Center for Business and Commercial Law
DSNLU

DAMODARAM SANJIVAYYA NATIONAL LAW UNIVERSITY
VISAKHAPATNAM

LEX COMMERCIALE

CBCL'S QUARTERLY E-NEWSLETTER

DAMODARAM SANJIVAYYA NATIONAL LAW UNIVERSITY

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PREFACE

The Center for Business and Commercial Law at Damodaram Sanjivayya National Law University (CBCL DSNLU), established in 2019, has worked incessantly to increase commercial awareness and this is one such effort. We present to you the first edition of "Lex Commerciale", a quarterly E-Newsletter.

Lex Commerciale is the flagship quarterly E-Newsletter, covering recent legal developments in the areas of corporate and allied laws. The newsletter systematically compiles the updates in the past quarter in totality. Its uniqueness lies in its all-embracing approach. Be it explaining the complex legal concepts in a comprehensive manner or analysing the nuances of the law, everyone has a bending reason to read this Newsletter, be a student, academician or professional.

This edition examines the notifications released by the SEBI. They are succinctly covered under the 'Regulatory Updates' section. The 'Articles' section scrutinizes the current state of Gig workers in India, along with the latest developments in Finance, Corporate Governance, Insolvency, and Labour Law to help readers stay abreast with the latest developments.

The 'Case Analysis' section gives a run throughout the diverse areas of law such as Arbitration, Insolvency law, Technology, Media & Entertainment, and the corresponding Court's decision on the same with crisp analysis and highlights from the judgments to help readers stay be au fait with the case.

The creative and original outlook of CBCL can be observed by the infographics used to encapsulate the concepts of LLP, Cryptocurrency and IBC procedures.

No reading is complete without amusement. Thus, we bring to you the' Bit of Fun' section that includes a puzzle to pique your interest.

We are constantly striving to work towards more commercial awareness. We are evolving and improving but your inputs will help us evolve in a much greater way. Feel free to mail us at cbcl@dsnlu.ac.in and share your ideas.

We hope you enjoy reading this edition of Lex Commerciale and find it useful in your area of work.

-Team CBCL DSNLU

CBCL DSNLU TEAM

Convenors

Dr. Dayananda Murthy CP
(Convenor)

Mr. P.Bayola Kiran
(Co-Convenor)

Members

Ananya	5th year	Utkrasht	2nd year
Krishna Vamsi	5th year	Anupriya	2nd year
Anagha	4th year	Surbhi	2nd year
Sejal	4th year	Harini	2nd year
Chandana	4th year	Rishika	1st year
Susmita	5th year	Prabal	1st year
Girish	5th year	Nehaa	1st year
Sanchit	4th year	Divyanshu	1st year
Allaka	4th year	Vineela	1st year
Sasthibrata	4th year	Katyayani	1st year
Sai Chaitanya	4th year	Shreeya	1st year

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Cover image Source: ArtHouse Studio

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Hon'ble Sri Justice Lavu Nageswara Rao,
Judge, Supreme Court of India & Visitor,
DSNLU, Visakhapatnam

Hon'ble Sri Justice Prashant Kumar Mishra,
Chief Justice, High Court of Andhra Pradesh
& Chancellor, DSNLU, Visakhapatnam

MESSAGES FROM THE DESK

Message from the Patron

It is my pleasure to introduce you to "*Lex Commerciale*" of the Center for Business and Commercial Law, DSNLU. The E-Newsletter focuses exclusively on recent legal developments in the areas of Corporate and allied laws. The present Newsletter explores some of the key notifications, orders, and notices issued by the Government of India and other authorities such as RBI, NCLT, SEBI, etc. The articles in this Newsletter have been contributed by the faculty and students of DSNLU.

Most lawyers, at some point during their careers, have to deal with issues of Business and Commercial law, so it's a great thing to announce that DSNLU is releasing its quarterly E-Newsletter, related to business and commercial law in the university.

In the modern age, Business and Commercial Law is not only confined to the business community but also to every member of the society and the Contract Act is equally applicable to business and non-business communities. Besides the business community, a common man in his day to day experience enters into a number of contracts. Business and e-Commercial Law are incorporated into a number of Acts, which follow to a considerable extent the English

Business Law with some reservations and modifications necessitated by the peculiar conditions prevailing in India.
In this way, Business Law has a fairly wide scope. The Government lays down the rules and regulations to run the business activities smoothly. Business Law and Commercial Law are two areas of legal practice that have so many overlapping issues that most attorneys who practise one will also have expertise in the other. Commercial Law focuses on the sale and distribution of goods, as well as financing certain transactions. Business Law focuses on the other aspects of business, including forming a company, mergers and acquisitions, shareholder rights, and property issues such as leasing office or warehouse space. A business that sells products will almost certainly need a lawyer with experience in both of these fields. Business Law is regulated by both State and the Federal law. The Federal Government primarily governs stocks and investments, workplace safety and Employment Laws, and Environmental protections. States, however, can add to these Federal Laws and pass their own laws in other areas, such as imposing licensing requirements for certain professions and establishing rules for forming and running a legal business. I firmly believe that this E-Newsletter would instill a great interest not only in students of law and business stakeholders but also in the regular readership of scholars and practitioners in India and abroad.
I appreciate Prof. (Dr.) Dayananda Murthy CP, Convenor of CBCL DSNLU, and Mr P. Bayola Kiran, Co-Convenor of CBCL DSNLU, and student members for their endeavours to make this Newsletter successful. I hope that the team will continue the publications of the Newsletter continuously in the coming years.

- Prof. (Dr.) S. Surya Prakash
Vice-Chancellor
DSNLU, Visakhapatnam

Message from the Chairperson

Civilised Societies are supported by well established legal systems. In India a Civilised Society along with perfect legal order is working right from the pre-Constitution era. During the colonial period, the British India did not have any ideology based economic system. Generally, the economic system in a country is visualized in accordance with the political ideology of the political dispensation. However, the Indian economy has not visualized any specific economic system for the country. Thus post-Constitution Indian Society has inherited a feudal economic structure. Part IV of the Indian Constitution comprising of socio-economic rights assisted the State in India to convert the feudal economy into a socialistic pattern of Society. The industrial policy resolutions announced from time to time by the Union Government appears to have established a mixed economy in India wherein along with the State, private entrepreneurs are also allowed to do business. Since the private entrepreneurs are also doing business in the essential commodities, a need was felt to regulate the private business entreprises in public interest. Thus a robust “License Raj” is pressed into society. This “License Raj” is operated through a rigorous legal structure wherein the private business is regulated strictly. When this mixed economy failed to work upto the expectations of the State and the Society in India, the State introduced structural reforms in the Indian economy therby the “License Raj” was given a go-by and market economy is established in its place.

In a market-driven economy, the place of framing socio-economic policies has shifted from New Delhi to Davos, London, New York, Geneva etc.

In this process, the legal structure regulating the economic structure is influenced by the market forces. A market economy is regulated through commercial Laws. These commercial laws administering the economic structure are changed very frequently to serve the interest of the capital/investment and the Society. This process has resulted in frequent changes in commercial laws. Law students pursuing commercial laws must update their knowledge to keep themselves aware of day to day changes in the commercial law area. The laws operating in this area, inter-alia, are Law of Contracts, Corporate Law, Securities Law, Banking Law, Law relating to SEBI etc. The law students must go through the latest amendments to these laws as well as new laws enacted in this area so as to equip themselves with the changing legal structure which is necessary for the development of their professional career. Comprising of all these requirements, CBCL of DSNLU is promoting an E-Newsletter that contains the opinions of the Jurists, renowned academicians in Law and reputed legal practitioners in this field. This Newsletter is prepared by eminent professors of Commercial Laws of DSNLU. Hence, all the law students are advised to go through this Newsletter.

- Prof. (Dr.) K.Madhusudhana Rao
Registrar I/c
DSNLU, Visakhapatnam

Message from the Academic Advisor

It is heartening to note that the Center for Business and Commercial Law (CBCL), Damodaram Sanjivayya National Law University, is bringing out a Newsletter to highlight the academic programs and other events it has undertaken and also focus on academic events that it will be planning for. Corporate law is throwing many challenges to the policy makers, corporate bodies and also the community at large. Issues of business law generally draw the immediate attention of researchers, analysts & policymakers for meaningful solutions. Hence, corporate issues require extensive research and fruitful debates. The Centre which is promoted by DSNLU has laudable objectives to undertake such diversified academic and research programs to guide and enlighten all the stake holders. It also promotes innovative academic practices to enhance rich professional skills and also imparts training in business law to the students by conducting competitions in events such as mock merger and acquisitions and employee and management disputes at intra and inter-university level. In recent times, university-industry coordination has become one of the focus areas of all academic planning committees. The Center of Business and Commercial Law of DSNLU will actively liaison such University-Industry interactions. In my view, the centre has all necessary infrastructure and research facilities to undertake academic and research projects with the active and dynamic support of University authorities. Best wishes to the well-wishers and stakeholders of this centre.

- Prof. (Dr.) Rajendra Prasad
Emeritus, Academic Advisor
DSNLU, Visakhapatnam

Message from the Chief Editor

The significance and wealth of a country depends on the economic stability. Entities do enter into commercial transactions on day-to-day basis. There is exponential growth in economic activities of the entities and requires management of the documents, which is specified by the Statutes. The statutes facilitates the parties to enter into business transactions and the parties are free to decide the terms and conditions.

The “Prudent Business Test or Business Judgment Rule” in the commercial activities of the entities are recognized not only by the legislation, but also by the courts. The vibrant economic development has expanded the scope of Business and Commercial Laws. Special regulatory mechanism are in place, in certain cases, which are sector specific. Any commercial transactions are engulfed in a “catch-all” scenario and ever-changing scope has increased the scope further. The area of learning includes law relating to contracts, property, employment, business entities like partnerships, limited liability partnerships or corporate entities, insurance, telecommunication, anti-competitive agreements, consumer protection, intellectual property, taxation, etc. The legislation has to be on toes and have to be modeled to this changing dynamics of business. In view of this, we need to have knowledge and understanding of the law including the Rules and Regulations framed thereunder. Centre for Business and Commercial Law (CBCL) has conceived an idea of publishing an E-Newsletter on quarterly basis namely, "Lex Commerciale". CBCL strives to bring awareness as to the development of law on quarterly basis. The CBCL team has endeavored to bring the first edition of the E-Newsletter and this initiative of the student's is commendable. I congratulate all the student members and contributors for this edition, which is a humble beginning. I wish with the support of all the students and Faculty member, CBCL and the E-Newsletter will mark its presence in the Business and Commercial Laws arena. This E-Newsletter will bring in a feast for reading and understanding the latest development and keep you updated. I request all the Students and Faculty Members to contribute for the forthcoming issues by sharing their knowledge on the development of law in the area of Business and Commercial Laws. E-Newsletter will have four issues annually, commencing from this October (2021) and I on behalf of DSNLU, wish the Student members all the success for their endeavor. I thank the Hon'ble Vice-Chancellor, the Registrar and the Advisor, CBCL for their support in bringing this Newsletter before you. I thank Mr. Bayola Kiran and all the student members for their efforts to launch the E-Newsletter.

