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CROSS-BORDER INSOLVENCY: AN INDIAN PERSPECTIVE

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INTRODUCTION

With global economies and businesses transcending boundaries, national laws limited by territorial borders find themselves engulfed in constant strife when it comes to cross-border disputes. Insolvency disputes are not an exception. Cross-border insolvency disputes involve insolvency procedures initiated in one or more countries against an entity having debts and assets scattered across various jurisdictions.

With multi-national entities getting embroiled in insolvency procedures frequently, the need for a unified approach towards cross-border insolvency proceedings has intensified through the years. Despite the adoption by UNCITRAL of the Model Law on Cross-Border Insolvency ("UNCITRAL Model Law") way back in 1997, States have failed to implement the same domestically, leading to an unfortunate multiplicity of applicable insolvency laws in cases where disputes are not territorially limited. To add to this, the inconsistent approach of States in treating the insolvent debtors has resulted in an unclear legal position.

CROSS-BORDER INSOLVENCY DISPUTES: THE LEGAL FRAMEWORK

Cross-border insolvency disputes are particularly problematic and lengthy in nature. With assets and debts of the debtor positioned across several territories, the situation gives birth to an inherent conflict of laws situation. There are two primary approaches to such a situation under the insolvency framework, i.e., territorialism and universalism[1]. While the concept of territorialism obligates States to apply its own substantive insolvency law to the assets of a debtor located in its own jurisdiction, universalism on the other hand refers to the insolvency law of the jurisdiction where the debtor has its 'Centre of Main Interest' ("COMI")[2].

Taking into consideration the distinct approaches that States might resort to for resolving cross-border insolvency disputes, various international organisations have enacted their own cross-border insolvency frameworks that States may incorporate within their domestic laws.

ABOUT THE FIRM

AKS Partners (formerly known as A.K. Singh & Co) is a law firm based in New Delhi (India) that provides a comprehensive range of legal services and solutions to domestic and international clients. The Firm offers a unique blend of the local knowledge to apply the regulatory, economic, political and cultural context to legal issues and develop case strategies. We regularly handle technically challenging and complex multi-jurisdictional matters. Our team is spearheaded by one of the highly recongnised lawyers with extensive experience in international dispute resolution and strong government and diplomatic backgrounds. This experience gives us the deepest understanding of the key decision points that are critical in navigating complex & complicated matters and managing government regulations.

UNCITRAL Model Law on Cross-Border Insolvency

The cross-border insolvency framework as propounded by the UNCITRAL Model Law rests on four primary pillars viz., access to local courts[3], recognition of certain orders issued by foreign courts[4], relief to assist foreign proceedings[5] and cooperation and co-ordination among the courts of States where the debtor's assets are located[6]. States possess the option of modifying the provisions of the UNCITRAL Model Law while incorporating it within their jurisdiction.

European Commission Regulation on Insolvency Proceedings, 2000 ("EC Regulation")

Article 3 of the EC Regulation delineates the courts that shall possess jurisdiction in cases of cross-border insolvency disputes within the European Union member States. As per the provision, the primary jurisdiction vests with the courts of the member States where the debtor has its COMI, while secondary jurisdiction vests with any other States where the debtor has an establishment. Article 4 of the EC Regulation provides that the law to be applied to the proceedings shall be that of the member State within the territory of which such proceedings are invoked.

CROSS-BORDER INSOLVENCY DISPUTES – LEGAL FRAMEWORK IN INDIA

The Indian insolvency regime, in its present state, does not address the varied concerns that may arise from cross-border insolvency disputes. India has not adopted the UNCITRAL Model Law as of date. The regime regulating such disputes is limited to Sections 234 and 235 of the Insolvency and Bankruptcy Code, 2016 ("IBC"). The provisions are limited in their scope in the present form and leave out various significant issues that may crop up in such a dispute.

Cross-Border Insolvency Framework under the IBC

Duty of a Resolution Professional/Liquidator/Bankruptcy Trustee (Section 235 (1))

If the Resolution Professional ("RP")/Liquidator/Bankruptcy Trustee is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India, the RP may make an application to the National Company Law Tribunal ("NCLT") that evidence or action relating to such assets is required in connection with such process or proceeding.

The following pre-requisites are to be fulfilled:

- The resolution or bankruptcy process must have been initiated under the IBC; and
- There must be a reciprocal arrangement with the said country under Section 234 of the IBC. Under the said provision, the Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of the IBC. The Central Government may further specify conditions for the application of IBC provisions to such disputes.

Duty of the Adjudicating Authority (Section 235 (2))

On receiving an application from the RP/ Liquidator / Bankruptcy Trustee, the adjudicating authority on being satisfied that such evidence or action is required, may issue a letter of request to a court or an authority of such country competent to deal with such request.

The abovementioned provisions are limited to very specific situations, i.e., only where proceedings are initiated under the IBC, or where the Central Government enters into any reciprocal arrangement. Taking the situation into consideration, the Insolvency Law Committee on Cross-Border Insolvency in its report dated October 16, 2018[7], suggested the adoption of a framework for cross-border insolvency disputes that mirrors the UNCITRAL Model Law with certain modifications.

