Corporate

amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

August 2023 / Issue–143

Contents

Article

Digital Personal Data Protection Act – Implications for financial entities and fin-tech sector 2

Notifications and Circulars 7

Ratio Decidendi 11

News Nuggets 18

Lakshmikumaran & Sridharan attorneys

An ISO 27001:2013 certified law firm

Article

Digital Personal Data Protection Act – Implications for financial entities and fin-tech sector

By **Prashant Phillips and Sameer Avasarala**

The article in this issue of Corporate Amicus discusses elaborately the implications of the new Digital Personal Data Protection Act, 2023 for the financial entities and the fin-tech sector. It, in this regard, discusses topics like, meeting consent and notice requirements; interplay with sectoral regulations; legitimate purposes for processing; and how Data Fiduciaries in the financial sector need to review internal protocols and mechanisms concerning disclosure and/or sharing of personal data. Similarly, the article also deliberates on liabilities if an entity is covered as 'significant data fiduciary', and how entities can avail certain exemptions from compliance under this new law. According to the authors, entities in the financial and fin-tech sectors may well consider undertaking appropriate readiness assessments for assessing and ensuring that their frameworks for processing personal data including notice and consent architecture, technical, organizational and security measures remain 'future-ready' and responsive to implementation timelines and rule-making guidance anticipated soon.

Digital Personal Data Protection Act – Implications for financial entities and fin-tech sector

By Prashant Phillips and Sameer Avasarala

The Digital Personal Data Protection Act, 2023 ('**Act**') has been notified[1] in the Gazette but is yet to come into effect. It introduces a comprehensive framework governing processing of personal data including notice[2] and consent requirements[3], compliance with principles-based obligations[4] in respect of processing personal data of individuals (referred to as '**Data Principals**'). Additional requirements are also provided for the processing personal data of children and persons with disabilities[5] and extending certain rights to individuals[6].

Entities determining means and purpose of processing ('**Data Fiduciaries**'), complying with the existing law may have to realign their approach in collecting and processing personal data. In effect, their business practices and operations will have to transition from expanding data collection to minimizing it to 'fit-for-purpose' to reduce exposure. Given its sector-agnostic approach, this law is likely to have a significant impact on entities across various sectors, including financial institutions.

Meeting consent and notice requirements

At the outset, any entity handling personal data must aim to realign customer-facing platforms and mechanisms to realign privacy focus (*such as by adopting privacy-by-design and default practices*) and adhere to privacy principles postulated by the Act. This includes the key requirements of publishing privacy notices and building a concrete consent architecture. Publishing brief, concise and unambiguous notices for data collection and processing may be relevant to demonstrate 'specific' and 'informed' consent[7] of Data Principals. Apart from brevity, such platforms must also make them available in the Eighth Schedule languages[8], in addition to English.

In the context of obtaining customer consent, the Act now provides that consent must be specifically obtained through a clear and affirmative action. This may warrant evaluation of consents obtained through click-wrap and other methods to determine whether:

(a) such mechanisms are sufficient to accurately authenticate identity of Data Principals and take any

[1] The Digital Personal Data Protection Act, 2023, available here
[2] Section 5, Digital Personal Data Protection Act, 2023.
[3] Section 6, Digital Personal Data Protection Act, 2023.
[4] Section 8, Digital Personal Data Protection Act, 2023.
[5] Section 9, Digital Personal Data Protection Act, 2023.
[6] Chapter III, Digital Personal Data Protection Act, 2023.
[7] *Supra* Fn. 7
[8] Section 5(3), Digital Personal Data Protection Act, 2023.

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

additional measures (*such as implementing two-factor authentication*) if required;

(b) they avoid any practices which may lead to ambiguity in consent or lack a clear affirmative action on behalf of Data Principals; and

(c) ensuring storage of proof of consent in a retrievable and auditable manner, especially in view of the onus to demonstrate the same when required[9].

In this regard, relevant mechanisms may also have to be implemented to factor in receiving consents (and exercise of other rights or requests) by Data Principals using Consent Managers[10]. Entities may have to develop standardized mechanisms to authenticate identity, manage and comply with such requests from Consent Managers. This may particularly be relevant in the context of entities in the financial sector (and consumer-facing platforms), where consent managers are likely to play an extensive role.

Interplay with sectoral regulations

The notification of the Act may also necessitate evaluating the interplay between the Act (*including the DPA*) and sectoral regulations, especially in sectors with higher regulatory activity, such as financial and fin-tech sectors. Sectoral regulators in financial services have been proactive in providing regulations for protection of specified data and measures such as localization (*of payment system data*[11]*, policyholder data*[12] *etc.*), prescribing framework for information technology (*for banks*[13]*, NBFCs*[14] *and other regulated entities*), information security[15] and incident reporting obligations, well ahead of the enactment of the Act.

This was also iterated in many reports (*such as the Srikrishna*[16] *and Joint Parliamentary Committee*[17] *Reports*) which have highlighted the need to harmonize sectoral laws and regulations with the data protection law. While the Act provides (*with regard to cross-border transfers*) that laws or regulations that provide a 'higher degree of protection or restriction' would continue to apply[18], a significant role would still have to be played by the Central Government or the DPA in harmonizing sectoral laws and regulations (*including obligations other than cross-border transfers*) with such requirements.

Relying on legitimate purposes for processing

The Act also does not expressly include certain grounds for processing covered in the predecessor drafts. The absence of

---

[9] Section 6(10), Digital Personal Data Protection Act, 2023.
[10] Section 6(7), Digital Personal Data Protection Act, 2023.
[11] Storage of Payment System Data Circular dated April 6, 2018.
[12] IRDAI (Maintenance of Insurance Records) Regulations, 2015.
[13] Cyber Security Framework in Banks dated June 2, 2016.
[14] Master Direction - Information Technology Framework for the NBFC Sector dated June 8, 2017.
[15] Guidelines on Information security, Electronic Banking, Technology risk management and cyber frauds, available here
[16] A Free and Fair Digital Economy, Committee of Experts under the chairmanship of Justice B. N. Srikrishna, available here
[17] Report of the Joint Committee on the Personal Data Protection Bill, 2019, available here
[18] Section 16, Digital Personal Data Protection Act, 2023.