-Prof. (Dr.) Dayananda Murthy C. P.
Director, Academic Affairs and Research and
CBCL Faculty Convener
DSNLU, Visakhapatnam

Message from the Deputy Editor

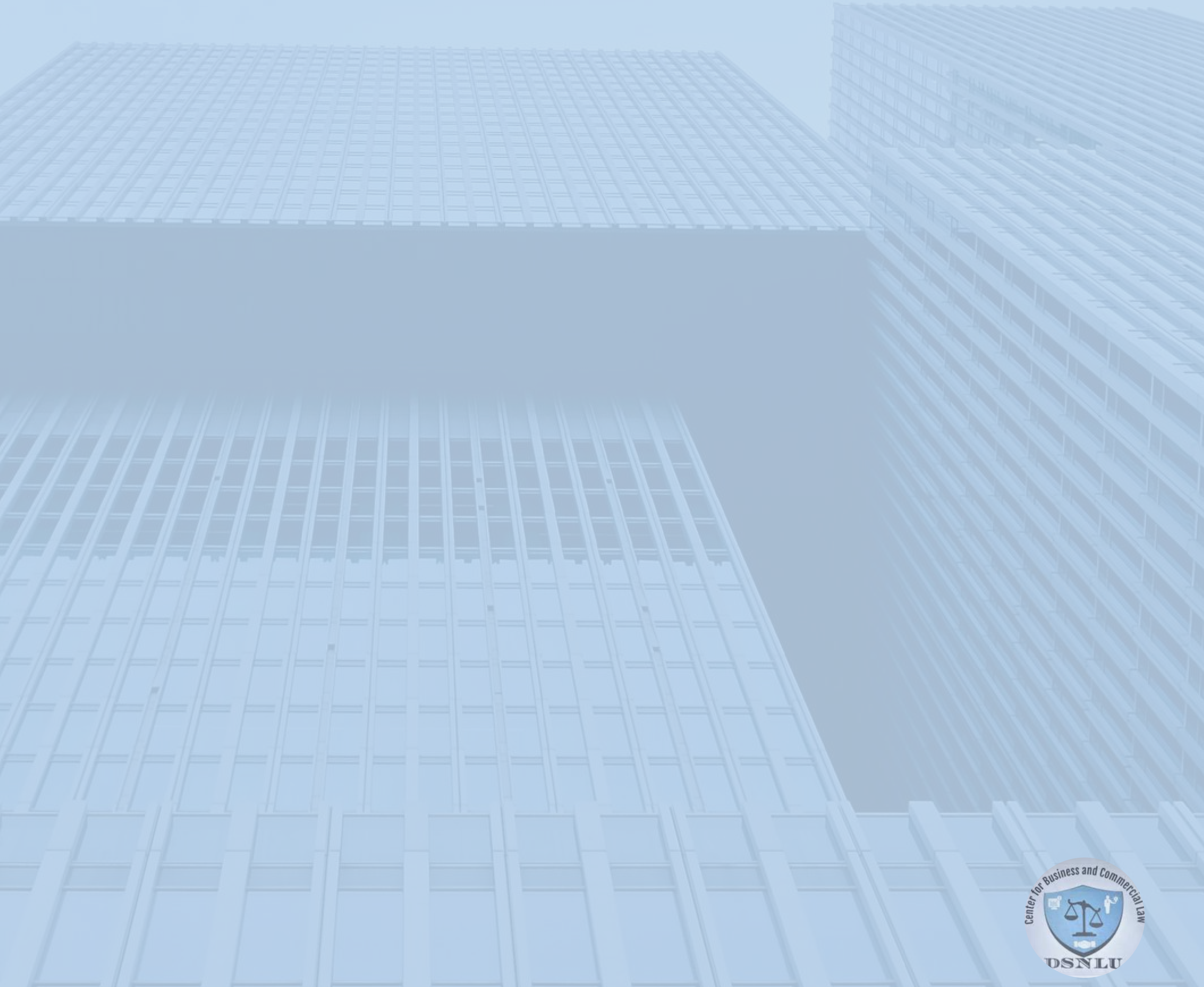
The E-Newsletter of the CBCL, DSNLU is our humble attempt to demystify the complex world of commercial laws. The field of commercial regulation is ever growing and hence the volume of information required to carry out a commercial transaction is dynamic. One may feel sceptic that another bunch of words are added to the existing information but I firmly believe in the endeavors of our student team in providing curated content with in text references (hyperlinks) does not make it so called another bunch of words both in letter and in spirit. Dr. Ambedkar said that knowledge is power in every field of life; and I presume that the legal fraternity will join me when say that it is an undeniable fact equally applicable field of law, in general, and commercial regulation, in particular.

To undertake a commercial activity which is clean and free from violations (no matter big or small) in the complex regulatory regime of the day is a herculean task, yet the commercial actors resort to their work with commitment that is second to none. Mahatma Gandhi once made an observation that it may be difficult, but not impossible, to conduct honest business.

I feel that this E-Newsletter comes handy to all the stakeholders in understanding the developments of the regulatory regime of commerce in India.

I place on record my sincere congratulations to the student team in making this E-Newsletter a reality, and I appreciate their effort in designing, editing, and formatting everything in-house and going green by deciding to not go for a print version. The student team behind this newsletter deserves all the accolades for everything that is good and all the brickbats should be on me for anything that is not proper.

- Mr. P.Bayola Kiran
Asst. Professor and
CBCL Faculty Co-Convener
DSNLU, Visakhapatnam



SEBI LAW UPDATES

SEBI's New Rules for Independent Directors

To strengthen the role of the independent director (ID), the SEBI brought some new rules on the appointment, remuneration and removal of the independent directors of the listed companies. The appointment and removal of ID in a listed company will be done through a special resolution of shareholders. To comply with these rules, the SEBI introduced an amendment in SEBI (LODR) Regulation, 2015. The amendment will be implemented from 1st January 2022.

SEBI's Consent is not Mandatory for Compounding of the Offences under the SEBI Act, 1992

The Supreme Court in the case of *Prakash Gupta* v. *SEBI*[1], held that section 24A of SEBI Act, 1992 does not stipulate that consent of SEBI is necessary for Securities Appellate Tribunal (SAT) or Court before which such proceedings are pending to compound an offence. However, the SAT or Court must obtain views of SEBI for furnishing guidance to its ultimate decision, before deciding on whether to compound an offence punishable under Section 24(1) of SEBI Act, 1992. Also, the Supreme Court laid down some guidelines for compounding under Section 24A of SEBI Act, 1992.

[1] 2021 SCC OnLine SC 485.

Top 100 Listed Entities get an Extension of Time for Holding the Annual General Meeting (AGM)

Under Regulation 44(5) of the SEBI (LODR) Regulation, 2015, top 100 listed entities, must hold their AGM within 5 months from the date of closing of the financial year. On 23rd July 2021, due to continued COVID-19 Pandemic, the SEBI issued a circular to give extension for the conduct of AGM by top 100 Listed Entities. Now, with the issuance of this circular, the top 100 listed entities are allowed to hold their AGM within 6 months.

The Growth of Direct Selling in India

After Indian Directing Selling Association (IDSA) reported only a 4.7% growth of direct selling in the first half of the Covid-19 hit 2020-21, the IDSA suggests that the direct selling market would likely increase to around 10% during this financial year 2020-21. This is a drop from the previous financial growth of 28.2%. Recently, the government made a draft Consumer Protection (Direct Selling) Rule, 2021, to regulate direct selling entities and to protect the interest of consumers by preventing the offering of pyramid and money circulation schemes from being offered.

Regulating Alternative Investment Funds

In August, SEBI approved the third and fourth amendment to SEBI (Alternative Investment Funds) Regulation, 2012. The third amendment introduced the term "Accredited Investor", which which refers to any person who is granted a certificate of accreditation by an accreditation agency.

However there are some exceptions to becoming an "Accredited Investor", wherein, the person is deemed to be an accredited investor and may not even require a certificate of accreditation. For large value funds, the tenure is extended beyond two years for accredited investors. Also, there are some relaxations for the "Large value for accredited investors".

The fourth amendment introduced terms like "debt fund", "investment funds" and "units" in the definition clause. Moreover, there are some major amendments in Regulations 12, 16 and 17 of the SEBI (Alternative Investment Funds) Regulations, 2012. In addition to this, there are substitutions of words and symbols.

SEBI allows Non-Schedule Payment Banks to Register as Banker to an Issue

SEBI issued a circular, dated 03/08/2021, that permits other banking companies to act as the Bankers to an Issue. SEBI amended the SEBI (Banker to an Issue) Regulations, 1994. Accordingly, non-schedule payment banks are allowed to act as the "Bankers to an Issue" but the non-schedule payment banks must have the approval of the RBI.

Amendment in SEBI Circular on Comprehensive Review of Investor Grievance Redressal Mechanism

In September, the SEBI issued a circular to bring some changes to its circular dated 23/02/2017. The following changes were made to protect the interest of the investors and regulate the security market. The following changes are:
The additional statutory cost for the arbitration will be paid by the party who wants to change the place of arbitration.

Previously, the appellant paid the additional statutory cost.
Apart from the additional fees charged from the trading members, the stock exchange must return the deposit to the party, who got the arbitral award. However, if the party claim such additional fees beyond the timeline, then the additional fees will be given to the Investor Protection Fund (IPF) of that stock exchange. It placed the Member Core Settlement Guarantee Fund Committee as the committee which determines the claims from IPF for the clients of the default members. There are some modifications in the interim relief's threshold that is paid from IPF.

SEBI Circular revised the Position Limits in Permitted Currency Pairs

According to the suggestion received from the stock exchanges or the clearing corporations, the SEBI, through a circular, has revised the position limits for the client level, Non Resident Indians, family offices, individuals & corporate entities of the Category II Foreign Portfolio Investors (FPIs). However, the position limits of the Category I FPIs were not revised.

SEBI makes the Stock Exchanges flexible by Adopting T+1 Settlement Cycle

In order to shorten the settlement system cycle, the SEBI has issued a circular to introduce the T+1 settlement cycle as a settlement option for the security exchanges.

Similarly, the funds will be transferred within Trade + 1 day to an investor who is selling his shares. The T+1 system cycle will be applied to all types of transactions.