Recommendations of Insolvency Law Committee on Cross-Border Insolvency ("Draft Law"):

- The Draft Law shall be made applicable to corporate debtors including foreign companies.
- While the Draft Law is to be initially made reciprocal in nature, i.e., the provisions shall be extended only to those countries that have adopted the UNCITRAL Model Law, the reciprocity provision is to be slowly diluted based on experience and developments.
- The Draft Law designates benches of the NCLT as the adjudicating authorities.
- The Draft Law allows a foreign representative[8] to seek recognition of a foreign proceeding from an NCLT bench, in order to avail appropriate relief in relation to the foreign proceeding. This is subject to the foreign representative providing all information with respect to the foreign proceedings to the NCLT.
- Very similar to the EC Regulation, the Draft Law classifies proceedings into Foreign Main Proceedings ("FMP") and Foreign Non-Main Proceedings ("FNMP"). FMP are those that take place at the COMI, while an FNMP may take place where the corporate debtor has an establishment. Factors to be considered for determining the COMI include, the place where the central administration of the debtor takes place that is readily ascertainable by creditors. Further, a rebuttable presumption exists for establishing COMI unless the debtor has relocated its registered office to another country within the 3 months period prior to the request for opening insolvency proceedings.
- The Draft Law also provides for mandatory and discretionary relief. While, under mandatory relief, in cases of FMP the NCLT must grant a moratorium, the same is discretionary in cases of FNMP.
- The Draft Law also recommends joint hearings to be undertaken directly by the NCLT and foreign courts. Moreover, the NCLT may also be allowed to directly communicate and request assistance or information from foreign representatives.
- The Draft Law also allows multiple concurrent proceedings to take place simultaneously.
- The Committee also recommended suitable amendments to Sections 234 and 235 of the IBC.

LEGAL PRECEDENTS IN INDIA

Though India is yet to embrace the concept of cross-border insolvency in its truest form, the National Company Law Appellate Tribunal ("NCLAT") in State Bank of India v Jet Airways ("Jet Airways Case")[9], visited this very question as to whether the provisions of UNCITRAL Model Law on cross-border insolvency be read with the IBC when parallel proceedings have been initiated in two jurisdictions. In 2019, corporate insolvency resolution process ("CIRP") were initiated against Jet Airways by the State Bank of India ("SBI") before the NCLT Mumbai. Earlier in that year, the insolvency proceedings were also instituted against Jet Airways by two European creditors of the group before the Noord Holland District Court ("Dutch Court") in order to freeze the assets of the defaulter. The Dutch Court ruled in favour of the creditors group and constituted a Netherlands-based bankruptcy trustee to take possession of Jet Airways' assets that were located offshore. Upon Jet Airways' admission to the CIRP in India, the Dutch Court appointed an administrator to present himself and seek enforcement of the Dutch proceedings before NCLT Mumbai.

However, the NCLT categorically stated that any proceedings initiated outside the territory of India or any judgment or decree handed down by an insolvency court having foreign nationality shall not be recognized under the IBC and therefore refused to acknowledge the same. Aggrieved by the NCLT's order, the Dutch administrator, thereafter, appealed before the appellate tribunal i.e., NCLAT to get the Dutch insolvency proceedings recognized under the IBC.

NCLAT set aside the order passed by the NCLT Mumbai and allowed the Dutch administrator to be a part of Committee of Creditors ("CoC") meetings and proposed for a joint CIRP. NCLAT directed the parties involved, to reach onto an agreement so as to have a relationship of trust and cooperation between the Dutch administrator, the RP and the CoC. The parties developed a 'Cross Border Insolvency Protocol' wherein the Indian proceedings were regarded as the "main insolvency proceedings" and the Dutch proceedings as the "non-main insolvency proceedings".

According to this protocol, the Dutch administrator and the RP were to give due consideration to the terms and conditions on which the parties agreed upon under this. Further, so as to avoid the overlap of powers, the NCLAT restricted the role of the Dutch administrator in the CoC meetings to that of a mere observer. Therefore, through the Jet Airways Case, the NCLAT paved the path for the recognition of cross-border insolvency and welcomed it to be read in consonance with the framework of the IBC.

This was not the first time that the NCLAT dealt with the question of cross-border insolvency. In Usha Holdings v Francorp Advisors[10], the NCLAT was called upon to address the question as to whether the adjudicating authority can determine the legality or enforceability of a foreign decree while accepting or rejecting the claim as debt under the IBC. This was not an absolute case concerning itself with the cross-border insolvency, but the issue dealt by the NCLAT did stem out from the same genus.

In 2017, the NCLT Delhi (Principal Bench), refused to acknowledge a decree passed by the United States District Court (New York) as evidence for the dues paid in the form of debt by the Francorp Advisors (corporate debtor) to Usha Holdings (financial creditor) via application filed under Section 9 of the IBC. The NCLAT, thereafter, set aside the NCLT order. The NCLAT relied on its judgment passed in Binani Industries[11], wherein the NCLAT analysed the report of the Bankruptcy Law Reforms Committee, 2015 ("BLRC Report"). The BLRC Report discusses the aim, purpose and object of the IBC. It was inferred from both Binani Industries and the BLRC Report that the sole aim of the IBC and CIRP is to aid the corporation in operating as a going concern and not that of litigation. The NCLAT concluded that the adjudicating authority can never tantamount to the role of 'court' and therefore can never determine the legality or enforceability of a foreign decree in India or even for that matter the decree passed by the Indian courts.

Recently, the Mumbai bench of the NCLT ordered the inclusion of the overseas subsidiaries of the corporate debtor, Videocon, in insolvency proceedings against it. The NCLT laid down some factors to be ascertained before such inclusion of overseas assets can be undertaken[12].

ANALYSIS OF THE INDIAN POSITION AND WAY FORWARD

Currently, there is no straitjacket approach that may guide the parties as to the path that a particular cross-border insolvency dispute may take in the future. However, a situation-specific trail can be highlighted by drawing references from the existing law, precedents and the Draft Law.