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

'public interest'[19] and fair and reasonable[20] purposes outlined under deemed consent proposed in the Digital Personal Data Protection Bill, 2022 ('**2022 Bill**') is notably one among them. The 2022 Bill had proposed that processing pursuant to certain functions, such as detection and prevention of fraud, credit scoring, network and information security, would not require consent prior to processing personal data.

On the other hand, the Act permits processing for a purpose specified by the Fiduciary for which the Data Principal has voluntarily given personal data and consent has not been denied. Entities in the financial sector may take benefit by relying on the same in responding to enquiries, processing applications and other purposes not contemplated under applicable laws and regulations and limit processing based on consent, to the extent permissible.

While processing is permitted without consent in the case of certain legitimate uses, such purposes have not expressly been covered in the Act. In the absence of such legitimate purposes or any exemptions provided by the Government, entities may have to rely on consent in order to process such data.

Organizational measures

Fiduciaries in the financial sector may review internal protocols and mechanisms concerning disclosure and/or sharing of personal data with Fiduciaries as well as with entities which process on their behalf (or '**Processors**'). While such processing must only be undertaken pursuant to a valid contract, such agreements must also provide for:

(a) implement appropriate technical and organizational safeguards and security measures;

(b) comply with requests or exercise of rights of Data Principals (*or Consent Managers*);

(c) restrict sharing of such personal data further, unless authorized;

(d) prohibit any processing which may cause harm to Data Principal;

(e) report breaches of personal data promptly;

(f) erase or delete any personal data at the request of Data Principals or Fiduciaries;

(g) conduct periodic assessments of purpose fulfillment and make erasures, where appropriate;

(h) engage processors or sub-processors only with approval of Fiduciaries;

(i) designate point-of-contact details for redressing grievances; and

(j) provide effective post-termination obligations for deletion of personal data.

Such entities must also consider deploying appropriate organizational measures to protect personal data, such as by implementing access control, asset management, incident

[19] Clause 8(8), Digital Personal Data Protection Bill, 2022.

[20] Clause 8(9), Digital Personal Data Protection Bill, 2022.

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

response, information and network security, employee training, outsourcing and business continuity, apart from technical measures (such as pseudonymization and encryption).

Categorization as Significant Data Fiduciaries

Depending upon nature and volume of personal data processed and other factors (*such as impact on public order and sovereignty*), it is very likely that such entities would be classified as Significant Data Fiduciaries[21]. This would invite significant obligations on such entities such as conducting data protection impact assessments with regard to processing activities, periodic data audits and any other requirements prescribed by the Government.

While periodic training and development of employees is likely to be a prerogative for all entities, those categorized as Significant Data Fiduciaries may also have appoint dedicated personnel for data protection compliance, such as resident data protection officers, independent data auditors and invest in capacity building to ensure, evaluate and maintain compliance.

Availing necessary exemptions

The Act also enables entities to avail certain exemptions[22] from compliance, especially where processing is undertaken for legal compliance, enforcing legal rights, mergers and acquisitions, debt recovery and for outsourcing entities in India which process personal data of foreign nationals. Startups in the sector can also avail necessary exemptions from complying with notice, accuracy, retention limitation and information access request requirements.

In view of the above, entities in the financial and Fin-Tech sectors may well consider undertaking appropriate readiness assessments for assessing and ensuring that their frameworks for processing personal data including notice and consent architecture, technical, organizational and security measures remain ‘future-ready’ and responsive to implementation timelines and rule-making guidance anticipated soon.

[The authors are Executive Partner and Senior Associate in Data Protection and TMT practice of Lakshmikumaran & Sridharan Attorneys at New Delhi and Hyderabad, respectively]

[21] Section 10, Digital Personal Data Protection Act, 2023.

[22] Section 17, Digital Personal Data Protection Act, 2023.

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

Notifications & Circulars

- Companies (Incorporation) Second Amendment Rules, 2023 notified
- SEBI – Procedure for seeking prior approval for change in control notified
- SEBI – Timeline for listing of securities after closure of public issue reduced from T+6 days to T+3 days
- SEBI – Online Disputes resolution in the Indian Security Market
- SEBI (Foreign Portfolio Investors) (Second Amendment) Regulations, 2023 notified
- Guidelines issued for extension of validity of industrial license
- Employees' State Insurance (Central) Amendment Rules, 2023 notified
- Pan Masala – Enforcement date of 'Note' for warning extended by FSSAI

Companies (Incorporation) Second Amendment Rules, 2023 notified

The Ministry of Corporate Affairs, *vide* Notification dated 2 August 2023 has notified Companies (Incorporation) Second Amendment Rules, 2023. The new rules revised Form No. RD-1 (Form for filing application to Central Government as approval applications for compromises, arrangements, amalgamations and conversions).

The noted changes in Form No. RD-1 are: (a) Addition of 'Notice of approval of the scheme of merger in CAA-11' as a specific option to be chosen as purpose for filing the application; (b) Details of the financial year concerned; (c) Reporting of details of publications of advertisement as per Rule 41 of Companies (Incorporation) Rules, 2014 in the form rather than to be given as attachment; (d) Particulars of Debentures Holders and Creditors to be reported in the form rather than to be given as attachment; (e) Details of previous application to be furnished; and (f) Details of conversion made in last five years. Further, the mandatory declaration by Key Managerial Personnels on compliance under Section 2(68) of the Companies Act, 2013 has been omitted as well as providing copy of advertisement is no longer a required as a compulsory attachment.