After the implementation of this circular, the security exchanges can provide either the T+1 settlement cycle or the T+2 settlement cycle. If a stock exchange wants to opt for the T+1 settlement cycle then it needs to send a notice to the market before one month. The stock exchange can only switch back to the T+2 settlement cycle after the completion of 6 months of opting the T+1 settlement cycle.

This circular will be implemented from 1st January 2022.

- Sasthibrata Panda[2]

[2] Fourth Year, B.A., LL.B (Hons.), Damodaram Sanjivayya National Law University,Visakhapatnam.

WHY TO GO FOR A LIMITED LIABILITY PARTNERSHIP?

LIMITED LIABILITY

The liability of partners in an LLP is limited to the extent of the amount contributed by them. Personal assets of partners cannot be used to pay off the business debts.

NO MINIMUM CAPITAL AND NO BARRIER ON NUMBER OF PARTNERS

A minimum of 2 partners are required to form an LLP, and there are no restrictions on the number of maximum partners. Additionally, LLPs have no mandatory capital requirement.

NO STATUTORY AUDIT

Only when the annual turnover or contributions exceed 40 lakhs or 25 lakhs respectively, are LLPs required to conduct a self-audit.

TAX COMPLIANCE

LLP is not liable to pay the tax on the income and share of its partner. Thus, no dividend distribution tax is payable as under section 40(b). However, it is liable to pay 30% tax as any other partnership firm.

EASE OF OPERATIONS

It is easy to start and manage a business like entrepreneurs. LLP agreements are customized in according to meet the needs of partners concerned. There is fewer formalities in areas of legal compilation, annual meeting, etc.

SEPERATE LEGAL ENTITY

An LLP is distinct from its partners and holds a unique identity. It can enter into contracts, sale/purchase assets, and pay-off liabilities in its own name.

TO SUM UP : Limited Liability Partnership is a decent option because of lower registration costs, limited partner liability, easier tax compliance, efficient management, etc. So why not go for it?

- by Surbhi Gupta [3]

[3] Second Year, B.A., LL.B (Hons.), Damodaram Sanjivayya National Law University,Visakhapatnam.

RBI: IS YOUR CARD TOKENISED?

Image source- Shutterstock

In order to enhance card security in online transactions and prevent the storage of card credentials by third parties in the payment chain, the Reserve Bank of India (RBI) has issued a circular: "Tokenisation – *Card Transactions: Permitting Card-on-File Tokenisation (CoFT) Services*" on September 07, 2021, under Section 10(2) read with Section 18 of Payment and Settlement System Act, 2007. This circular is in connection with the January 2019 circular which established the framework on '*tokenisation for card*'.

Background

Tokenisation has been around since 2001 (developed by Trust Commerce). It is one of the most secured levels of the Payment Card Industry Data Security Standard (PCI DSS). The rapid adoption of digital payment has resulted in numerous payment mechanism innovations, such as tokenization and scanning of Quick Response (QR) codes for making payments using smartphones. According to a study, tokenisation is more secure than encryption because the strength of the encryption is in the algorithm used and contains the actual card details. In the case of tokens, the real data is replaced by random code, making storage for online transactions less vulnerable to leakage. Tokenisation is irreversible and has no exploitative meaning.

What is tokenisation?

Payment card transactions are governed by PCI standards. Tokenisation is a process in which the real primary account number is coded with random numbers, referred to as a 'token', which must be distinct for each card, token requestor (an entity that accepts a customer's request for card tokenisation and forwards it to the card network to issue a corresponding token), and identified device combination. As a result, in a tokenised card transaction, the merchant does not seek or capture the actual card details. This improves the card transaction's safety and security. Card-on-file *refers to payment gateways or merchants storing card information in an encrypted format for future transactions. For example, card information can be saved on Amazon for quick purchases.*

What is the tokenisation guideline?

As per the January 2019 guideline on tokenisation of card transactions the following guidelines are laid down:

i. **Audit:** The card payment networks are obligated to establish a mechanism for at least annual system audits of parties involved in providing card tokenisation services. A copy of the report shall be submitted to the RBI with auditor's (empanelled to CERT-In) comments w.r.t to requirements listed therein. In addition, a monthly report with details provided in Annex 2 of the said circular, must be submitted by email to the Chief General Manager, RBI, DPSS, Mumbai.

ii. **Tokenisation & de-tokenisation**: Only authorised Token Service Provider (TSP) (card network/issuer) must have access to de-tokenise in order to recover the primary account number (PAN) of the cardholder. The card network must record tokenization and de-tokenisation. The token requestor should not store the PAN.

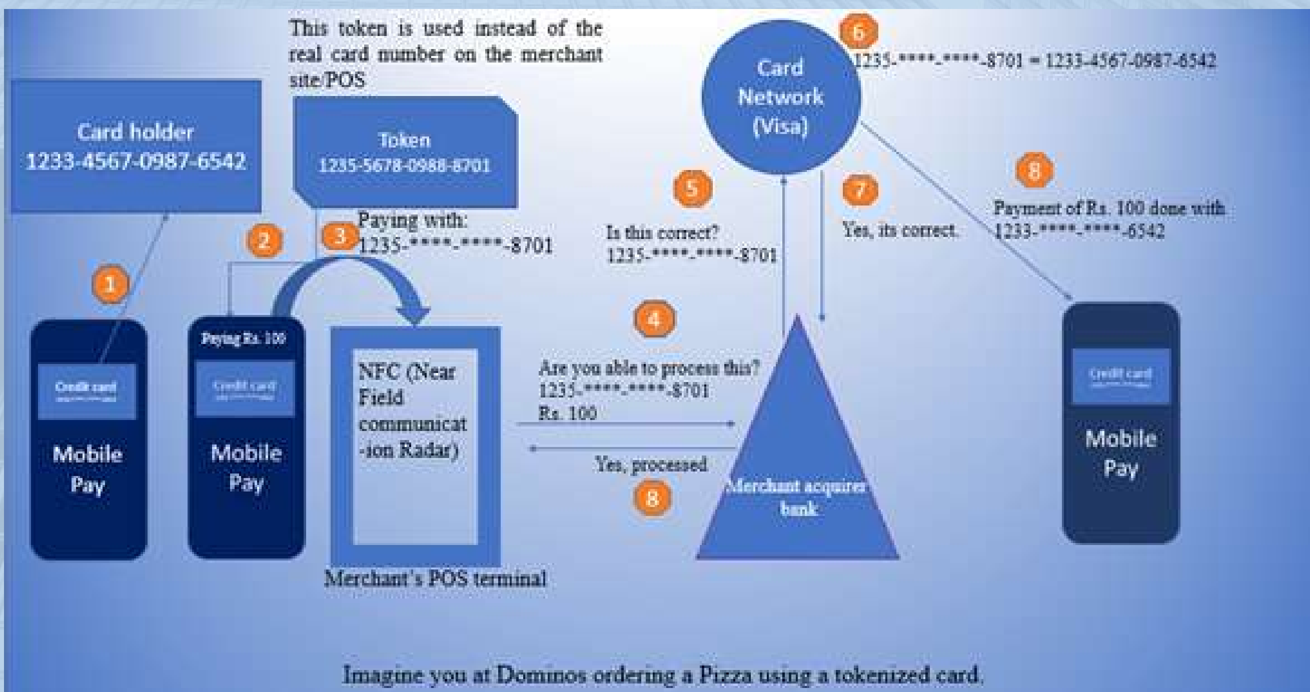
iii. **Certification:** Card network shall certify the token requestor system and card issuers/service providers for changes made to enable processing of tokenised card transactions as per best global standards.

iv. **Registration:** Only with the free consent of the customer, the token requestor shall register the card on its app through Additional Factor of Authentication. Authentication shall be done as per RBI's instruction on the authentication of cards.

Customers shall be given the option to register/de-register and set limits for tokenised transactions. Appropriate velocity checks on daily transactions may be set by the card issuer/network.

v. **Secure storage & security**: The entities can store the last four digits of the card for transaction tracking purposes. The card network may decide if the card issued must be registered by the token requestor based on the risk.

During the tokenisation process, the card network must monitor to prevent any malfunction, abnormality, suspicious behaviour, or the presence of illegal activity and devise a method to notify all stakeholders.



Did you know?

Tokenisation is used by ICICI Pockets for digital transactions in India.

- Ananya Malaviya [4]

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[4] Fifth Year, B.A., LL.B (Hons.), Damodaram Sanjivayya National Law University, Visakhapatnam.

ANALYSIS OF GIG WORKERS IN INDIA

Image source- Shutterstock

Introduction

The last decade saw a shift in the traditional understanding of what constitutes work, nature of employment and skills required for being employed worldwide. In India, the form of informal work has also changed with the evolution in the service sector especially in urban areas. With 24% of global online labour, India is home to the highest number of gig workers. According to some estimates, the number of gig workers has almost doubled from 8.5 million in 2016 to 15 million in 2018. Platforms such as Urban Company, Uber, Ola, Swiggy, Zomato, etc., that link customers with digital service providers, constitute India's flourishing gig economy.

The nature of employment is temporary/on-demand, flexible, regular/occasional and very often the job is for supplementary earning in addition to a regular job. Importantly, the status of gig workers is not an employee but of **executives/partners implying that these workers are considered independent contractors, and hence, no contract for terms of duty/benefits is signed.**

Employer's Perspective

According to the Periodic Labour Force Survey, the unemployment rate was at 6.1% for the year 2019 although for 2020 it stood at 4.8% with the highest levels of joblessness seen among the urban youth. With the unemployment rate high, the youth comprising of fresh graduates and diploma holders, look at gig work as an instant stop-gap solution. Many delivery executives don't have any other option as **these jobs don't require any specific specialization or skill, and don't need any minimum education qualification.** The only requirement is to have a two-wheeler which may be a motorcycle or even a bicycle. The flexibility that these jobs provide is unmatched compared to any other job profile. The executives are allotted shifts at the convenience of their own, thereby, allowing them suitable timings according to their needs and requirements. The executives can take leaves on any day or at any hour and may even take lunch/dinner breaks according to their convenience. But unlike other employees/professionals, the remuneration structure of delivery executives is not comprehensive. However, there are other elements that have been catered into and have been incorporated into the pay structure.

For example, a supplementary sum is compensated for every consignment/food delivered above the allocated target. Similarly,[1] for doing overtime, an extra amount is rewarded. The system of payment of salaries is transparent and is directly transferred to the bank accounts of the executives on weekly basis without any hassles which are pertinent in other informal sector jobs.