Situation I: When a proceeding is initiated in India and there are assets outside India.

Under the existing legal regime under the IBC, the RP holds the liberty to make an application to the adjudicating authority that evidence or action relating to such assets is required in connection with the proceedings in India. The adjudicating authority may then proceed to issue a letter to the authority of the country requesting assistance.

However, this procedure is limited by Section 235 of the IBC that mandates the presence of an agreement between the said country and the Indian government. If no such agreement exists, then it may not be possible to resort to the present provisions.

This situation has also not been expressly provided for under the Draft Law that primarily deals with recognition of foreign proceedings and conduct of joint hearings. However, the Draft Law recommends the adoption of the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters[13] formulated by the Judicial Insolvency Network[14]. The Guidelines aim to effectuate the sharing of information between different jurisdictions in order to save costs, and the identification, preservation, and maximisation of the value of the debtor's assets, including the debtor's business.

It is also significant to note that in the absence of uniform insolvency laws, the outcome of the dispute shall be contingent upon the relations between the two countries, the approach

that courts in the countries adopt, and the existing insolvency laws.

Situation II: When a proceeding is initiated in India and there are creditors outside India.

While the existing provisions under the IBC do not provide for such a situation, the Draft Law incorporates provisions that allows foreign representatives to access the proceedings in India. A similar situation arose in the Jet Airways Case. While the Draft Law has not been implemented, the parties in the Jet Airways Case resorted to formulating a Cross-Border Insolvency Protocol under which the NCLAT allowed the Dutch administrator to sit as an observer in the CoC meetings in India.

In the case of Macquarie Bank Limited v. Shilpi Cable Technologies Ltd.,[15] the Supreme Court of India made an attempt to render the insolvency proceedings more accessible to foreign creditors by affording a liberal interpretation to the definition of the term 'financial institutions' contained under Section 3(14) of the IBC. This depicts a general trend of ensuring that foreign creditors are not discriminated against and cross-border proceedings are not hampered due to strict interpretation of regulations.

Situation III: When a proceeding is initiated outside India and the corporate debtor has creditors in India

While the existing provisions under the IBC do not provide for such a situation, the Draft Law provides for concurrent proceedings and joint hearings. The Draft Law also incorporates provisions for recognition of foreign proceedings. In a case where the foreign proceeding is an FMP, the NCLT would have to mandatorily order a moratorium on all proceedings, while in the case of an FNMP, the moratorium shall be discretionary.

Possible approaches to the issues:

Inconsistent rulings across borders may make the insolvency process time-consuming and burdensome for the parties involved. While the Draft Law attempted to resolve several conflicts, the same has yet to be adopted. The adoption of a uniform body of laws across all States does not seem to be a near possibility in the future. In such a situation, some possible approaches may include the following:

A) Cross-Border Insolvency Protocols/Cross-Border Insolvency Agreements- Formulating and implementing Cross-Border Insolvency Protocols may be the way forward in situations where the legal regimes of different jurisdictions do not allow for an effective means to resolve the dispute. Insolvency protocols are generally aimed towards providing a common ground for all the parties to come together and arrive at a mutually beneficial mechanism for conducting the restructuring process. Insolvency protocols have been granted acceptance and recognition by several enactments. For instance, the European Insolvency Regulation (Recast) recognises that insolvency professionals and courts can enter 'into agreements and protocols for the purpose of facilitating cross-border cooperation of multiple insolvency proceedings in different Member States' (recital 49).

Such agreements have been recognised by the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, 2009.

In the British case of Re P MacFayden & Co., [16] the court observed that 'such an agreement is a proper and common-sense business arrangement to make, and one manifestly for the benefit of all parties interested'[17].

However, such agreements may not prove suitable for parties where there are parallel proceedings.

B) Comity between Tribunals and Courts- By its very nature, cross-border insolvency proceedings mandate the cooperation and coordination between various jurisdictions. There is only so much that parties can do in such a situation. Hence, courts must pave the way by providing a harmonious system for both debtors and creditors. In the case of Re Maxwell Communications Corp PLC[18], the court made the observation that, 'Pending an international insolvency convention, the basic approach is one of cooperation and judicial restraint. These are two sides of the same coin, and can be accommodated under the heading of judicial comity. The normal assumption must be that a foreign judge is the person best qualified to decide whether the proceedings in his court should be allowed to continue. Comity demands a general policy of non-intervention.'

CONCLUDING REMARKS

While India is yet to adopt the Draft Law, the COVID-19 pandemic has also contributed in decelerating the process of adopting the Draft Law as a bill. Undoubtedly, the Draft Law, once adopted, shall go a long way in clarifying several issues with respect to the procedure and mechanism to be adopted whilst also paving the way for a more unified legal regime.

However, the pandemic has brought a halt to insolvency proceedings across India, with similar restrictions across the world. Assuming that the pandemic is going to push several entities into insolvency procedures, courts are going to witness an increase in cross-border insolvency disputes as well. This might have the effect of providing a much-needed impetus for the government to enact the Draft Law.

REFERENCES

[1] Sefa M. Franken, 'Cross-Border Insolvency Law: A Comparative Institutional Analysis', 34, Oxf. JLS, 98, (2014).
[2] As per the EC Regulation on Insolvency Proceedings, the concept of 'Centre of Main Interest' (also commonly referred to as COMI) refers to the place where the debtor conducts the administration of his business on a regular basis and is ascertainable by third parties. In case of a corporate entity, the COMI is usually where the registered office is situated.
[3] Chapter II, UNCITRAL Model Law.
[4] Chapter III, UNCITRAL Model Law.
[5] Ibid.
[6] Chapter IV and Chapter V, UNCITRAL Model Law.
[7] Ministry of Corporate Affairs, 'Report of Insolvency Law Committee on Cross Border Insolvency', (2018), https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf.