SEBI – Procedure for seeking prior approval for change in control notified

Securities Exchange board of India (SEBI) *vide* Circular dated 10 August 2023 has given out a streamlined procedure for intermediaries including Merchant Bankers and Bankers to an Issue to seek approval for change in control under the provisions of Regulation 9A(1)(a) of SEBI (Merchant Bankers) Regulations, 1992 and Regulation 8A(1)(a) of SEBI (Bankers to an Issue) Regulations, 1994. The Circular specifies the following procedure: (a) Online application before SEBI the SEBI Intermediary Portal ('SI Portal') (https://siportal.sebi.gov.in); (b) Application to be accompanied with details of the current and proposed shareholding pattern of the intermediary, past applications, any action taken by SEBI, pending litigation and confirmation of fees due to SEBI whether paid, declarations in the format given, NOC (if required from respective institutions including stock exchanges, depositories, etc.); (c) any prior approval granted by SEBI shall be valid for a period of six months from the date of SEBI's approval within which the applicant shall file application for fresh registration pursuant to change in control.

Further, the SEBI had put in place the following streamlined process for providing approval to the proposed change in intermediary with respect to the matters that involves scheme of arrangements requiring sanction of National Company Law Tribunal (NCLT): (a) The proposed change in control of the intermediaries shall firstly be filled with SEBI and not NCLT; (b) In-principle approval, if granted by SEBI, shall be valid for a period of 3 months within which the application shall be made to NCLT; (c) Within 15 days from the date of the order of NCLT, the intermediary shall have to submit an online application in accordance with the above guidelines along with certain documents such as NCLT Order, approved scheme, etc. to the SEBI for final approval.

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

The Circular further supersedes the Circular No. CIR/MIRSD/14/2011 dated 2 August 2011, with effect from the date of applicability of this Circular, to the extent they relate to Merchant Bankers and Bankers to an Issue.

SEBI – Timeline for listing of securities after closure of public issue reduced from T+6 days to T+3 days

Securities Exchange board of India *vide* Circular dated 9 August 2023 has notified that the timeline for listing of specified securities in public issue shall be reduced from T+6 Days to T+3 Days. The Circular made it mandatory for companies going for IPOs to list their stock in 3 days after the closure of the public issue. The T+3 timelines for listing shall be appropriately disclosed in the Offer documents of public issues. Further, the Circular provides general instructions in relation to: (a) Direct Bank ASBA and Syndicate ASBA applications; (b) third party verifications of such applications by the Registrar to an Issue; (c) Lock-in of pre-issue shares shall be made effective in compliance with ICDR Regulations. Further, the operationalization of lock-in shall be in line with the Standard Operating Procedure (SOP) of Depositories issued vide circular/communique dated August 08, 2023; and (d) the compensation to investors for delay in unblocking of ASBA application monies (if any) shall be computed from T+3 day.

The Circular shall be applicable on voluntary basis for public issues opening on or after 1 September 2023 and Mandatory for public issues opening on or after 1 December 2023.

SEBI – Online Disputes resolution in the Indian Security Market

The Securities and Exchange Board of India *vide* circular dated 31 July 2023 has notified for setting up Online Dispute Resolution (‘**ODR**’) portal by Market Infrastructure Institutions (MII). *Vide* another Circular dated 4 August 2023, SEBI has amended the guidelines for the resolution of disputes *via* online arising from Indian Securities Market. According to the concerned circular, the Market Participants must be enrolled on the ODR portal and the last date for the same is 15 September 2023. The Circular further notifies that the ODR cannot be proceeded during the moratorium period upholding the law laid down under Insolvency and Bankruptcy code, 2016. It further states that if the dispute is not resolved by conciliation within 21 calendar days and further if the Market Participants opts to go for online arbitration then 100% of the admissible claim value must be deposited by the Market Participant with the MII and the applicable fee must be paid for online arbitration.

SEBI (Foreign Portfolio Investors) (Second Amendment) Regulations, 2023 notified

The Securities and Exchange Board of India *vide* notification dated 10 August 2023 has issued further amendments to the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019. According to the notification, the words ‘twenty five percent or more’ in Regulation 4 clause (f) shall be substituted with ‘more than the threshold prescribed under sub-rule (3) of rule 9 of the Prevention of Money-

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

laundering (Maintenance of Records) Rules, 2005'. Further, in Regulation 22, after sub-regulation (5), the following sub-regulations shall be inserted, namely, – '(6) A foreign portfolio investor that fulfils the criteria specified by the Board from time to time, shall provide information or documents in relation to the persons with any ownership, economic interest or control, in the foreign portfolio investor. (7) The information or documents specified in sub-regulation (6) shall be provided in the manner as may be specified by the Board from time to time.'

Guidelines issued for extension of validity of industrial license

Ministry of Commerce and Industry, Department for Promotion of Industry and Internal Trade (DPIIT) has published its Press Note dated 21 July 2023. The press note stated that the industrial licenses granted under Industries (Development and Regulation) Act will be valid for 15 years instead of 3 years. Further the press note even stated that extension of the license is applicable only if the applicant meets certain criteria such as acquisition of land either under ownership or on lease for a minimum period of 30 years. Apart from that, the construction on such lands must be completed and the machinery should be installed.

.

Employees' State Insurance (Central) Amendment Rules, 2023 notified

The Ministry of Labour and Employment *vide* Notification dated 25 July 2023 has published the Employees' State Insurance (Central) Amendment Rules, 2023 to further amend the Employees' State Insurance (Central) Rules, 1950, deemed to be effective from 1 January 2021, and shall remain in force till 30 June 2021. The notification pertains to claiming of sickness and maternity benefits.

Pan Masala – Enforcement date of 'Note' for warning extended by FSSAI

Food Safety and Standards Authority (FSSAI) has issued a direction dated 1 August 2023 (earlier direction was issued on 22 May 2023 to defer the 'Note' requirement up to three months from 1 May 2023) to further extend the enforcement date of 'Note' i.e., '*The warning statement must cover 50% of front-of-pack of the label*' in Schedule -II of the Food Safety and Standards (Labelling and Display) Second Amendment Regulation 2022 for a period of 3 months from 1 August 2023. This direction has been issued upon the representation made by the industry association to exhaust the existing packaging material having the warning and to arrange for the new ones.