Executive's Perspective

With longer working hours, both the physical and mental health of the gig workers is severely impacted. Cab drivers, for example, often drive for 15 hours a day which leads to disturbed meal routines. Since they are always on a move, they can’t even take toilet breaks which eventually lead to health and hygiene-related diseases. According to a survey conducted by the Indian Federation of App-based Transport workers (IFAT) in collaboration with the International Transport Workers’ Federation (ITF) on Ola and Uber drivers, around 90% claimed that they were unable to get 6 hours of sleep. This is not only dangerous for drivers but also for passengers as it can lead to road accidents. A recent media report reveals that these gig jobs don’t offer any benefits that a regular job offers like a limit on working hours, overtime regulations or any other health benefits. **Moreover, female gig workers are not allowed any social security benefits like maternity benefits and are not even eligible for protection under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.** In addition to this, the delivery executives are constantly pressured to maintain good customer ratings and any consumer complaints lead to penalties on the money earned by these workers. Most of these companies strictly instruct the delivery executives to maintain a rating of 4.5 stars.

The executives are taken off and are only reinstated after re-training in case the rating drops. Furthermore, the companies are now expressing their urge to reduce the delivery time. For example, Grofers, which is an online grocery delivery platform, is targeting 10-minutes delivery. In this battle to reduce the time of delivery, the consequences would be faced by the delivery executives as it would be them who would take the risk, especially on road to get those deliveries delivered within the time limit. For these reasons, a survey by Oxford Internet Institute, University of Oxford and WZB Berlin Social Science Centre which deals with fairness of working conditions of digital labour platforms, **rated Swiggy and Zomato '4/10' for the year 2019 but surprisingly it went further down to '1/10' for the year 2020.**

Observations

It has been a worrying sign to see that only 26 per cent of regular salaried earners and casual labourers have access to social security benefits. This has left workers, including gig workers in a position of vulnerability for a long time now. Workers sometimes opt for these delivery-based jobs as a supplement to regular income, but mostly because they are unable to get regular salaried jobs. Lack of opportunity along with insufficient income is forcing people to take up delivery-based gig jobs. The condition of informal workers, including gig workers during the pandemic has been there for all of us to see. The lockdown resulted in an economic slowdown which led to millions losing their salaried jobs. The impact was quite significant on gig workers and about half of them lost their jobs during this period and the other half lost a significant chunk of their income.

According to a media report by Flourish Ventures, **the majority of the gig workers who were earning more than ₹25,000 per month saw a decline in income and after the lockdown, nearly 87% were earning less than ₹15,000.** It is also to be kept in mind that with fuel rates hovering at record levels, these executives are hit the hardest.

But with the voices of workers becoming strong against their employers, these platforms have now started to make some necessary amendments in their policies. For example, Zomato improved its delivery structure payable to its delivery executives for long-distance orders and even restructured its delivery partner remuneration to factor in the dramatic increase in fuel prices. This component is in addition to the existing structure and automatically gets pegged to adapt to changes in fuel prices. Besides this, Zomato has also announced a long-distance return pay system in which for every long-distance order, its delivery partner would either receive another order within minutes and would bring the partner back closer to its base location or will receive an additional fee for that extra distance. Zomato is also testing its Minimum guarantee payment system in areas where there is a high density of orders. This new payment scheme will ensure that a monthly salary of around ₹26,000 is made to the delivery executives which will be higher than the market norms. In addition to this, companies like Zomato provide executives with personal accidental life and health insurance against injuries and protect executives against financial cost in the event of an accident.

The Code on Social Security, 2020

The Social Security Code 2020 (hereinafter ‘the Code’) has been brought in aiming to extend social security to employees and workers irrespective of the fact whether they work in the organized or unorganized sector. The Code states a gig worker is a person who performs work or participates in a work arrangement and earns from such activities outside of the traditional employer-employee relationship. The Code has mandated the central government with the power to frame social security schemes for gig workers in matters related to accidental insurance, health benefits, etc. This is the first time that gig workers are being recognized and are offered benefits. While the code is a welcome step to provide social security benefits to gig workers, the code is still ambiguous in a lot of aspects. For instance, it doesn't define the scope, the nature of schemes, the process of funding as well as the realistic goals that the authorities have to set with regards to providing benefits to gig workers.

Another worrying sign has been the lack of judicial scrutiny in India with regards to the status of gig workers. The Supreme Court of the United Kingdom recently classified Uber drivers as employees, thus providing them with all employment benefits such as minimum wage, annual leave etc. Courts in India have not dealt with any such issues nor shown any interest in doing the same. In a case before the Delhi High Court, the question of whether gig workers could be classified with the status of employees was put forward however the case is still pending judicial scrutiny and legislative examination.

Conclusion

These executives/partners may just be the last leg of supply chain operations but it's very tough to value the role that they play in the smooth functioning of the E-commerce/food delivery industry. Nevertheless, some companies like Amazon and Flipkart are doing their bit by going beyond the salary structure and giving them added incentives to make them feel valued. In a pandemic hit world, many companies are opting for the online model which is leading to an increase in digital market size. With this increase, it has become even more important to make laws and policies that could reinforce a set of guidelines and at the same time monitor these platforms.

- Utkrasht Gupta[5]

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CORPORATE GOVERNANCE: PRINCIPLES AND CHALLENGES

Image source- Bnblegal

Definition of Corporate Governance

OECD terms Corporate Governance as "*the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performances are determined.*"

Cadbury Committee, United Kingdom defines corporate governance as a concept and not as a device that directs and controls corporations. This system provides regulations and procedures which further assure that the corporation is achieving its aims and objectives, that it's adding value to the organisation and is acting in the best interest of all the stakeholders in the longer run.

Historical Perspective

The concept of Corporate Governance is not new in India. Earlier, in the ancient texts, it was evident that there was a requirement of the essence of ethics and good governance.

Kautilya's Arthashastra deals with the norms of corporate governance, indirectly. Raksha, which means protection, can be equivalent to risk management in the corporate world.

Vriddhi, which means growth, is similar to the enhancement of the value of all stakeholders. Palana means maintenance and is meant to be the concept of compliance in the corporate scenario. Yogakshema, which means social security, is termed as Corporate Social Responsibility in the present day.

Objectives and Benefits of Corporate Governance

The following are the aims to be achieved:
1. To have a balanced and independent board that takes up and manages the affairs of the company effectively.
2. To maintain transparency, to disclose adequate information to shareholders with regard to the management of the company for corporate success and growth.

Principles of Corporate Governance

The pillars of corporate governance generally differ based on the regulation, the respective stock exchange, the country and the AOA of the company.

Some of the fundamental keystones are:

1. *Involvement of Independent leadership*: For proper compliance, there is a requirement to have an independent chairperson/ independent directors who can, without prejudice, decide the good for the company. All the shareholders should have value and should be allowed to participate in the affairs of the company.

2. *Transparency*: The most important objective of corporate governance is to have lucidity in the company which has a clear direct impact on the growth of the company.

3. *Accountability and Fairness*: Every professional in the company is accountable for the protection of the rights of the shareholders and for the decisions made on behalf of the company.

4. *Rule of Law*: A Corporation has to follow and abide by, ethically and legally, all provisions established by SEBI with regard to the same.

Legal Framework

Section 139(2) of the Companies Act, 2013, mandates to appoint a person as an auditor for a period of one term that includes 5 consecutive years. Section 149(4) read with Rule 4 of 'The Companies (Appointment of Qualifications of Directors) Rules, 2014, talks about the appointment of Independent directors in BOD for transparency and fairness. Listed public corporations mandatorily should include one-third of the Independent Directors, whereas, Unlisted Public Corporations are required to have at least 2 of them as independent directors.

The term, Independent director, is defined under Section 149(6) of the Act and the code of conduct is prescribed in Schedule IV. To further ensure gender equality, Section 149(1) second proviso read with Rule 3, states to have at least one woman director. Section 177(9) of the Act read with Rule 7, aims to have a compulsory vigil mechanism for companies that accept deposits from the public and borrow from banks. This vigil mechanism will help directors and other stakeholders to report any issues.

SEBI (Listing of Disclosure Requirements) Regulations, 2015, applies to the listed companies who are recognized on the stock exchange. These regulations basically deal with disclosure and other principles of corporate governance, which are further in line with OECD Principles.

Under Regulation 6, the listed company is required to appoint a Company Secretary as the compliance officer, who shall ensure conformity with other regulations. Under Regulation 17, the board should comprise a combination of executive, non-executive and female directors. Under Regulation 24, it mandates to have one independent director on board, who shall be the director for the unlisted material subsidiary.

Clause 49 of the Listing Agreement has widened the scope of corporate governance from 31st December 2005. It states to have at least 50 % of non-executive directors in the entity and if the corporate entity has an executive chairman, then at least half/one-third of the BOD should consist of independent directors. Their major role is to establish and maintain the internal checks and risks of the company without influence.

Subclause 6(2) *of clause* 49 mandates all corporate entities to submit a compliance report to the SE in the prescribed form, every quarter.

With respect to the annual report submitted along with the auditor's / CS's certificate, the company should provide detailed compliance on corporate governance in it. It should also disclose the fees that have to be paid to non-executive directors while also being required to constitute various committees like the Audit committee, shareholder's grievance committee, Management's Discussion and Analysis (MD&A).

Issues and Challenges in Corporate Governance

The following are the issues of corporate governance:

Firstly, Stressed balance sheets and the issue of bad debts (NPA) have been the outcome of bad corporate governance. There is a requirement to obtain the proper approval of the shareholders.
Secondly, it is the role of the independent directors in the company. They are supposed to ensure accountability of the BOD to the shareholders & ensure financial disclosures are in accordance with the law. Since the independent directors can be easily removed by the promoters or majority shareholders, it is affecting their independence, which is the major reason for the failure to ensure transparency in the board. **Thirdly**, disagreements between the promoters, who are the majority shareholders, and the entire management lead to weak corporate governance.

Recent examples are that of the ousting of Tata group's chairman by Tata sons and the forceful exit of the CEO of Infosys. ***Lastly,*** the remuneration and compensation paid to key professionals in the entity.

According to the Companies Act, 2013 it has to be decided by the board committee comprising of independent directors mostly. But the exorbitant remuneration in certain instances shows that the promoters have a significant say in the matter.

And some other issues are data protection, cyber security, non-applicability to unlisted companies, non-disclosure of transactions in the balance sheet, family-owned enterprises, lack of understanding of the risks by the BOD, bribery and issues in whistleblower mechanism.

Overcoming these challenges

Firstly, there is a requirement to invest in compliance costs & the competence of Independent directors. *Secondly*, there is a need to upgrade to newer and stringent regulations for vigilance, transparency and accountability. *Thirdly*, it is to have new regulations and a universal nodal regulator governing the entities including the unlisted ones.

The Corporate Social Responsibility mechanism was voluntary in nature, but later in 2019, an amendment made it mandatory for the entities to transfer the amount to government funds. In 2021, the procedural compliances are elucidated, such as the requirement to prepare an annual report for the board;

to undertake an impact assessment through an independent body and disclose the same on the corporation's website, which can be accessed by the general public. Recently, SEBI has widened the scrutiny of related party transactions which will further boost corporate governance, limit the liability of major shareholders and balance the interests of the stakeholders. Hence, these steps by the authorities aim at improving and ensuring good corporate governance in India.

