regard which will be effective from financial year 2021-22.

Gary Gensler elected as the Chairman of the Securities and Exchange Commission

The U.S. Senate voted to confirm former derivative markets regulator Gary Gensler, President Biden's nomination, as head of the country's top securities markets regulator. Gary Gensler will lead as the chairman of Securities and Exchange Commission. Perhaps best known for his unyielding work at the Commodity Futures Trading Commission, where he devised the regulatory framework for the multitrillion-dollar derivatives market, it is expected from him to look into matters revolving around the GameStop trading mania, digital currencies and the manner in which corporate America prioritizes governance, social and environmental issues. Read more

MORGAN STANLEY SOLD $5 BILLION IN ARCHEGOS' STOCKS

Morgan Stanley sold $5 billion in shares from Archegos' stocks to a small group of hedge funds as per individuals with knowledge of the trades. Archegos, run by former Tiger Management analyst Bill Hwang, consented to this transaction. The bank offered the shares at a discount informing the hedge funds that they were part of a margin call that could prevent the collapse of an unnamed client. But the shares being sold were merely the opening salvo of an unprecedented wave of sales by Morgan Stanley and five other investment banks. Read more

FUNDRAISING THROUGH PUBLIC ISSUES MORE THAN DOUBLED IN 2021

Morgan The Finance Ministry said fundraising through public and rights issues surged 115 per cent and 15 per cent, respectively, in 2020-21 despite the uncertainties and adversities caused by the COVID-19 pandemic. As far as numbers are concerned, FY21 witnessed 55 initial public offerings (IPO) and one follow-on public offer (FPO). In the fiscal, 21 rights issues were successfully completed as against 17 in the previous year. Read more

NON-ADMISSABILITY OF STATUTORY CLAIMS AFTER RESOLUTION PLAN APPROVAL: CONSEQUENCES LEFT UNADDRESSED

This post is authored by Kshitiz Jain, Digital Editor at RGNUL Financial and Mercantile Law Review (RFMLR).

1.INTRODUCTION

Section 31(1) of the Insolvency and Bankruptcy Code, 2016 (IBC) provides that the resolution plan, once approved by the Adjudicating Authority (AA), shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. Moreover, by the virtue of Insolvency and Bankruptcy Code (Amendment Act), 2019, the approved resolution is also binding upon the central government, any state government and any local authority to whom a debt is due. However, there have been numerous instances where the governmental bodies have claimed their dues from the corporate debtors even after the approval of resolution plan by the AA. Recently, the Apex Court, in the case of Ghanshyam Mishra v. Edelweiss Asset Reconstruction Company Limited (EARC) & Ors, has ruled upon the long-standing ambiguity of the admissibility of statutory claims after the approval of the resolution plan by the AA.[i]

2. GHANSHYAM MISHRA v. EARC & ORS.

As provided under section 31(1) of IBC, the National Company Law Tribunal (NCLT), exercising its power, approved the resolution plan proposed by the Committee of Creditors and Resolution Professional in the instant bunch of cases. However, several creditors-initiated proceedings against the corporate debtor even after the successful resolution process. When the IBC applicant instituted an appeal against such proceedings, the Appellate Tribunal (NCLAT) carved out 3 classes of

creditors as exception and allowed them to claim their dues through initiating new proceedings against the corporate debtor even after the approval of resolution plan by the NCLT. These classes of creditors included the employees (workmen), statutory bodies, and the guarantors.

Subsequently, on appeal, the cases reached the Supreme Court regarding the primary issue of whether any creditor, including governmental bodies, such as Income Tax Dept., Service Tax Dept., etc., are entitled to initiate any proceedings for recovery of debts that were not a part of the resolution plan approved by the AA under section 31 of the IBC.

The Apex Court, highlighting the objectives of the IBC, decided that all pre-CIRP claims that are not a part of approved resolution plan by the NCLT shall stand extinguished. The 3 judge-bench based their judgement on three basic reasons that, firstly, a successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan,[ii] secondly, the 2019 amendment is declaratory and clarificatory in nature and by virtue of which the government departments are equally obliged to the approved resolution plans, and thirdly, any pre-CIRP claims, if permitted to remain, would totally frustrate the object of I&B Code of revival of a Corporate Debtor and to resurrect it as a going concern.

Henceforth, to prevent belated and recurring proceedings after a successful resolution process as well as to provide a fresh start to the corporate debtor, the Court held that no creditors including the statutory bodies can initiate any proceedings regarding the pre-CIRP dues against the corporate debtor. Consequently, no statutory dues can be claimed after the approval of resolution plan.
However, given the significant rise in the number of statutory dues that have not been accommodated in the resolution plan before the approval from the AA, there exists an urgent need to review the legal framework for inviting, determining and collating statutory dues during the CIRP process.

3. ANALYSIS AND SUGGESTIONS

Currently, IBC mandates the Interim Resolution Professional (IRP) to publish a public announcement for inviting all the claims for verification and, subsequently to receive and collate the verified claims for the resolution plan. The Code stipulates all the creditors to bring forward and get their claims verified once the public announcement is made. The statutory departments are also expected to file their claims in the same way. However, the status quo is that these departments have failed repeatedly in presenting their claims before the IRP in the due CIRP Process.

In such a situation, the policymakers should consider changing the method of inviting statutory claims. It has been a consistent view of the courts that if the amount borrowed is shown in the Balance Sheet, it may amount to Acknowledgement.[iii] Since the statutory dues would usually be reflected in the books of accounts of the corporate debtor, the IRP should be required to take cognizance of the dues as per the books of accounts.[iv]

Additionally, there have been instances when the statutory bodies had not been afforded an opportunity to file a claim before the Interim Resolution Professional ("IRP") due to an improper public announcement. It was decided in such a case that the claim would not be extinguished after the approval of the resolution plan.[v]

This exception carved out by the Jharkhand High Court once again raises ambiguities regarding the admissibility of any statutory claim after the approval of resolution plan by the AA. Hence, to eliminate such unnecessary exceptions, it is suggested that once the IRP has confirmed all the statutory dues from the books of accounts of the corporate debtor, the statutory departments should be notified about the same through a separate notice by the IRP for an absolute communication.

4. CONCLUSION

The judgement by the Supreme Court on admissibility of any claims after the approval of resolution plan has been a welcome one. The Court has clarified all the ambiguities raised around the initiation of any proceedings after the successful resolution process. However, the CIRP framework needs to be fine-tuned in a manner which ensures that the statutory dues are not left unaddressed. If there is a constant rise in the cases where statutory dues are not included in the resolution plan during the CIRP process, then the Insolvency and Bankruptcy Board of India (IBBI) shall need to review the framework for determining and collating the statutory dues before the approval of the resolution plan. In such a condition, acknowledging the statutory dues from the account-books and sending a separate notice to the government departments can resolve the issue.

ENDNOTES

[i] Ghanshyam Mishra v. Edelweiss Asset Reconstruction Company Limited & Ors., LL 2021 SC 212.
[ii] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors., Civil Appeal No. 8766-67 of 2019.
[iii] V. Padmakumar v. Stressed Assets Stabilisation Fund and Ors., (2020) 221 CompCas 153.
[iv] State Bank of India v. ARGL Ltd., CA No. 1215 of 2019, Principal Bench NCLT (decided on Mar. 12, 2019).
[v] Electrosteel Steels Limited v. State of Jharkhand, W.P.(T). No. 6324 of 2019 (decided on May 1, 2020).

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