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

Ratio Decidendi

- Stockbroker Company, being a Financial Service Provider, is outside the purview of 'Corporate Person' under Insolvency & Bankruptcy Code, 2016 – NCLT, New Delhi
- Unsecured Financial Creditors can be classified as assenting or dissenting unsecured financial creditors – Differential payment structure is not discriminatory – NCLAT, New Delhi
- Arbitration award in a case involving insufficiently stamped agreement cannot be set aside under Section 34 of Arbitration and Conciliation Act, 1996 – Delhi High Court

Stockbroker Company, being a Financial Service Provider, is outside the purview of 'Corporate Person' under Insolvency & Bankruptcy Code, 2016

The National Company Law Tribunal **('NCLT')** Delhi Bench has held that an entity registered with the Securities and Exchange Board of India **('SEBI'),** and involved in trading of shares, stocks, debenture is a 'Financial Service Provider'. Considering the same, the said entity is outside the definition of 'Corporate Person' under Section 3(7) of the Insolvency and Bankruptcy Code 2016 ('**IBC**'). Since, a Financial Service Provider is not a Corporate Person, it cannot be categorized as Corporate Debtor under Section 3(8) of the IBC. The IBC proceeding initiated against a Financial Service Provider was thus dismissed by the Tribunal.

Brief facts:

Bezel Stockbrokers Private Limited **('Corporate Applicant')** initiated IBC proceeding against itself. The Corporate Applicant being a stockbroker, was a company incorporated under the Companies Act, 1956 registered with Registrar of Company ('**ROC**') Delhi. The Corporate Applicant was also registered under the Securities and Exchange Board of India Stockbrokers and Sub-Brokers Regulations, 1992.

The Corporate Applicant was in a financial crisis and had been incurring mounting losses year after year due to which it had become impossible for it to carry out its operations. Consequently, the Corporate Applicant had been declared as a defaulter and expelled from National Stock Exchange's membership. Therefore, due to the financial hardships faced by the Corporate Applicant it preferred to initiate IBC proceeding against itself.

Submissions by the Corporate Applicant/Petitioner:

- The Petitioner submitted that they are entitled to invoke IBC Proceeding under Section 10 of the IBC Code, as they are a Company incorporated under the provisions of the Companies Act, 1956 and registered with Registrar of Companies, Delhi.
- Due to financial crisis, the Corporate Applicant was not able to comply with SEBI Rules, and it had become impossible for the Corporate Applicant to carry on its business. Therefore, the Corporate Applicant had invoked IBC Proceeding under Section 10 of IBC.

Contentions raised by SEBI/Respondent No. 1:

- The SEBI, being the Respondent No.1, contended that the Corporate Applicant was a Financial Service Provider as defined under Section 3(15) of the IBC, and hence it cannot be held as a Corporate Person. Basis, the same, a Financial Service Provider cannot be held to be a Corporate Debtor. For the said argument, SEBI placed reliance on the judgement of Hon'ble NCLT Delhi in the case of *Globe Capital Market Limited* v. *Narayan Securities Limited,* Company Petition No. (IB)-856(ND)/2022, wherein the NCLT had held that, when an entity is dealing with

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

'Financial Product' as defined in 3(15) of IBC, and is providing 'Financial Services' in terms of Section 13(d), the said entity cannot be termed as 'Corporate Person' under Section 3(7) of the IBC.

- The Respondent also contended that the Corporate Applicant was registered with the SEBI. Hence, the services provided by the Corporate Applicant could be regulated by SEBI, which is covered under the definition of 'Financial Sector Regulator' under Section 3(18) of IBC. On the said basis, it was further contended that the Corporate Applicant was a 'Financial Service Provider' in terms of Section 3(17) of IBC and cannot be treated as 'Corporate Person'.

Decision:

The Hon'ble NCLT held that the Corporate Applicant, being a stockbroker, was dealing in the activities of buying, selling, or dealing in securities etc., which in terms of Section 3(15) of IBC 2016 are held to be 'Financial Product' belonging to another person. Hence, in terms of Section 3(16) of IBC 2016, the Corporate Applicant was providing 'Financial Service' or in other words, it was a 'Financial Service Provider'.

The Tribunal also noted that the Corporate Applicant being registered with SEBI under the provisions of the SEBI Act read with SEBI (Stockbrokers and Sub-brokers) Regulations, 1992, was subject to control and supervision of SEBI, i.e., a Financial Sector Regulator, and hence, the Applicant/Stockbroker Company was a 'Financial Service Provider'.

It was further observed that the Corporate Applicant, being a 'Financial Service Provider' is specifically excluded from the definition of a 'Corporate Person' under Section 3(7) of IBC. Since the Corporate Applicant cannot be held to be a Corporate Person, it cannot qualify to be a Corporate Debtor under Section 3(8) of IBC. Therefore, the instant application was held to be not maintainable by or against the Applicant for the purpose of initiating the CIRP.

[*Bezel Stockbrokers Pvt. Ltd.* v. *Security Exchange Board of India* – Judgement dated 2 Aug 2023 in Company Petition No. (IB)-251/(ND)/2021, National Company Law Tribunal, New Delhi]

Unsecured Financial Creditors can be classified as assenting or dissenting unsecured financial creditors – Differential payment structure is not discriminatory

The Principal Bench of Hon'ble National Company Law Appellate Tribunal ('**NCLAT/Tribunal**') has observed that the unsecured financial creditor can be of two categories i.e., one who did not vote in favour of the resolution plan i.e., dissenting unsecured financial creditor ('**Dissenting UFC**') and those who voted in favour of the resolution plan, i.e., assenting unsecured financial creditor ('**Assenting UFC**'). Basis the said classification, different payment structure would be applicable to different class of unsecured financial creditors.