Conclusion

The key facet of good corporate governance in India is basically, protecting the interests of all stakeholders, minority shareholders of the entity and the government and economy at large, both in form and spirit. India, as a developing country, holds a good position but has a long way to go, based on this emerging era. The Companies Act aims at appointing Independent Directors for maintaining transparency and also empowers minority members to approach NCLT in case of any violation. It is one of the pillars of any company. If implemented voluntarily and effectively, it can increase and attract more investments.

The only dichotomy prevailing today is to understand what amounts to good corporate governance and what amounts to bad corporate governance. The answer lies this way. The quality of leadership and the level of transparency and accountability in the company amount to good corporate governance, and if it lags behind in these aspects, then it is bad in nature.

Such bad corporate governance breaches the trust and confidence of the investors.

Ethics are essential and is beyond commercial law.

-Muskan Jain[6]

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BACK TO TATA: A FULL CIRCLE JOURNEY OF AIR INDIA

Image source- RN Tata's Twitter Handle

The story of Air India is an interesting one, from starting as a pioneer of the airlines' industry to being an industry leader in debt. The fact that Air India was actually founded by the legendary entrepreneur and industrialist JRD Tata, might come as a surprise to many of the newer heads reading this. It started out with just two planes, two single-engine de Havilland Puss Moths.

The Story of Tata Air Service (Later on Tata Airlines) begins, as all stories of the legendary tycoon do, in 1932. It is said that JRD was inspired by Louis Bleriot, the first man to ever have flown over the English Channel, and decided to enter the airlines' industry.

Initially, the planes, that were flown by him personally along with his friend, were essentially for mail transportation. They were, in erstwhile India, flown along travelling routes such as Bombay-Trivandrum, Bombay-Madras but later went on to include International routes also. It is pertinent to note that it was one of the first Companies to fly over international routes in Asia.

The Tatas were also involved in the war efforts of World War II and went public right after that in 1946. The government in 1948 then went on to buy 48% of the company stake.

After the War, the name of the company was changed to Air India. Later in 1953, with the enactment of the Air Corporations Act, the Company was nationalized. JRD wasn't very happy with the government's move, and let it know that he believed that nationalization would not benefit the public. His view was a very accurate prediction of the current ruined state of the Company. Although JRD was the chairman of the board of Air India till 1977, even after the nationalization. Later when his chairmanship was taken away, he famously commented that "I feel as you would feel if your favourite child was taken away".

Trouble Starts brewing:

Although Air India was an inspiration and a pioneer of the Airlines Industry, it could not hold the position much longer. Merely 13 years after the exit of JRD from the Air India Board, the company started to struggle. This was exacerbated by the rise of low-cost carriers which was a nail in the coffin of the company which could not keep up with the stiff competition given by the Emirate Companies.

Having said that, it is important to note that, some argue that, the turning point of Air India can be attributed to the merger of Air India with Indian Airlines, which was a loss-making company. Their cohort started raking in an insurmountable amount of debt due to inefficient administration and mismanagement. Their merger only seemed to have strengthened their combined loss-making ability. Before the merger in March 2007, their individual losses only amounted to a total of US$110 million.
But after the merger, they reached an alarming amount of $1 Billion by March 2009. By March 2011, the company had a total debt of US$ 6 Billion and was making operating losses of US$ 3.1 Billion. The company approached the government, asking for a sum of $6 billion and although the government could not give the required sum, it paid around US$450 Million in March 2012.

Privatization: The Light at the End of the Tunnel

Although the BJP is going through with the privatization of the Company, this was a solution initially proposed by the UPA-elected Aviation Minister, and funnily enough, it was met with harsh criticism from both the BJP and CPI (M). As much as it might be hypocritical, it is now the BJP-led government that is finally privatizing the company.

Although the government floated an Expression of Interest (EoI) in 2018 with 76%, along with Air India Express and a 50% per cent Stake in Singapore Airport Terminal Service (SATS), there was no interest displayed by any of the parties. In 2020, the EoI was modified to include a 100% stake in Air India along with Air India Express.

This EoI would entail a debt burden of $3.26 billion which the new company would have to clear. Least to say only three bids have been made, out of which only two have qualified, and they are Tata and SpiceJet.

Although it is merely speculation at this point, rumours and trends do point to Tata having emerged as a successful bidder.

It would be rather ironic if this were to be the case, more so due to the nature of transactions that have taken place over the last century with reference to this company. From being a pioneer in the airline industry under the leadership of JRD to being a red spot on the government's balance sheet. It almost feels as if, in the words of JRD Tata, that the government snatched a toy from him believing they could fly it better and ended up hurting themselves.

The Nationalization Hypothesis

It would not be too much to believe that many other industries that have been nationalized suffer from a similar defect. It is simply that no other example could possibly be as clear as this. From banks, temples, educational institutions, commodities Industries and railways,d all of which were nationalized and are now dreaded by the common man for having reached a state of ruin. They have become a symbol of inefficiency and ineptitude, much like the government itself.

In many ways India stands to be a real life example of the bleak world portrayed by Ayn Rand in her book - Atlas Shrugged.

There is an uncanny resemblance of the characters portrayed to the history of India, the entire rhetoric cannot be constructed to be that of anti-communistic but rather of a more utilitarian nature. In so many ways, there is no one responsible for the management of the airlines, yet the burden of its administration must be shouldered for the desire of its profits.

Moreover, unlike the CIRP proceedings provided under Part III of the IBC, where the corporate debtor moves away from ‘debtor-in-possession to ‘creditor-in-control' model of insolvency by taking away the reins of the corporate debtor from its Board of Directors (“**BoD**”) to the creditor, the PPIRP aims to retain the control of the corporate debtor with its BoD.

The slow-moving and bureaucratic nature of the government competing with the likes of the dynamic and meritocratic nature of large companies leaves no room for doubt of the demise of Air India. Its fate was sealed a long time ago, the situation is merely a consequence that was long due.

The question of Nationalization is merely not that of equity but of competence, stability, vision, and foresight. Often in a flurry of change of governments and employees, in the pursuit of greater job security and slower speed, much of the competitive edge of the companies is lost. It is also important to note that the commercial functioning of the airlines is not a statutory obligation of the Government, and to believe that the government can actually run an industry in profit even if that is in monopoly, is nothing more than a midsummer night's dream.

The decision of the government to privatize PSUs not critical to the sovereignty of the country is a wise move since commercial practice is clearly not the government's strong suit. And hopefully, this trend stands to stay.

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PRE- PACKAGED INSOLVENCY RESOLUTION: MSME

Image source- Corporate Finance Institute

The Insolvency and Bankruptcy Code, 2016 (“**IBC**”) is a code that is constituted to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons.
On April 04, 2021, an ordinance (“Ordinance”) was promulgated to introduce the Insolvency and Bankruptcy Code (Amendment) Bill, 2021, based on the recommendations given by a sub-committee which is constituted by the Insolvency Law Committee (“ILC”) on pre-packaged insolvency resolution process (“PPIRP”). Subsequently, this Ordinance was converted into the Insolvency and Bankruptcy Code (Amendment) Act, 2021 (“Amendment”) and was made effective from the very same day.

Through this Amendment, Chapter IIIA (Section 54A to 54P) was introduced to Part II of the IBC, which dealt with PPIRP for corporate persons classified as Micro, Small and Medium Enterprises ("MSME") under Section 7 of the Micro, Small and Medium Enterprises Development Act, 2006. Thereafter, the Insolvency and Bankruptcy (Pre-packaged Insolvency Resolution) Rules, 2021 and Insolvency and Bankruptcy of India (Pre-packaged Insolvency Resolution) Regulations, 2021 were also introduced to provide more clarity on PPIRP.

MSME in India

The MSME sector contributes immensely to the economy of India and also provides employment to many. However, due to the economic recession caused by the disruptions in businesses during COVID-19, there was a rise in insolvency cases in the country. Moreover, owing to their unique business operations and simpler business structure, the resolution of their stress entities in the MSME sector had to be treated differently. Therefore, to assist the MSMEs through the tough times, the Government of India ("**GOI**") adopted various measures to revive this sector. One such measure was the introduction of the Ordinance by the GOI that was later converted into the Amendment.

Minimum Default Limit to Initiate PPIRP

Vide the powers given under the proviso of Section 4 of the IBC, the Central Government published a notification on April 09, 2021, and specified INR 10 (ten) lakhs as the minimum amount of default to initiate PPIRP of MSME.

What is PPIRP?

PPIRP is a restructuring plan of the corporate debtor, which is a voluntary consensual process undertaken by the promoters of the corporate debtor and its creditors, in which, the promoters of the corporate debtor propose a resolution plan to the creditors of the corporate debtor. Once it is approved by the creditors of the corporate debtor, it is thereafter sanctioned by the court.

The sub-committee report, submitted by a team lead by Mr Sahoo, mentioned Mr Bo Xie's book on Comparative Insolvency Law, wherein it was noted that the PPIRP framework may be an efficient and innovative corporate rescue method that incorporates both informal (out of court) and formal (judicial) settlement. This hybrid model gives flexibility to the stakeholders to internally resolve their issues and reach a consensus before proceeding with any formal recourse.

Furthermore, an application for PPIRP can only be initiated by the corporate applicant. However, it is pertinent to note that the application for PPIRP can only be filed after seeking approval from 66 % (sixty-six per cent) of unrelated financial creditors or operational creditors, in case there are no financial creditors, as the case may be.

Through this Amendment, the GOI aims to provide the best of both worlds to the corporate debtor by reducing state interference in the revival process and by providing an efficient alternative to the Corporate Insolvency Resolution Plan ("**CIRP**").

As per Sections 11A(1) and 11A(2) of IBC, the PPIRP will get priority over CIRP, if the application for PPIRP is filed before the application for CIRP or is filed within 14 (fourteen) days of the filing of CIRP, thus, encouraging negotiations between the creditors and management of the company to maximise its recoveries.

This ‘debtor-in-possession' model ensures, firstly, that there is minimal disruption in business; secondly, that the business is not juggled between its management, creditors and Resolution Professional (“**RP**”); thirdly, to amicable resolve the issues of the business with the stakeholder; fourthly, maximisation of profit of the corporate debtor and lastly, that it provides flexibility to the stakeholders of the corporate debtor.

‘Debtor-in-possession’ Model of Insolvency

In 2016, the IBC was framed by keeping the ‘creditor-in-control’ model of insolvency in mind. The reason for giving the power to the creditor was stated to be that the entity should not be left in the hands of the very parties that first got it into such financial trouble. However, with time it has been noticed that such a model of insolvency was not economically feasible for small businesses, which support each other and rely on each other for business or supplies. This is why the need for a process that could amicably resolve their issues and get them out of the financial trouble at early stages itself was required to be addressed.