[8] As per Article 2(d) of the UNCITRAL Model Law on Cross-Border Insolvency "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding. The Draft Law adopts this definition.
[9] State Bank of India v. Jet Airways (India) Ltd., Company Appeal (AT) (Insolvency) No. 707 of 2019,https://nclat.nic.in/Useradmin/upload/14485121915d8df2bae7814.pdf.
[10] Usha Holdings LL.C. & Anr v Francorp Advisors Pvt Ltd (Company Appeal (AT) (Insolvency) No. 44 of 2018), https://ibbi.gov.in/webadmin/pdf/order/2018/Dec/30th%20Nov%202018%20In%20the%20matter%20of%20Usha%20Holdings%20LL.C.%20&%20Anr.%20vs%20Freancorp%20Advisors%20Pvt.%20Ltd.%20CA%20(AT)%2044-2018_2018-12-03%2018:13:31.pdf.
[11] Binani Industries Limited v Bank of Baroda & Anr (Company Appeal (AT) (Insolvency) No. 82 of 2018),https://nclat.nic.in/Useradmin/upload/3893249755bebcea7be390.pdf.
[12] State Bank of India v. Videocon Industries Limited and Others (MA 2385/2019 in C.P.(IB)-02/MB/2018) (Factors included: Common Control, Common Directors, Common Assets, Common Liabilities, Inter-Dependence, Inter-Lacing of Finance, Pooling of Resource, Co-existence for survival, Intricate link of subsidiaries, Intertwined accounts, Inter-looping of debts, Singleness of economics of units, Common Financial Creditors) https://nclt.gov.in/sites/default/files/Feb-final-orders-pdf/State%20Bank%20of%20India%20MA%202385%20of%202020%20in%20CP%28IB%29-02_2018%20NCLT%20ON%2012.02.2020%20FINAL.pdf.
[13] Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters, http://www.jin-global.org/jin-guidelines.html.
[14] Formed in October 2016, the Judicial Insolvency Network ("JIN") is a network of insolvency judges from across the world. It serves as a platform for sustained and continuous engagement for the furtherance of various objectives. The JIN Guidelines address key aspects of and the modalities for communication and cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including the conduct of joint hearings. The overarching aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs.
[15] (2018) 2 SCC 674, https://indiankanoon.org/doc/185937110/.
[16] [1908] 1 KB 675.
[17] Professor Rosalind Mason and John Martin, 'Conflict and Consistency in Cross Border Insolvency Judgments', https://www.uncitral.org/pdf/english/congress/Papers_for_Programme/46-MASON_and_MARTIN-Conflict_and_Consistency_in_Cross_border_Insolvency_Judgments.pdf.
[18] (No 2) [1992] BCC 757].

NEWS AND UPDATES IN ARBITRATION

WHETHER ARBITRATION CLAUSE IN AN UNSTAMPED CONTRACT CAN BE ENFORCED – ISSUE REFERRED TO CONSTITUTION BENCH:

A three-judge bench of the Supreme Court in M/s. N.N. Global Mercantile Pvt. Ltd. v. M/s. Indo Unique Flame Ltd. and Others has held that the finding in SMS Tea Estates Pvt. Ltd. v. M/s. Chandmari Tea Co. Pvt. Ltd. and Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited ("Garware") judgments, that the non-payment of stamp duty on the commercial contract would invalidate even the arbitration agreement, and render it non-existent and un-enforceable, is not the correct position in law. However, since the judgment in Garware was affirmed in Vidya Drolia v. Durga Trading Corporation by a three-judge bench, the Court in this case referred the issue of validity of an arbitration clause in an unstamped contract to a Constitution bench of five judges.

POWERS UNDER ARTICLES 226 AND 227 SHOULD BE USED SPARINGLY BY HIGH COURTS WHEN INTERFERING WITH ARBITRAL PROCESS

The Supreme Court in Bhaven Construction v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. has held that the powers under Articles 226 and 227 of the Constitution of India ("Constitution") should be used sparingly by High Courts when it comes to interfering with any arbitral process. The Court also observed that such power should be exercised only in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' is shown by one of the parties. The Court observed that Section 16 of the Arbitration Act, necessarily mandates that the issue of jurisdiction must be dealt with first by the arbitral tribunal before the Court examines the same under Section 34 of the Arbitration Act. Thus, the Respondent was not left remediless.

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IN THE NEWS

Our Partner Mr. Anish Jaipuriar has been named as one of India's Future Legal Leaders by India Business Law Journal, 2020.

SECTION 16 OF ARBITRATION ACT NOT APPLICABLE WHEN DISPUTE IS NON-ARBITRABLE

The Delhi High Court in Dr. Bina Modi v. Lalit Kumar Modi & Ors. has held that Section 16 of the Arbitration Act is only an enabling provision and does not confer exclusive jurisdiction on the arbitration tribunal—without rendering a decision on the issue of 'non-arbitrability' of the subject disputes. The Court further held that the principles of autonomy of arbitration and kompetenz-kompetenz do not prima facie arise when the disputes themselves are not capable of being submitted to arbitration. The Court further also observed that issues under the Trusts Act, 1882 cannot be the subject matter of arbitration.