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

Lakshmikumaran & Sridharan attorneys

Brief facts:

In the present case, Corporate Insolvency Resolution Process ('**CIRP**') against Sharon Bio-Medicine Limited ('**Corporate Debtor**') was initiated by the National Company Law Tribunal ('**NCLT**'), Mumbai ('**Adjudicating Authority**'). During the CIRP, a Resolution Plan was submitted by the present Appellant (unsecured creditor) which got approved. However, the CIRP could not succeed due to delay and non-implementation of the approved Resolution Plan.

Therefore, the Adjudicating Authority directed the Committee of Creditors ('**CoC**') for initiating fresh CIRP and appointed a new Interim Resolution Professional ('**IRP**'). The new resolution plan was approved by a majority of 79.28% vote share. However, the Appellant abstained from voting for approval of the new Resolution Plan.

On application filed for approval of the new Resolution Plan before the Adjudicating Authority, the Adjudicating Authority approved the new Resolution Plan. Thereafter, the Appellant received an email along with a statement regarding distribution of funds to unsecured creditors. By virtue of the same, the Appellant noted that there was difference in payment mechanism for unsecured creditors who voted in the Resolution Plan *vis-à-vis* the unsecured financial creditor who did not participate in the voting or were found to be Dissenting UFC. Aggrieved by this order the Appeal was filed.

The main question raised in the appeal was whether the payment to the unsecured Financial Creditors based on their 'assent' or 'dissent' of the resolution plan can be considered to be discriminatory.

Submissions on behalf of the Appellant:

- Appellant placed reliance on Section 30(2)(b) of IBC and Regulations 31(1)(b) of the Regulations 2016 to argue that Resolution plan is violative and discriminatory and there cannot be any discrimination in the payment to the unsecured Financial Creditors on the basis of their 'assent' and 'dissent' of the resolution plan.
- It was further argued that as per the amendments in Section 30(2)(b) brought in the year 2019, it is necessary that at least a minimum amount (not nil) is paid to the 'Dissenting UFC' and the distribution must be fair and equitable.
- Reliance was placed by the Appellants, *inter alia*, on the judgement of *Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta and Ors.*, (2020) 8 SCC 531 to argue that Financial Creditors who have a right to vote under sub-section (2) of Section 21 of IBC and did not vote in favour of resolution plan, shall be paid in priority over financial creditors who voted in favour of the plan.

Submissions on behalf of the Respondent:

- It was argued that once the CoC has approved the Resolution Plan, the jurisdiction of the Adjudicating Authority is very limited, and the distribution made by the CoC does not warrant any interference.
- It was argued that the treatment of Dissenting UFC is in accordance with the provisions of the IBC and Regulation 2016, as according to Section 30(2)(b)(ii) of the IBC, dissenting financial creditors secured or unsecured are

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

entitled to payment of liquidation value due to them. The liquidation value due to the Appellant herein being nil there is no discrimination in payment.

- It was further argued that another financial creditor who assented to the plan has been paid as per the payment envisaged in the plan and similarly the Appellant has not been paid anything. This has been done as per the plan approved by the CoC is their commercial wisdom therefore, it does not warrant any interference by the Tribunal.

Decision:

The Hon'ble Tribunal noted that Section 30(2)(b) of IBC specifically contemplates the payment of debt of the Dissenting UFC. It was clarified that the amount payable to Dissenting UFC shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of Section 53 in the event of a liquidation of the Corporate Debtor. Furthermore, it was clarified that Regulation 38(a) & (b) provides that the Dissenting UFC shall be paid in priority over Assenting UFC. The Hon'ble Tribunal clarified that the priority in payment is a different aspect than the amount to which the creditor who does not vote in favour of the plan is entitled. In the present case there is no dispute that liquidation value of the Appellant in the present case was Nil. Hence, there was no error in the order of the Adjudicating Authority approving the new resolution plan.

Furthermore, it was held that the clause 7 of the Form-H under Regulations 2016 as amended by Notification dated 27 November 2019 classifies the unsecured financial creditors into two separate categories i.e., one who did not vote in favour of the resolution plan and other those who voted in favour of the resolution plan. This clearly indicates there can be differences in payment for both the categories. Hence, there differential payment to Dissenting UFC and Assenting UFC cannot be held to be discriminatory.

[*Peter Beck and Partner Vermoegensverwaltung GMBH* v. *Sharon Bio-medicine Limited & Ors.* – Judgement dated 14 August 2023 in Company Appeal (AT) (Insolvency) No. 912 of 2023, NCLAT Delhi]

Arbitration award in a case involving insufficiently stamped agreement cannot be set aside under Section 34 of Arbitration and Conciliation Act, 1996

The Delhi High Court has held that once an insufficiently stamped agreement has been admitted in evidence by the Arbitrator, and an award has been passed by relying on the said agreement, the award cannot be set aside under Section 34 of the Arbitration and Conciliation Act, 1996 ('**Act**') on the ground that the Agreement was insufficiently/improperly stamped.

Brief facts:

ARG Outlier Media Pvt. Ltd. ('**Petitioner**') challenged an arbitral award under Section 34 of the Act, which was passed by the Sole Arbitrator in favour of HT Media Ltd ('**Respondent**'), *inter alia,* on the ground that the agreement which incapsulated the provision for arbitration was not properly stamped.

The fact regarding the applicability of the Stamp duty was disputed since one of the parties signed the agreement at New Delhi and the other party signed the said agreement at

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

Mumbai. The Ld. Arbitrator considering the correspondence exchanged between the parties and the terms of the agreement declared that the agreement was executed in New Delhi and hence, the required Indian Stamp Act, 1899, as applicable to state of NCT Delhi would be applicable.