That is the reason why, by introducing a simple and flexible regulatory framework i.e. PPIRP, the GOI aims to ensure that MSMEs can reduce their economic cost, maximise their business and negotiate a workable deal.

PPIRP is a blend of both, the 'creditor-in-control' and the 'debtor-in-possession' model. This hybrid version of the insolvency model for the PPIRP process is beneficial for both the promoter as well as the creditor. This is because, the promoter will retain his skin in the game unlike an RP in CIRP, and at the same time, they will do their best to incentivise the exit process with manageable options and thus, make a lucrative offer for the potential buyers. Whereas, in the case of the creditors, they may prefer PPIRP because of the better value provided to them through the restructuring of the corporate debtor in comparison to the CIRP process.

As per Section 54H of the IBC, throughout the process of PPIRP, the management continues to vest with the BoD, the powers of the corporate debtor. Though it may seem that the control of the corporate debtor is retained by its management, in certain situations, on an application filed by 66% (sixty-six) per cent of the Committee of Creditors constituted under the IBC, the National Company Law Tribunal may pass an order vesting the control of the corporate debtor in the RP, if it feels that there is fraud or mismanagement in the affairs of the corporate debtor. Thus, the PPIRP framework does not entirely shift to the 'debtor-in-possession' regime of insolvency altogether.

Conclusion

IBC is still in its nascent stages in the country. The introduction of PPIRP is a welcome step towards its growth and aims to introduce a process that continues to keep the promoter's skin in the game.

The pre-pack insolvency process of insolvency is already a well-established process in the UK and other western countries and hence, a similar response from the MSME sector is anticipated with its introduction even in our country.

The Amendment seems to be moving away from its promoter-averse approach and towards a consensus-based approach, which is an equilibrium between the 'creditor-in-control' and 'debtor-in-possession' model of insolvency. This blend of models of insolvency seems promising for the businesses in our country and only time will tell how successful the PPIRP will turn out in the future.

-K.Ritika[8]

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CAN THE COURT GRANT INTERIM RELIEF AFTER FORMING AN ARBITRAL TRIBUNAL?

On the 14th of September, 2021, the Supreme Court of India speaking through Justice Indira Banerjee and Justice J.K. Maheshwari in Arcelor Mittal Nippon Steel India Limited v. Essar Bulk Terminal Limited,[9] clarified that after constituting an Arbitral Tribunal, a court will neither take up nor apply its mind on any application seeking interim relief until and unless the remedy available to the parties to apply for relief of interim nature to the Tribunal has been rendered inefficacious. The Court further clarified that the present bar doesn't apply in cases where the Court has already taken up the applications for consideration. Through this, the Court reiterated the powers of Courts to entertain applications for interim relief.

Brief facts of the case

The Appellant and the Respondent entered jointly in a Cargo Handling Agreement that stipulated that all the disputes which may arise out of the Agreement shall be settled in Court, in accordance with the Arbitration and Conciliation Act, 1996 ("**the Act**"), and be referred to a Sole Arbitrator who will be appointed by the parties. Some dispute arose between the parties and the Appellant invoked the Arbitration Clause, to which the Respondents did not respond. Meanwhile, the Appellants went to the Commercial Court, Surat vide application u/s 9(1) of the Act.

[9] 2021 SCC OnLine SC 718.

Afterwards, the Respondents filed a similar application. The Commercial Court upon hearing the arguments on the said application reserved a date for the orders. The Gujarat High Court then appointed a Tribunal consisting of 3 retired judges. After the constitution, the Appellants prayed before the Commercial Court to refer the said Interim Applications to the Tribunal, which was rejected by the Court. This order was challenged before the Hon'ble High Court of Gujarat, which dismissed the claim and hence the Appellant approached the Supreme Court.

Issues before the Court

The Supreme Court had to decide on two major issues which were:

- Can a Section 9(1) application be taken up after constituting an Arbitral Tribunal and if it can, the meaning of "entertain" as per Section 9(3) of the Act?
- Does the efficacy of the interim relief under Section 17 need to be compulsorily examined by the Court?

Observations

Starting with its observations, the Court first clarified that there are 2 segments of Section 9(3), wherein the former is to prohibit applications u/s 9(1) to be entertained after the constitution of a Tribunal, and the second provides an exception to the said bar if the court records "such circumstances which may not render the remedy provided under Section 17 to be efficacious."

The Court then clarified that in order discourage the filing of Section 9(1) applications, Section 17 has been amended so that the Tribunal has similar powers to grant interim relief, and hence as the law stands today, orders of a Tribunal u/s 17 is just as efficient and enforceable as an order of the Court. Therefore, a Court should not take up applications seeking interim relief, unless and until "there is some impediment in approaching the Tribunal, or the said relief cannot be expeditiously obtained from the Tribunal."

Whilst elucidating the terms 'entertain' as stipulated u/s 9(3), the SC stated that the term 'entertain' means to "*consider by application of mind to the issues raised.*" Hence, entertainment means the Court taking it up for consideration, till the judgment is pronounced. The Court, after observing a plethora of precedents stated that

"*Once an Arbitral Tribunal is constituted the Court cannot take up an application Under Section 9 for consideration unless the remedy Under Section 17 is inefficacious. However, once an application is entertained in the sense it is taken up for consideration, and the Court has applied its mind to the Court can certainly proceed to adjudicate the application.*"

Further, the Court stated that the intention of the legislature behind enacting Section 9(3) was "*not to turn back the clock and require a matter already reserved for orders to be considered in entirety by Arbitral Tribunal u/s 17 of the Act.*"

While considering the second issue at hand, the Court opined that the bar of Section 9(3) would not be applicable after taking up and considering an application. It observed that an application with the prayer of interim relief is one that requires immediate hearing and disposal, and unless such applications are decided promptly, the parties shall face grave harm or a disadvantage. Hence, the intention was the legislature would never have been to decline an application under Section 9 which has been heard, just to send the parties back to the Tribunal under Section 17, as was prayed by the Appellants in the present matter.

Therefore, when taking up or considering an application that has been done with or is being considered or has already been considered, the question of examining the efficacy of the remedy u/s 17 would not arise. It only arises when the application is in the process of getting taken up or entertained.

The Court further placed reliance on the 246th Report of the Law Commission, which stated that Section 9(3) of the Act seeks to reduce the role of the Courts in relation to grant of an interim measure, once the Tribunal has been constituted, which is also in coherence with the UNCITRAL Model Law. It also placed reliance on *Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors.* [10] wherein Apex Court reiterated that the object of introducing Section 9(3) was to avoid Courts being flooded with applications u/s 9. Therefore, since an application has already been entertained and considered by the Court, it shan't be deemed essential to consider the efficacy of relief u/s 17.

[10] ICL 2021 (8) SC 778.

Conclusion

To sum it up, the Supreme Court hence clarified that the Commercial Court was correct while taking up the application u/s 9(1) since a remedy of interim relief was available to the parties. It also clarified that if the application has been taken up before the Tribunal has been constituted, the Court is not inclined to send the application back to the Tribunal after its constitution, as it goes against the legislative intent of the provision. It also stated that even after the constitution of the Tribunal, parties can approach a Court under Section 9(1) if the said remedy cannot be efficaciously granted by the Tribunal. However, considering the efficacy of relief u/s 17 isn't necessary after entertaining or considering an application.

- Rudresh Kumar[11]

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PERESTROIKA- DISINVESTMENT, COMPETITION & MONOPOLY

Image source: Civilsdaily

Disinvestment or Privatization is the most heard term in the recent past and the government made it a policy to do business which was started by Prime Minister Sri. Narendra Modi while addressing a webinar on privatization on 24th February 2021 by the Department of Investment and Public Asset Management, but it has many other aspects to look after such as Education, Health, Housing and other welfare activities to ensure dignified living to the people. In this regard, it is attracting a huge outrage from the employees in the Public Sector as well as from the public. As a matter of fact, the current economic status of the country is the result of the reforms in the year 1991 by **Late Sri. P.V. Narasimha Rao** led Government in which the **Dr Manmohan Singh**, the Former

Prime Minister was Finance Minister in the Cabinet of P.V and the guidance for disinvestment policy has been published in the name of Disinvestment Policy, Procedures and Progress by the Department of Disinvestment, Government of India.

Due to the timely intervention, the Government could save the country from the **worst economic situations**. There were multiple reasons for the failure of the economy and some were a Rise in Fiscal Deficit, Increase in Adverse Balance of Payments and Underperforming PSU's. Importantly most of the sectors were handled by the Government and it lead to near-monopoly which in turn led to underperformance. The Government then decided to give a free hand to the local as well as foreign investors and opened up most of the sectors to the private players to do business with ease. Now, the investors are choosing various destinations for their investment based on the report of Ease of Doing Business and even India is releasing the Ease of Doing Business Report every year to assess the performance of the states and its development.

With the advent of technology, many things have changed and almost all the countries in the world have globalized and opened their markets for private and foreign investors. In the last ten years, there has been a massive change in the market structure and there are a significant number of persons on the list of richest Asians. The government has always been known for the trust of the people and it is the fear that, if the private players are completely allowed to take over key sectors and operate the Public Sector Undertakings, then it would lead to inflation and the concentration of wealth in a few hands.

It is the responsibility of the state to ensure that the interests of the consumers and other stakeholders would never be hampered and also make sure that there are multiple players in the market. Apart from profit, any business enterprise aims at building an acquaintance with the customers and working towards strengthening the relationship. In this competitive business world, it should happen only by providing the best, efficient and satisfying services to the customers but not by the financial backing for such a company or enterprise in order to kill the other market players. The most relatable example for such a situation is RJio which is backed by Reliance Industries.

The Competition Commission of India (CCI) has probed in the year 2017 into the complaint made by Airtel in which it alleged Predatory Pricing of services offered by Jio. The CCI in *its* Prima Facie Analysis of the facts and Allegations **firstly** said that merely an approximate huge investment of One Lakh Sixty Thousand Crores doesn't amount to a dominant position and whereas Airtel has come up with an investment of over One Lakh Sixty Thousand Crores which is more than the RJIO's investment. **Secondly**, CCI also considered the Market Share report of TRAI which shows 23.5% of customers were using Airtel Services and only 6.4% of customers were using the new entrant's services that is RJIO. The point to be noted here is, the report was released in the year 2017. Now, the latest news report for the month of July says, RJIO's market share in Telecom Services stands at 35.54% whereas Airtel stands at 29.83% and Vodafone Idea's market share reduced to 22.91%. All these developments suggest that RJIO is marching towards the dominant position and it has the high chances of becoming the sole Telecom Service company, which in turn is a strategical way to look at the long term attain the monopolistic position. With this kind of business strategy, be it a new investment or M&A, **CCI must study the market which would show its results in the long run, that is, Adverse Effects in the market.** A company with huge capital always aims at long-run success and doesn't bother much about the initial losses. In the relevant market, it is necessary for the companies to make the services affordable for the public but at the same time it is the duty of the government to ensure there are enough competitors and consumers have a wide range of options either by close vigilance through a regulatory body or by making its presence in the relevant market, which is by holding some share.