ARBITRATOR CANNOT BE APPOINTED UNILATERALLY

The Delhi High Court in Jorawer Singh v. Black Pepper Hospitality Andevents Pvt. Ltd. has reiterated that a clause of an arbitration agreement which grants complete power to one party to appoint the arbitrator cannot be enforced, in view of Section 12(5) of the Arbitration Act read with the Seventh Schedule thereto and the judgments of the Supreme Court in Perkins Eastman Architects BPC v. HSCC (India) Limited and Bharat Broadband Network Ltd. v. United Telecoms Ltd. as well as the judgment of the Delhi High Court in JMC Projects (India) Ltd. v. Indure Pvt. Ltd. In this case, since arbitrable disputes existed between the parties and the parties could not agree on the name of an arbitrator, the Court went on to appoint an arbitrator.

PRINCIPLES OF ORDER XXXIX, CPC APPLICABLE TO SECTION 9 OF THE ARBITRATION ACT:

The Delhi High Court in Beigh Construction Company Private Limited v. Varaha Infra Limited has held that orders for interim measures of protection under Section 9 of the Arbitration Act cannot be passed ignoring the well-settled principles as are applicable for exercising the analogous power conferred under Order XXXIX Rules 1 and 2 and Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 ("CPC"). The Court also held that the principles as applicable under Order XXXVIII Rule 5 of the CPC would guide the grant of an order in the nature of attachment before judgement. The Court observed that two conditions are required to be satisfied before issuing any directions in terms of Order XXXVIII Rule 5 of the CPC; firstly, that the plaintiff must establish a strong prima facie case; and secondly, that the Court is prima facie satisfied that the defendant is acting in a manner so as to defeat the realisation of the decree that may be passed.

ARBITRABILITY CANNOT BE DECIDED UNDER SECTION 14 OF THE ARBITRATION ACT:

The Delhi High Court in Medisprouts India Pvt. Limited & Ors. v. M/S Silver Maple Healthcare Services (P) Ltd. has held that the question whether the disputes are arbitrable or not cannot be made the subject matter of proceedings under Section 14 of the Arbitration Act. The Court observed that recourse to Section 14 of the Arbitration Act is not available to challenge the decision of the arbitral tribunal regarding any question of arbitrability / jurisdiction, unless the issue relates to the ineligibility of an arbitrator to act, such as in terms of Section 12(5) of the Arbitration Act. The Court held that Section 14 of the Arbitration Act has no application in cases where the arbitral tribunal is proceeding with the reference and the mandate of the arbitrators is not terminated by the parties.

PROCEDURE OF PREPARING A PANEL OF ARBITRATORS FOR APPOINTING ARBITRATORS IS VALID:

The Delhi High Court in Consortium of Autometers Alliance Ltd. and Canny Elevators Co. Ltd. v. Chief Electrical Engineer/Planning, Delhi Metro Rail Corporation and Others has held that the procedure of preparing a panel of arbitrators, for appointing arbitrators to adjudicate the disputes between the parties is valid, and that the preparation of a panel consisting of names of persons, who have retired from other public sector undertakings, will not be a ground to challenge it under Section 12(5) of the Arbitration Act or relevant Schedules therein. The Court observed that the absence of any private sector engineers, accountants, or lawyers in the panel from which arbitrators have to be selected, does not vitiate the panel. The Court relied on the Supreme Court judgment in Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited to hold that a party must have a wider choice for nominating its arbitrator from the panel. The Court in this case held that a panel having 51 names was broad based and gave the petitioner a wide choice to choose its nominee arbitrator.

ORDER TERMINATING ARBITRAL PROCEEDINGS ON CLAIMANT'S FAILURE TO FILE ITS STATEMENT OF CLAIM IS AN ORDER UNDER SECTION 32(2) OF THE ARBITRATION ACT AND NOT AN AWARD:

The Delhi High Court in PCL Suncon v. National Highway Authority of India has held that Section 32 of the Arbitration Act makes a clear distinction between an award and an order under Section 32(2) of the Act, and that the same does not amount to an award. The Court held as such because such an order does not decide any of the points on which the parties are in issue in the arbitration. The Court also reiterated that the remedy available to parties to challenge such an order would be to approach the court under Section 14 of the Arbitration Act and not under Section 34.

NEWS AND UPDATES IN COMPANY LAW & IBC

NATIONAL COMPANY LAW TRIBUNAL ("NCLT") DIRECTS RESOLUTION PROFESSIONAL TO NOT PROCEED WITH RESOLUTION PLAN PENDING DECISION ON RIGHTS OF LANDOWNERS:

The NCLT, Principal Bench has passed an order in SCSL Buildwell Pvt. Ltd v. PAL Infrastructure & Developers Pvt. Ltd. directing a resolution professional to not proceed with a resolution plan in a corporate insolvency resolution process ("CIRP") after an issue with respect to the rights of the landowners came up before it. In this case, certain landowners moved the NCLT, which had admitted an insolvency petition against the corporate debtor, asserting that the corporate debtor was unlawfully trying to proceed with invitation of resolution plans in respect of their land. The landowners asked that their valuable piece of land be given back to them.

The resolution professional also filed an application seeking a direction to the land owners to file their claim as an operational creditor of the corporate debtor. After hearing both the parties, the NCLT held that the resolution professional shall not proceed with processing of resolution plans until an order is passed in the applications by the landowners as well as the applications filed by the resolution professional in respect to the land-hold rights of the landowners.