Submissions on behalf of the Petitioner:

- The Petitioner argued that since the agreement was signed by petitioner at Mumbai, the stamp duty applicable on the agreement would be calculated as per the Maharashtra Stamp Act, 1958. Therefore, paying stamp duty as applicable in the state of NCT Delhi would make the agreement insufficiently stamped.
- As the document was insufficiently stamped, the Arbitrator should have ordered for impounding of the document i.e., the agreement containing the arbitration clause as per the mandate of the Hon'ble Supreme Court laid down in the judgement of *N.N. Global Mercantile Private Limited* v. *Indo Unique Flame Ltd. & Ors.*, 2023 SCC OnLine SC 495. Hence, the award passed without the document being impounded needs to be set aside under Section 34 of the Act.

Submissions on behalf of the Respondent:

- Respondent contended that the Arbitrator had held that the arbitration agreement was properly stamped, since the same was executed at Delhi, and the required stamp duty was paid as applicable to the State of NCT of Delhi.
- Respondent contended that the Petitioner did not raise any issue regarding the maintainability of the arbitration proceeding under Section 16 of the Act. The issue regarding the insufficient stamping of the document was only raised at the time of challenging the award.

Decision:

The Delhi High Court has held that as per Section 36 of the Indian Stamp Act, 1899 where an instrument has been admitted in evidence, such admission shall not be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. In this regard, the bench referred to the judgement of Apex Court's in *Javer Chand & Ors.* v. *Pukhraj Surana,* (1962) 2 SCR 333, wherein it was held that once the court, rightly or wrongly, decides to admit the document in evidence, so far as the parties are concerned, the matter is closed; it is not open either to the Trial Court or a Court of Appeal or Revision Court to object the order admitting such an instrument in evidence.

The High Court of Delhi considering the ratio laid down by the Hon'ble Supreme Court in *N.N. Global (supra),* held that the Agreement, not being properly stamped, could not have been admitted in evidence, however, once having been admitted in evidence by the Arbitrator, the Award passed by cannot be challenged on the said ground.

The Hon'ble Court further observed that Section 61 of the Indian Stamp Act, 1899 provides that where the appellate court is of the opinion that an instrument should not have been admitted in evidence by the lower court without the payment of duty and penalty, or without the payment of a higher duty and penalty than paid, it may record a declaration to that effect, and determine the amount of stamp duty, to be paid. Moreso, in such cases, the court may impound the insufficiently stamped

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

instrument and send the same to the Collector, who may, under Section 61(4), prosecute the concerned person for any offence against the Stamp-law.

The Hon'ble Court further clarified that even if Section 61 of the Indian Stamp Act applies, in view of the Proviso (b) to Section 61 of the Indian Stamp Act, the Court would only impound the document and refer it to the Collector of Stamps for adjudication on the proper stamp duty and penalty. However, the same shall not, in any manner, affect the enforcement or the validity of the Arbitral Award.

The Hon'ble Court further clarified that since it doesn't act as a court of appeal against the award, it may have the powers in accordance with Section 61 of the Indian Stamp Act once the document is accepted in evidence. Considering all the said aspect, the Court upheld the award and dismissed the Petition filed under Section 34 of the Act.

[*ARG Outlier Media Private Limited* v. *HT Media Limited* – Judgment dated 4 July 2023, Neutral Citation- 2023: DHC:4366, Delhi High Court]

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

News Nuggets

- Arbitration – Pre-reference interest amount cannot be added to principal amount in determining *pendente lite* interest
- Arbitration – Section 29A providing time limit for passing award, is a non-derogable provision – Section 4 thus has no application
- Arbitral award to be set aside in a case where the arbitrator had appeared as a counsel for an 'affiliate company' of the claimant
- Arbitration – Family members when bound by arbitration agreement
- Insolvency – Section 9 petition is not maintainable against claim for compensation penalty under a contract
- Insolvency – Greater Noida Industrial Development Authority is a 'secured creditor' under Section 3(30) of IBC
- Insolvency – Writ of prohibition cannot be issued to a creditor to proceed against a personal guarantor under IBC
- Insolvency – Leased aircraft is 'property' under Section 3(27) of IBC

Arbitration – Pre-reference interest amount cannot be added to principal amount in determining *pendente lite* interest

The Delhi High Court has held that an arbitrator while computing the *pendente lite* interest, cannot add the amount of pre-reference interest to the principal amount as the same would account for levying interest on a compounded basis and the principal amount shall be required to remain static throughout. In the case of *National Projects Constructions Corporation Ltd* v. *Interstate Construction* [dated 1 August 2023], the High Court observed that the order of the arbitrator and the Single Judge Bench was erroneous in nature because Section 31(7)(a) of the Arbitration and Conciliation Act, 1996 (**A&C Act**) only allowed for two periods or heads of interest to be made payable under the A&C Act i.e., the period from which the cause of action arose until the date of the award and from the date of the award declared until such payment is actually made. Therefore, the High Court held that it would be impermissible under the A&C Act to award interest under a third head, namely the pre-reference period. The High Court also observed that the difference between the pre-reference period and the *pendente lite* interest no longer exists and thus shall be inapplicable to the arbitrations governed under the A&C Act. Therefore, the High Court set aside the award to the extent of the findings where pre-reference period was included in the principal amount.

Arbitration – Section 29A providing time limit for passing award, is a non-derogable provision – Section 4 thus has no application

The Bombay High Court has held that even in cases where parties were involved in an arbitral proceeding after the expiry of the arbitrator's mandate, the same shall not constitute a waiver as provided for under Section 4 of the Arbitration and Conciliation Act, 1996 ('**A&C Act**'). In the case of *Mahaveer Realities & Ors.* v. *Shirish J. Shah* dated 21 July 2023 where a petition for extension of time limit in passing the award was filed by the petitioner, the High Court while appointing a substitute arbitrator held that the arbitral proceedings shall continue from the date of expiry of the mandate of the erstwhile arbitrator and the proceedings so held by the erstwhile arbitrator after the expiry of his mandate shall be disregarded by the newly appointed substitute arbitrator. The High Court dismissed the claim that the parties knowingly proceeded with the arbitrator after the expiry of his mandate and so it shall fall under the provisions of waiver of right to object under Section 4 of the A&C Act. Apex Court's decision in *Jayesh H. Pandya & Anr.* v. *Subhtex India Ltd. & Ors,* (2020) 17 SCC 383, wherein it was held that a pertinent element of a waiver is a voluntary and intentional relinquishment of ones right, was relied upon. The High Court here also observed that the respondents had no choice but to continue with the proceedings, so, the same shall not constitute to be a waiver under Section 4.