A similar trend is now seen in the E-Commerce sector. Flipkart, which is owned by Walmart, has its stores even in tier two cities. Amazon.Inc is a Multinational Conglomerate that focused primarily on E-Commerce and digital streaming in Indian Market. Customers have already shifted to their comfort zone, which is E-Commerce because of various benefits like Multiple Options, easy returns and exchanges which would not be possible in a retail store. This trend has now captured the market of daily needs grocery stores both retail and as well as wholesale. The Competition Commission of India has conducted a workshop on the "E-Commerce: Changing Competition Landscape in India" in the year 2019. According to the findings in the report, one of the important benefits of E-Commerce shopping is price transparency and heavy competition in the relevant market.

It may be the best shopping platform for a variety of other reasons but the most important factor that attracts the customer is the discount. This has become the deciding factor. There seems to be a strategy to shut the stores and make only E-Commerce the option of purchases by giving heavy discounts on the products owned by E-Commerce platforms or giving the opportunity to the selected sellers which could be said as Unfair Trade Agreement. **The Government has given a free-hand or complete access with respect to Foreign Direct Investments** but it has regulated the E-Commerce with respect to the Inventory based model of E-Commerce by a Press Note. 2 (2018 Series). This has badly affected the E-Commerce owned by foreign entities like amazon which has partnered with Online Retailers like Cloudtail and Appario Retail Private Limited to take advantage by putting behind the third-party sellers. Now it can do so only to the extent of 25% but not more than that. This is the reason for the allegations faced by the E-Commerce companies that they are preferring sellers to achieve the targets. Probably the Reliance- Future deal could also be said as a similar strategy to achieve the near-monopoly in the Retail market. Also, now with allegations by preferring sellers both E-Commerce giants are facing CCI probe.

Though it might be the policy of the Government to come out of businesses and privatize them to enhance more competition, there is always a threat of Unfair Competition. Just as mentioned above, the CCI probed into RJIO in the year 2017, but today there are very few Telecom companies providing services. Inactiveness of BSNL, Telenor, Docomo, Tata Indicom, Reliance Mobile, Videocon Telecom and Aircel are no more.

The study by the CCI on the aspect of Adverse Effect on Competition should always anticipate the future of the relevant market and only then it is right to decide whether the Strong financial backing by the parent company would lead to Unfair Competition. In the case of E-Commerce government could successfully curtail similar Unfair Advantages of financial resources from foreign sources but E-Commerce Companies have been alleged to have chosen sellers to completely vanish the other retailers. In both these cases, if they achieve their targets, it will lead to Unfair Pricing. Disinvestment or Privatization completely is always not a great move but the government must have minimal participation or make its presence either by holding some share in all the relevant markets just to ensure fair competition & pricing and avoid adverse effects.

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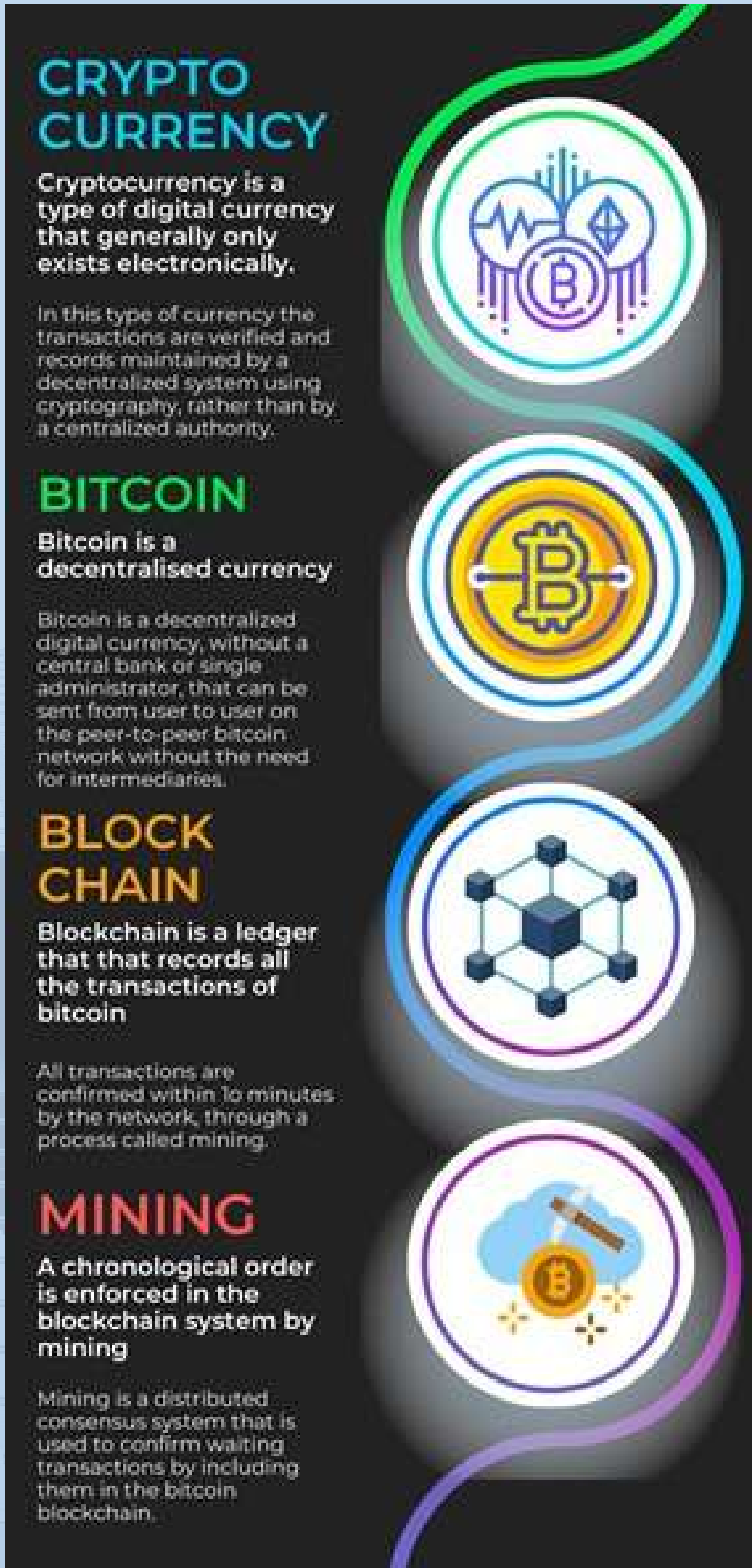
A Beginner's Guide

CRYPTO 101 CURRENCY

by

Prabal Pratap Singh[13]



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ARBITRABILITY OF DISPUTES RELATING TO FRAUD

Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Ltd.

Image source- TheWeek

The Supreme Court has addressed the subject of whether accusations of fraud can be resolved in arbitration or before a Court in the matter of Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Ltd. [14] [hereinafter Avitel]. In its ruling, the case determined clear standards to evaluate if a conflict concerning fraud accusations is arbitrable and if adjudication would be required before a Court. This decision provides clarity to Courts and arbitral tribunals, which should help in filtering out endless and inventive submissions attempting to 'wriggle out' of arbitration agreements.

[14] 2020 SCC OnLine SC 656.

The Supreme Court noted that two main tests were previously established in *the* Ayyasamy decision[15] [hereinafter Ayyasamy] and reiterated them, namely, whether —

• the plea pervades the whole contract, including the arbitration agreement, rendering it
invalid; or

• The charges of fraud concern the parties' internal matters, which have no bearing on the
public sphere.

The first criteria is fulfilled only when the arbitration clause or agreement itself cannot be deemed to exist in a clear situation where the court decides that the party accused of breaching the arbitration agreement did not enter into it at all. The second criteria is satisfied when charges of arbitrary, fraudulent, or malafide conduct are brought against the State or its agents, prompting a writ court hearing in which questions are addressed that are not primarily about the contract or its violation, but rather about public law.

a) A pro-arbitration position by the court

Predecessors of the 1996 Act gave some discretion to the courts as to whether the issue should be sent to the arbitration. This is no longer the situation under the 1996 Act, which aims to "minimize judicial supervision in the arbitral proceedings."

[15] (2016) 10 SCC 386.

Test Laid Down

1.The plea made must be with regards to the entire agreement
2.The allegation of fraud must be relating to the internal matter.

The deep-rooted mistrust of the court about the jurisdiction of arbitral tribunals in the 19th and most of the 20th century was also connected to the historical grounds: arbitrators were frequently non-lawyers in colonial India and lacked expertise to handle complicated legal matters.
Decisions such as Abdul Kadi Shamsuddin Bubere v. Madhav Prabhakar Oak[16] [hereinafter Abdul Kadir] and Russell v. Russell,[17] often referenced by parties as an undermining of arbitral tribunal's power to deal with fraud issues, relate to an age in which complicated legal problems were mainly seen to be in judicial domain and not arbitration.

[16] 1962 AIR 406.
[17] Russel v. Russel (1880) LR 14 Ch D 471.

In order to recognize the different framework foreseen by the 1996 Act, the Avitel Supreme Court rightly dissociated itself from the situation under the 1940 Act, including judgments such as Abdul Kadir.

In view of Sections 5, 8, and 16 of the 1996 Act, it is progressive and notable that parties' decisions to arbitrate disputes must be supported. This approach echoes Justice D.Y. Chandrachud's decision in Ayyasamy, which recognized the contrast between referral to arbitration of dispute under the Act of 1940 and 1996, recognizing that the reference is not discretionary under the Act of 1996.

Furthermore, Avitel intends to follow the true essence of the 1996 Act, in a manner similar to what a single-judge bench of the Supreme Court did in the case of Swiss Timing Limited v. Commonwealth Games 2010 Organising Committee[18] (an approach rejected in Ayyasamy), but it does not go as far as thoroughly recognizing the principle of Kompetenz Kompetenz.

b) The "serious allegations of fraud" test compromises the principle of *Kompetenz Kompetenz*

It is laudable that the Supreme Court recognizes the arbitrability of fraud in situations involving civil or contractual accusations and that two criteria should be drawn up to restrict judicial interference. Nevertheless, there was no change in the use of "serious allegations of fraud" as a basic test, indicating that courts may define what constituted "serious allegations of fraud," and also their own level of involvement, on a case-by-case basis.