APPLICATION FOR INITIATION OF CIRP CAN BE REJECTED IN CASE THERE IS A PRE-EXISTING DISPUTE:

The National Company Law Appellate Tribunal ("NCLAT") in Sumilon Polyester Pvt. Ltd. Formerly Sumilon Polyester Ltd. v. Parikh Packaging Pvt. Ltd. has held that if there is a 'dispute in existence' even before the issuance of demand notice under Section 8(1) of the Insolvency and Bankruptcy Code, 2016 ("IBC"), the application for initiation of insolvency process by an operational creditor can be rejected by the adjudicating authority. The NCLAT also observed that the object of the IBC, at least insofar as operational creditors are concerned, is to initiate insolvency process against the corporate debtor only in clear cases where a real 'dispute' between the parties as to the 'debt owed' does not exist.

OTHER NEWS AND UPDATES

GRATUITY CAN BE WITHHELD FOR RECOVERY OF DUES FROM EMPLOYEE:

The Supreme Court in Steel Authority of India Ltd. v. Raghbendra Singh has held that gratuity can be withheld for recovery of dues from an employee. The Court, relying on ONGC Ltd. and Another. v. V.U. Warrier, held that if an employee occupies a quarter beyond the specified period, the penal rent would be the natural consequence and such penal rent can be adjusted against the dues payable including gratuity.

ACCEPTANCE OF A CONDITIONAL OFFER WITH A FURTHER CONDITION DOES NOT RESULT IN A CONCLUDED CONTRACT:

The Supreme Court in M/s. Padia Timber Company (P) Ltd. v. The Board of Trustees of Visakhapatnam Port Trust Through its Secretary, relying on Haridwar Singh v. Bagun Sumbrui and Ors., has held that when the acceptor puts in a new condition while accepting the contract already signed by the proposer, the contract is not complete until the proposer accepts that new condition. The Court further held that an acceptance with a variation is no acceptance, but simply a counter proposal which must be accepted fully by the original proposer, before a contract is made.

PLEA CHALLENGING PROVISIONS OF GST ACT DISMISSED:

The Supreme Court in Devendra Dwivedi v. Union of India has declined to entertain a writ petition challenging the constitutional validity of various provisions of the Central Goods Service Tax Act, 2017 ("GST Act"). The Court held that it would be appropriate to relegate the petitioner to the remedy of a petition under Article 226 of the Constitution so that the Supreme Court could have the benefit of the considered view of the jurisdictional High Court.

The Court held that the petitioner had an efficacious remedy in the form of proceedings under Article 226 of the Constitution to challenge the constitutional validity of the provisions of the GST Act. The Court observed that revenue legislations have their own internal discipline, and that short circuiting the same should not become a ruse for flooding the Supreme Court with petitions which can, should and must be addressed before the competent fora.

ADVOCATES CANNOT THROW¬AWAY LEGAL RIGHTS OF PARTIES BY ENTERING INTO ARRANGEMENTS CONTRARY TO LAW:

The Supreme Court in Kirti v. Oriental Insurance Company Ltd., while disposing an appeal arising out of Motor Accident Compensation Claim filed by heirs of a deceased couple who died in an accident, has held that advocates cannot throw¬away legal rights or enter into arrangements contrary to law. The Court observed that any concession in law made by either counsel of this nature would not bind the parties.

The Supreme Court observed that any claims and legal liabilities crystallise only at the time of the accident itself, and changes post thereto ought not to ordinarily affect pending proceedings and that an insurer cannot seek the benefit of the subsequent death of a dependent during the pendency of legal proceedings.

REMEDIES UNDER THE CONSUMER PROTECTION ACT IN ADDITION TO THE REMEDIES AVAILABLE UNDER SPECIAL STATUTES:

The Supreme Court in Ireo Grace Realtech Pvt. Ltd. v. Abhishek Khanna and Others has held that remedies under the Consumer Protection Act, 2019 ("CPA") are in addition to the remedies available under special statutes. The Court, relying on M/s Imperia Structures Ltd. v. Anil Patni and Another observed that a conjoint reading of Sections 79 and 88 of the Real Estate (Regulation and Development) Act, 2016 ("RERA") reveals that the bar on proceedings before a Civil Court under RERA does not preclude an allotee from initiating proceedings under the CPA.

INVOCATION OF THE BANK GUARANTEES CANNOT BE WITHHELD ON ACCOUNT OF ANY DISPUTES BETWEEN THE PARTIES:

The Delhi High Court in Dadheech Infrastructures Private Limited v. DTE GEN MD ACCN Project & Another has held that invocation of bank guarantees cannot be withheld on account of any disputes between the parties, and that bank guarantees are required to be honoured notwithstanding the disputes that have arisen between the parties. The Court also held that interdicting the operation of a letter terminating a contract, would in effect amount to directing specific enforcement of such contract, which is impermissible in terms of Section 14 (d) of the Specific Relief Act, 1963.

RELIEF FOR DAMAGES MAY BE PRAYED FOR IN A SUIT FOR MANDATORY INJUNCTION:

The Delhi High Court in Indian Agro & Recycled Paper Mills Association v. Tafcon Projects(india) Pvt Ltd (Tafcon) & Anr. has held that the plain language of Sub-section (1) of Section 40 of the Specific Relief Act, 1963 indicates that an amendment seeking the relief of damages in addition to, or in substitution of, the relief of injunction may be made in the suit which is for permanent or mandatory injunction as referred to in Section 38 or 39 of the Specific Relief Act, 1963.

The Court also held that the reference in the aforementioned provision is plainly to a suit in its pre-amended form, in which such relief is sought and that it does not stipulate that even after such a relief of damages is sought in substitution of the relief of injunction, the suit must continue to be one seeking the relief of injunction.