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

Arbitral award to be set aside in a case where the arbitrator had appeared as a counsel for an 'affiliate company' of the claimant

The Calcutta High Court has held that an arbitral award can be invalidated if the arbitrator appeared before a court for an affiliate company of one of the parties to the arbitration during the pendency of the arbitral proceedings without disclosing such facts. The Court in this regard observed violation of Sections 12(1), 12(2) and 12(5) of the Arbitration and Conciliation Act, 1996 ('**A&C Act'**). In the case of *Gopaldas Bagri* v. *C&E Ltd,* AP 364 of 2020 dated 27 July 2023, during the pendency of the arbitral proceedings, the arbitrator had appeared as an advocate for an 'affiliate company' of the respondent without disclosing the fact to the petitioners. The High Court, while dealing with the petition first dealt with the meaning of the 'affiliate company' under the provisions of Section 12 of the A&C Act and held that the respondents on lifting of the corporate veil would fall under the purview of the Section 12. Further, the High Court held that the disclosure requirement under the Section 12 shall be continuous through the pendency of the proceedings and the arbitrator shall be required to make the required disclosures until the time an award is passed and not just at the initiation of the arbitral proceedings. Therefore, the High Court held that the arbitrator was in contravention of the provisions of requirement of disclosures and thus, the award is liable to be set aside on the principle that 'justice must not only be done but manifestly seem to have been done'.

Arbitration – Family members when bound by arbitration agreement

The High Court of Delhi has held that where all the members of the families have appended their signatures to a Memorandum of Understanding (**MoU**), all of them shall be bound by the terms and conditions of the MoU including the arbitration clause therein. In the case of *Vinnu Goel* v. *Mr. Santosh Goes and Ors* dated 8 August 2023, the plaintiff claimed that it had merely signed an MoU and just basis the same it cannot be made party to the MoU and the arbitration agreement. Further, the plaintiff also contended that the MoU was governed by the Arbitration and Conciliation Act, 1996 (**A&C Act**) and there it shall be binding only on the parties to the MoU. However, the High Court while setting aside the claims of the plaintiff, held that the family heads of the parties to this case were the parties to the MoU and the plaintiff being a family member of one such family and having appended its signatures on each of the pages of the MoU shall be bound by the terms and conditions thereunder thereby disallowing it to escape the arbitration agreement merely because it was expressly not made a party to the same. Further, the High Court also observed that since the suit was filed after the 2015 amendment to the A&C Act came into effect, the reference would also be governed by the amended Section of the A&C Act.

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

Insolvency – Section 9 petition is not maintainable against claim for compensation penalty under a contract

The National Company Law Appellate Tribunal, Delhi Bench ('**NCLAT**') has upheld the dismissal of a petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('**IBC**') by the adjudicating authority, which was filed for a claim of compensation penalty under a contract. In the case of *Chandrashekhar Exports Pvt. Ltd.* v. *Babanraoji Shinde Sugar & Allied Industries Ltd,* dated 7 August 2023, the parties had entered into a contract and thereunder was a clause stating that, in case of non-performance of the contract, the respondent had to refund the advance money and a compensation penalty to the appellant. When the event of non-performance accrued, the respondent refunded the advance amount to the appellant. However, the compensation penalty was not paid by the respondent, against which the appellant had filed a petition under Section 9 of the IBC. The NCLAT in this appeal upheld the dismissal of the petition and the understanding of the adjudicating authority that the issue as to whether the compensation penalty has crystallized or not has to be decided by a competent court and not by the adjudicating authority. Therefore, the NCLAT dismissed the appeal observing that the appellant has a right to take any remedy available as per the contract in accordance with the applicable law.

Insolvency – Greater Noida Industrial Development Authority is a 'secured creditor' under Section 3(30) of IBC

The National Company Law Tribunal, Delhi ('**NCLT**') has held that the Greater Noida Industrial Development Authority ('**GNIDA**') is a secured operational creditor under Section 3(30) of the Insolvency and Bankruptcy Code, 2016 ('**IBC**'). In the case of *VMS Equipment* v. *Primrose Infratech Private Limited* dated 24 July 2023, GNIDA had leased land to the corporate debtor which failed to pay its dues to GNIDA. The resolution professional, while admitting GNIDA as an operational creditor, did not make the provision for the entire dues of GNIDA in its resolution plan submitted before the NCLT. Against the same, GNIDA filed its objections against such resolution plan and sought for its rejection. Against such application for rejection, the resolution professional claimed that as per the Section 238 of the IBC, the IBC shall have an overriding effect on the UP Industrial Area Development Act, 1976 and in case of any inconsistency between the two, the IBC shall prevail. The NCLT observed that Section 3(30) of IBC defines a secured creditor as the one for whom a security interest, including a 'charge,' is created. Therefore, it can be held that any creditor in favor of whom a charge is created shall be called a secured creditor. Moreover, relying on the judgement of the Apex Court in *State Tax Officer (1)* v. *Rainbow Papers Limited*, Civil Appeal No. 1661 of 2020, wherein it was held that the definition of a secured creditor provided under the IBC does not expressly exclude

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

government or governmental authorities, held that the GNIDA qualifies to be a secured creditor under Section 3(30) of IBC. Further, the NCLT also clarified that the creation of a charge in favor of GNIDA occurred before the imposition of the moratorium under the IBC thereby rendering Sections 13 and 13A of the Uttar Pradesh Industrial Area Development Act, 1976 not to be inconsistent with IBC and therefore the overriding effect of Section 238 of the IBC shall not apply to this case.

Insolvency – Writ of prohibition cannot be issued to a creditor to proceed against a personal guarantor under IBC

The Delhi High Court has held that no writ of prohibition may be granted against a creditor in order to restrain him from initiating proceedings under Section 95 of the Insolvency and Bankruptcy Code (**IBC**) against the personal guarantor. In the case of *Vineet Saraf* v. *Rural Electrification Corporation Ltd.*, dated 21 July 2023, the High Court has held that where an alternative remedy in law exists, the petitioner shall be required to prove in his petition as to if the proceedings under the alternative remedy, if taken shall be wholly out of jurisdiction and why the alternative authority/forum should be deprived of adjudicating a matter of its own jurisdiction. In the absence of being able to prove the aforesaid points, the issuance of writ against any creditor shall not be entertained by the High Court. Further, taking into consideration *inter alia* the fact that the respondent merely issued a demand notice to the petitioner in order to fulfill the statutory requirement of Section 95 of the IBC and the same may not termed arbitrary thereby invalidating the petitioner's claims for issuing a writ of prohibition against the respondent from approaching the National Company Law Tribunal to seek appropriate remedies for itself.

Also, the High Court opined that the issue in hand involved matters relating to interpretation of contracts and contractual private law which could not be dealt with by way of a writ petition. In opining the same, the High Court relied on the judgement of the Apex Court in *Kerala SEB v. Kurien, (2000) 6 SCC 293*, wherein it was held that interpretation and implementation of a clause in a contract normally cannot be the subject-matter of a writ petition. Therefore, the High Court dismissed the writ petition while making the aforesaid observations.

Insolvency – Leased aircraft is 'property' under Section 3(27) of IBC

The National Company Law Tribunal, Delhi ('**NCLT**') has held that aircraft leased to an airline company shall qualify to be a 'property' within the scope of Section 3(27) of the Insolvency and Bankruptcy Code, 2016 ('**IBC**'). The NCLT while dealing with an application filed by the lessors in a petition under Section 10 of the IBC filed by *Go Airlines (India) Limited* dated 26 July 2023, has observed that leasing aircrafts in the aviation business is a very widely practiced norm and taking away such leased aircrafts from the corporate debtor during the moratorium shall lead to the financial demise of the corporate debtor. Further, the NCLT had specifically stayed the recovery of any property

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

by an owner or lessor if such property was occupied by the corporate debtor. While basing on the definition under Section 3(27) of the IBC and declaring the aircrafts to be qualified as 'property', the NCLT also relied on the Apex Court's decision in *Rajendra K. Bhuta V. Maharashtra Housing and Area Development Authority* (AIR 2020 SC 3274) wherein it was held that the term 'occupied by' shall mean the actual physical possession of the property and so the aircrafts shall be liable to fall under the moratorium imposed by the NCLT. Therefore, the NCLT dismissed the claims and contentions of the lessors granting only an interim relief thereof to the extent of protection and maintenance of the aircraft.

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

NEW DELHI
5 Link Road, Jangpura Extension, Opp. Jangpura Metro Station, New Delhi 110014
Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing, Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden, 2nd Street, Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center, Brigade Gateway Campus, 26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Phone : +91-80-49331800 Fax:+91-80-49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road, Opp. Methodist Church, Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924 E-mail :lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII, Nehru Bridge Corner, Ashram Road, Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road, Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail : lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building 41, Chowringhee Road, Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59, Sector 26, Chandigarh -160026
Phone : +91-172-4921700
E-mail :lschd@lakshmisri.com

GURGAON
OS2 & OS3, 5th floor, Corporate Office Tower, Ambience Island, Sector 25-A,
Gurgaon-122001
phone: +91-0124 - 477 1300 Email: lsgurgaon@lakshmisri.com

PRAYAGRAJ (ALLAHABAD)
3/1A/3, (opposite Auto Sales), Colvin Road, (Lohia Marg), Allahabad -211001 (U.P.)
Phone : +91-532-2421037, 2420359
E-mail : lsallahabad@lakshmisri.com

KOCHI
First floor, PDR Bhavan, Palliyil Lane, Foreshore Road, Ernakulam Kochi-682016
Phone : +91-484 4869018; 4867852
E-mail : lskochi@laskhmisri.com

JAIPUR
2nd Floor (Front side), Unique Destination, Tonk Road, Near Laxmi Mandir Cinema Crossing, Jaipur - 302 015
Phone : +91-141-456 1200
E-mail : lsjaipur@lakshmisri.com

NAGPUR
First Floor, HRM Design Space, 90-A, Next to Ram Mandir, Ramnagar,
Nagpur - 440033
Phone: +91-712-2959038/2959048
E-mail : lsnagpur@lakshmisri.com

Disclaimer: *Corporate Amicus* is meant for informational purpose only and does not purport to be advice or opinion, legal or otherwise, whatsoever. The information provided is not intended to create an attorney-client relationship and not for advertising or soliciting. Lakshmikumaran & Sridharan does not intend to advertise its services or solicit work through this newsletter. Lakshmikumaran & Sridharan or its associates are not responsible for any error or omission in this newsletter or for any action taken based on its contents. The views expressed in the article(s) in this newsletter are personal views of the author(s). Unsolicited mails or information sent to Lakshmikumaran & Sridharan will not be treated as confidential and do not create attorney-client relationship with Lakshmikumaran & Sridharan. This issue covers news and developments till 28 August 2023. To unsubscribe e-mail Knowledge Management Team at **newsletter.corp@lakshmisri.com**

www.lakshmisri.com **www.gst.lakshmisri.com** **www.addb.lakshmisri.com** **www.lakshmisri.cn**

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved

Lakshmikumaran & Sridharan attorneys

© 2023 Lakshmikumaran & Sridharan, India
All rights reserved