EXECUTING COURT BOUND BY THE DECREE:

The Delhi High Court in Deepak Beri v. Atul Beri has held that an executing Court can neither travel behind the decree nor sit in appeal over the same or pass any order jeopardising the rights of the parties thereunder. The Court also observed that an executing Court has a very limited function of ensuring that the decree sought to be enforced is executed as it exists. The Court further held that it is not enough in every case for an executing Court to simply read and interpret the words of a decree, especially in cases where the execution pertains to settlement bearing clauses which are being differently interpreted, and that in such cases the Court is called upon to pay due regard to the surrounding circumstances as well as the letter of the decree in order to truly deliver justice in its powers of execution.

NON-REASONED ORDER CAN BE SET ASIDE UNDER ARTICLE 227:

The Delhi High Court in Commerzbank Aktiengesellschaft v. State Bank of India, Overseas Branch & Ors. has held that where an order prejudicial to the writ petitioner has been passed in violation of the principles of natural justice or the decision-making process is faulty, then the High Courts can interfere under Article 227 of the Constitution and issue appropriate directions instead of directing the petitioner to approach the forum under the Statute that provides for an alternative remedy.

SOUND RECORDING IS THE WORK OF JOINT AUTHORSHIP:

The Delhi High Court in The Indian Performing Right Society v. Entertainment Network (India) Ltd. has observed that a sound recording is the work of joint authorship within the meaning of Section 2(z) of the Copyright Act, 1957, i.e., a work produced by the collaboration of two or more authors and in which the contribution of one author is not distinct from the contribution of the other author or authors. The Court also observed that a sound recording is a collaboration of the author of a literary work, the author of a musical work and the author of a sound recording who ultimately directs the merger of the musical work and the sound recording to form one complete whole.

PRINCIPLES GOVERNING GRANT OF INTERIM INJUNCTION:

The Delhi High Court in Shrivats Rathi and Another v. Anil Rathi and Others has held that interim relief of injunction is granted at a time when all facts have yet to be proved in trial, and that the Court will consider whether the party seeking such injunction pending trial has a “prima facie case” in its favour. The Court further held that if no prima facie case exists, in other words, the party seeking the interim injunction discloses no right in its favour, no interim injunction will be granted as it would not be justified. However, it was observed by the Court that even where a party discloses a prima facie case, interim relief will not automatically follow, as the party would have to establish that the absence of such relief would cause it “irreparable injury and damage” which would not be compensated by money and

that the "balance of convenience" lies in its favour. The Court held that the existence of all these three conditions alone will justify the grant of interim injunction.

SUPREME COURT ORDER EXTENDING LIMITATION APPLIES ONLY TO FIRST 30 DAYS FOR FILING WRITTEN STATEMENT IN COMMERCIAL COURT CASES:

The Calcutta High Court in Siddha Real Estate Development Private Limited v. Girdhar Fiscal Services Private Limited has held that the order of the Supreme Court dated March 23, 2020 extending the limitation period would apply only to the first 30 days for filing written statement under Order VIII, Rule 1 of the CPC and not to the additional 90 days which follows the prescribed period for matters covered by the Commercial Courts Act, 2015.

(DISQUALIFICATION OF DIRECTORS) 2014 AND 2018 AMENDMENTS TO THE COMPANIES ACT HAVE PROSPECTIVE APPLICATION:

The Calcutta High Court in Naresh Kumar Poddar v. Union of India, through Secretary, Ministry of Corporate Affairs and Another has held that the 2014 amendment to Section 164(2) and the 2018 amendment to proviso to Section 167(1)(a) of the Companies Act, 2013 are prospective in nature, and that their retrospective application would be anomalous, absurd, unreasonable and could potentially ruin the economy. The Court opined that it cannot but be held that the operation of the 2014 and 2018 Amendments to the Companies Act, 2013 are prospective, given the punitive consequences these provisions entail, the ground-level impact and the practical impossibility of giving them retrospective effect. The Court held that any retrospective application would be anomalous and absurd, outlying the "reasonableness" envisaged in Article 19(6) of the Constitution. The Court clarified the following:

- The amendment to Section 164(2), introduced on April 1, 2014, has to be applied prospectively. The first possible three-year default contemplated has to commence from the financial year 2014- 2015 (April 1, 2014 - March 31, 2015) and end in the financial year 2016-2017 (ending on March 31, 2017).
- As far as the amended proviso to Section 167(1)(a) of the 2013 Act is concerned, the operation of such proviso also has to be construed prospectively by applying it to companies in default of Sections 92 and 137 of the Companies Act only after May 7, 2018.

IDBI Ltd is not a government undertaking under Article 12 of the Constitution of India:

The Bombay High Court in Mrimayee Rohit Umrotkar v. Union of India and Others has held that held that the Industrial Development Bank of India ("IDBI Ltd.") is not a government undertaking under Article 12 of the Constitution. The Court noted that from its inception under the Development Bank of India Act, 1964 to the Industrial Development Bank (Transfer of Undertaking and Repeal) Act, 2003, IDBI Ltd. came to be registered as a "company" under the Companies Act, 1956. The Court held that the Central Vigilance Commission's vigilance over IDBI Ltd. cannot be a "guiding factor" in determining whether it is a government undertaking. Furthermore, the Court held that just because Life Insurance Corporation of India may fall under "State" under Article 12 of the Constitution, the same does not apply for IDBI Ltd.

NATURAL JUSTICE PRINCIPLES HAVE TO BE READ INTO RESERVE BANK OF INDIA ("RBI") MASTER CIRCULAR ON FRAUDS:

The Telangana High Court in Rajesh Agarwal v. RBI and Others has held that before an account/borrower is declared fraudulent on applying the RBI's 2016 Master Circular on the classification of accounts as frauds, an opportunity of hearing must be given to the account holder, considering the principle of natural justice, lest the circular be unconstitutional.

IN CASE OF BREACH OF TERMS OF ONE-TIME SETTLEMENT, BANK BECOMES FREE TO RECOVER DEBT:

The Punjab and Haryana High Court in M/s. Milkhi Ram Bhagwan Dass v. District Magistrate and Another has held that once the terms and conditions of the One Time Settlement ("OTS") entered with the bank are violated by a borrower and the settled amount is not paid within the agreed upon time frame, no further orders are required from the Court to extend the period of payment under the OTS. The Court refused to apply the law laid down by a coordinate Bench of the High Court in Anu Bhalla & Anr. v. District Magistrate & Another that "claim for extension of time for payment of balance settlement amount, pursuant to mutually agreed OTS by the borrowers should be considered by the Court, liberally." The Court was of the opinion that the case at hand was different from the aforementioned case inasmuch as in that case extension of OTS was allowed after the defaulter had already repaid over 50% of the settled amount.

WRIT PETITION CANNOT BE ENTERTAINED IGNORING STATUTORY DISPENSATION:

The Himachal Pradesh High Court in M/s Radha Krishan Industries v. State of H.P. and Others has held that a writ petition should not be entertained by ignoring the statutory dispensation. The Court observed that where the statutory authority has not acted in accordance with the provisions of the law or in defiance of the fundamental principles of judicial procedure or has resorted to invoke the provisions which are repealed or where an order has been passed in total violation of the principles of natural justice, the High Court will not entertain a petition under Article 226 of the Constitution, if efficacious remedy is available to the aggrieved person or where the statute under which the action complained of has been taken, a mechanism for redressal of grievance still holds the field.

BENEFIT TO BE GIVEN TO THE INSURED IN CASE OF DOUBT OVER ADMISSIBILITY OF INSURANCE CLAIM:

The National Consumer Disputes Redressal Commission ("NCDRC") in Mavji Kanji Jungi v. Oriental Insurance Company has held that when there is a doubt over the admissibility of an insurance claim, the benefit of the doubt should be given to the insured. The NCDRC observed in this case that the law on this point was well-established, in so far as any uncertainty pertaining to the admissibility of an insurance claim must always be decided in favour of the insured party, rather than the insurer.

IN THE MATTER OF M/S SAHARA INDIA LIFE INSURANCE CO. LTD ("SILIC"):

In exercise of powers conferred under Section 52B(2) of the Insurance Act, 1938 SILIC is to – (i) take immediate steps to recover the advance of Rs.78.15 crore from M/s Sahara India, (ii) shareholding by SIFCL, SCL, SICCL and SIHL is be transferred to any other "fit and proper" promoters within a period of six months, (iii) a proper Board approved business plan is to forwarded to Insurance Regulatory and Development Authority of India within 3 months, (iv) reconcile all the remaining unreconciled bank account(s) as on 31st March 2020 within a period of 2 months.

5 MUST-READ BOOKS ON COMMERCIAL LAWS IN 2021

(Compiled by Mr. Gaurav Rai)

INTERNATIONAL ARBITRATION AND THE COVID-19 REVOLUTION

By Maxi Scherer, Niuscha Bassiri and Mohamed S. Abdel Wahab – The Covid-19 pandemic has forced the world to overhaul its existing systems and mechanisms. The Arbitration sector is not far behind with the pandemic forcing all alike to adapt to new-age systems and a technological revolution. The new system is expected to have a lasting impact on how dispute resolution mechanisms traditionally function. This book comprises a comprehensive analysis of how the Covid-19 crisis has redefined arbitral practice, with critical appraisal from well-known practitioners of the pandemic's effects on substantive and procedural aspects from the commencement of proceedings until the enforcement of the award. The book classifies as a must read for anyone hoping to understand the impact that the pandemic would entail on the Arbitration sector.

(Published by Kluwer Law International, 2020, ISBN Number: 9789403528458)

COMMENTARY ON LAW OF ARBITRATION

By Justice Indu Malhotra – With her expansive career Hon'ble Justice Indu Malhotra needs no introduction. If you wish to understand the modern-day dynamics of an Arbitration, look no further. The book covers the latest trends, legal amendments and precedents on Arbitration and would be immensely helpful for practitioners and students alike.

(Published by: Wolters Kluwer, 2020, ISBN Number: 9789389859102)

THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: REFORM, REPLACE OR STATUS QUO?

By Alan M. Anderson and Ben Beaumont - With State's realising the need to balance foreign investment goals with protection of State objectives, Investor-State disputes are constantly on the rise. This book is a must read for anyone wishing to attain a comprehensive grasp over several distinct aspect that intertwine in an Investment Arbitration, such as reforms in the sector, access to justice in investment disputes, third-party funding, etc.

(Published by Kluwer Law International, 2020, ISBN Number:

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THE INTERPRETATION OF CONTRACTS

By Kim Lewison – With contracts dictating each and every move in the commercial sector, how can a book on Contracts not be on our list. This book is a one stop guide for anyone wishing to understand the dynamics that courts are involved while interpreting contracts.
(Published by: Sweet & Maxwell Ltd., 2019, New Edition ISBN: 9780414070417)

BUILDING AND ENGINEERING CONTRACTS

By Bajirao Shankarrao Patil and Sarita Patil Woolhouse – Immensely helpful for professionals involved in the Engineering sector, this book boasts of a comprehensive index covering the expanses of a very niche field. Moreover, the book also comprises of references to FIDIC conditions, wherever applicable.
(Published by: CNC Press, 2019, ISBN Number: 978-0367133368)

AWARDS & RECOGNITIONS

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