[18] (2014) 6 SCC 677.

This approach is really counter to the established notion of Kompetenz Kompetenz which enables arbitral courts to determine their competence to hear a dispute. (recognized by the Act of 1996 in Section 16).

It is insufficient and antithetical to the spirit of modern arbitration to use “serious fraud allegations” as a test to permit courts to interfere in procedures wherein the parties have committed to choose arbitration. In accordance Ayyasamy decision, courts have grappled with the definition of “serious allegations of fraud”, a term that lends itself to a variety of interpretations of what such *seriousness* may entail.

Has the apex court respected the spirit of minimal intervention of courts?

While in Avitel, the Supreme Court is progressively developing a narrow-minded view of what may be “serious allegations of fraud,” this term remains applicable. With not choosing to distance itself from the phrase and stating that it must be dealt by judges on a case by case basis, the Supreme Court has indeed opened the way for additional discretionary interpretations —an approach which does not necessarily minimize the scope of legal intervention.

Arbitral tribunals throughout the world are frequently called upon to deal with complicated questions of fact and law in the arbitral institutions of the 21st century.

The Supreme Court of India, then, appears antithetical to the spirit of contemporary arbitration by drawing a derogation from an apparently esoteric category of controversy involving 'grave' fraud and further maintaining jurisdiction for deciding exactly what constitutes such severe fraud in all cases. It is disappointing that such issues may be resolved in open court rather than the confidential arbitration processes that the parties have voluntarily chosen. As long as the Indian courts remain consistent, parties that refuse to enforce decisions can always postpone or disrupt their behavior and enforcement of arbitral awards.

-M. Chandana[19]

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DECRYPTING THE CRYPTO REGIME

Hitesh Bhatia v. Mr. Kumar Vivekanand

Image source- Adobe Stock

The Tis Hazari court at Delhi, in the recent judgment of Hitesh Bhatia v. Mr. Kumar Vivekanand,[20] recently made some pertinent observations relating to cryptocurrencies and the responsibility of intermediaries involved in the trade of such currencies.

Cryptocurrencies have been steadily gaining traction in the Indian market, more so during the Covid-19 Pandemic. In the year 2018, the RBI sought to restrain trade in virtual currency in light of the various risks posed by cryptocurrencies, vide its circular dated 6th April 2018. Nevertheless, two years later, the apex court of the

[20] Hitesh Bhatia v. Mr. Kumar Vivekanand, Case No. 3207 of 2020, decided on 1st July 2021.

country decided to set aside the RBI circular of 2018 in the case of Internet and Mobile Association v. Union of India.[21]

The present case of *Hitesh Bhatia* involved a purported fraud being committed in the sale and purchase of bitcoins. The accused used to purchase bitcoins from the complainant frequently. Upon receiving money in his account, the complainant used to transfer the virtual currency in the accused's virtual wallet which was on 'Binance', an online portal. One day, the complainant was informed that his bank accounts were frozen and when asked about this to the accused, he admitted that the payments made for the virtual currency were a scam.

Cheating was also alleged by the complainant since the accused refused to return the bitcoins transferred to him by the complainant. The complainant had approached the court under section 156(3) of the CrPC.

Only legitimate trade can aspire protection under article 19(i)(g)

KYC compliance is the responsibility of the intermediary

Trade in crypto must comply with the general laws of India.

[21] 2020, SCC Online SC 275.

One of the issues before the court was whether the complainant was carrying on a legal trade and whether he has come to the court with clean hands. The court referred to the *Internet and Mobiles association case* at length and noted that the apex court had not adjudicated upon the legality of virtual currency and that there is no legislation dealing with the legality of cryptocurrency to date. The court noted that trade in crypto must comply with the general law in force in India like the IPC, PMLA, FEMA, NDPS Act, Tax Laws, and with RBI regulations relating to KYC, CFT, and AML requirements.

The court also noted that it is the responsibility of the intermediaries like 'Binance' to comply with KYC. They cannot shy away from the responsibility of ensuring the legitimacy of the source and destination of money, and the establishment of the real identity of the parties. Another important observation made by the court was that even though there is no specific legislation regulating cryptocurrencies presently in India, only legitimate trade in the same, through legitimate intermediaries, may aspire protection under Article 19(i)(g) (i.e., the freedom to practice any profession or to carry on any occupation, trade or business) of the Constitution of India.

With the increasing rise of cybercrimes, unrestricted by national boundaries, regulation of virtual currencies is much needed. The attempt of the district court in decrypting the complex regime of cryptocurrencies in India is a step in the right direction.

- Sejal Lahoti [22]

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STRICTLY STICK TO THE TIMELINES OF THE IBC: SUPREME COURT

Ebix Singapore Pvt. Ltd. v. Committee of Creditors of Educomp Solutions Ltd.

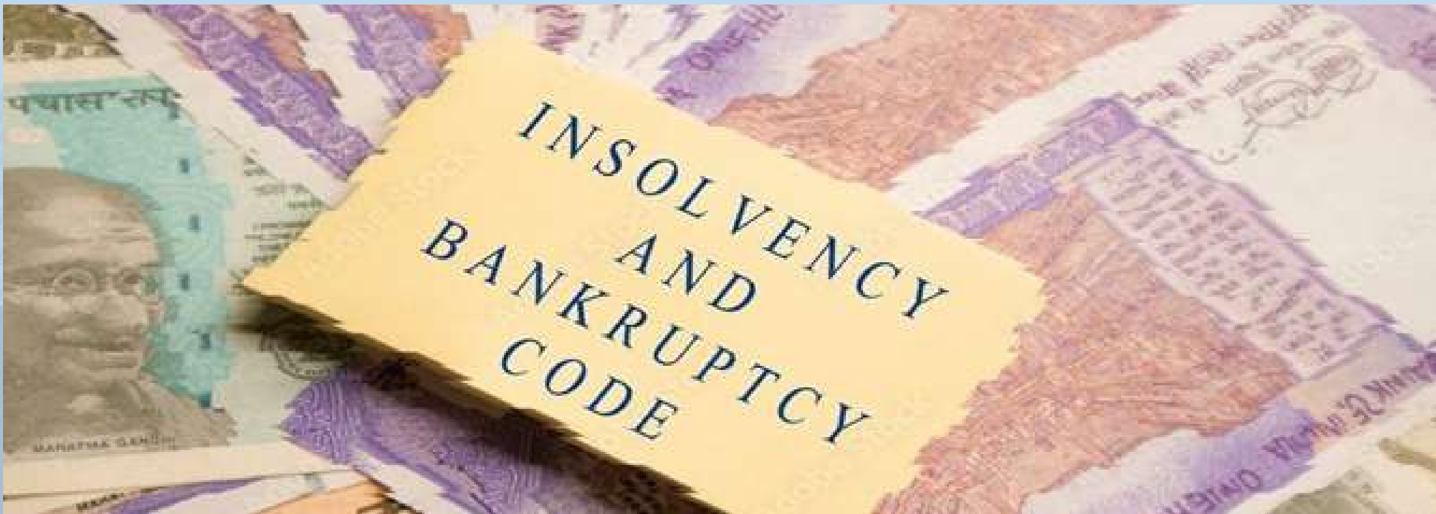

Image source- Adobe Stock

On September 13, 2021, Hon'ble Supreme Court of India in the judgment of- "Ebix Singapore Pvt. Ltd. v. Committee of Creditors of Educomp Solutions Ltd.",[23] observed that the judicial delay in approving a resolution plan would badly affect the 'insolvency process' and also the value of Corporate Debtor. Adding to it, the uncertainty of commercial activities would take place due to this delay.

[23] Supreme Court, Case No. 3224/2020.

In this judgment, the bench comprising of Hon'ble Justice M. R. Shah and D. Y. Chandrachud held that, once the 'resolution plan' is approved by the Committee of Creditors and submitted to the 'Adjudicating Authority', on the request of a Resolution Applicant, National Company Law Tribunal should not allow any modifications or withdrawals of such Resolution Plan.

"These delays, if systemic and frequent, will have an undeniable impact on the commercial assessment that the parties undertake during the course of the negotiation."

The bench opined that when the modifications or withdrawals are not allowed for the effective implementation of the resolution plan, on the other hand, if the adjudicating authorities delay the insolvency procedure by delaying the approval of the resolution plan, this would directly affect the implementation of the resolution plan. The bench stated, "*These delays, if systemic and frequent, will have an undeniable impact on the commercial assessment that the parties undertake during the course of the negotiation.*"

In favour of the Resolution Applicant's contention that the '*severe and inordinate delay*' in the approval of the submitted Resolution Plan by the NCLT and NCLAT is not allowed under Section 12 of the Insolvency and Bankruptcy Code, 2016, the Supreme Court held that the adjudicating authorities i.e., NCLT and NCLAT should strictly stick to the timelines given under IBC, 2016.

The bench, in this case, referred to the 32nd Report submitted by the "*Standing Committee on Finance*" (2020–2021) on the "*Implementation of the Insolvency and Bankruptcy Code: Pitfalls and Solutions.*"

"The NCLT and the NCLAT should endeavor, on a best effort basis, to strictly adhere to the timelines stipulated under the IBC and clear pending resolution plans forthwith."

According to this report, in almost 71% of the cases, delays in the insolvency process for more than 180 days lead to the deviation of the procedure from the actual objective of the Corporate Insolvency Resolution Process prescribed in the IBC, 2016. One of the reasons for this inordinate delay is the time-wasting attitude of the NCLT towards admitting the Resolution Plan submitted. The "*appellate process*" to NCLAT and the Supreme Court multiplies the litigation, which furthers delay in the insolvency process.

"The NCLT and the NCLAT should endeavor, on a best-effort basis, to strictly adhere to the timelines stipulated under the IBC and clear pending resolution plans forthwith."

History should not be repeated

The main reason for the utter failure of the previous insolvency regime that used to exist before the IBC, 2016 was the "*Judicial Delay.*"
The resolution plan, once submitted by a successful resolution applicant, should not be delayed because of the lethargic attitude of the adjudicating bodies. Even after the IBC, 2016 came into force, i.e., in the present day, if the insolvency process gets delayed and causes a bad effect on the value of corporate creditors and "*commercial uncertainty*", there is no point in following the new insolvency regime. The problems faced during the previous regime should not be repeated in the IBC 2016 regime.

- Anagha K.[24]

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BIT OF FUN: PUZZLE

Directions: Use the digits in blue coloured cells to identify the year and name of the important legislation passed in that year.

Name of the Legislation	Year			
Electricity Act				
Insolvency and Bankruptcy Code				
Securities and Exchange Board of India Act				
Securities Contract (Regulation) Act				

Year				

Name of the Legislation: ______________________________

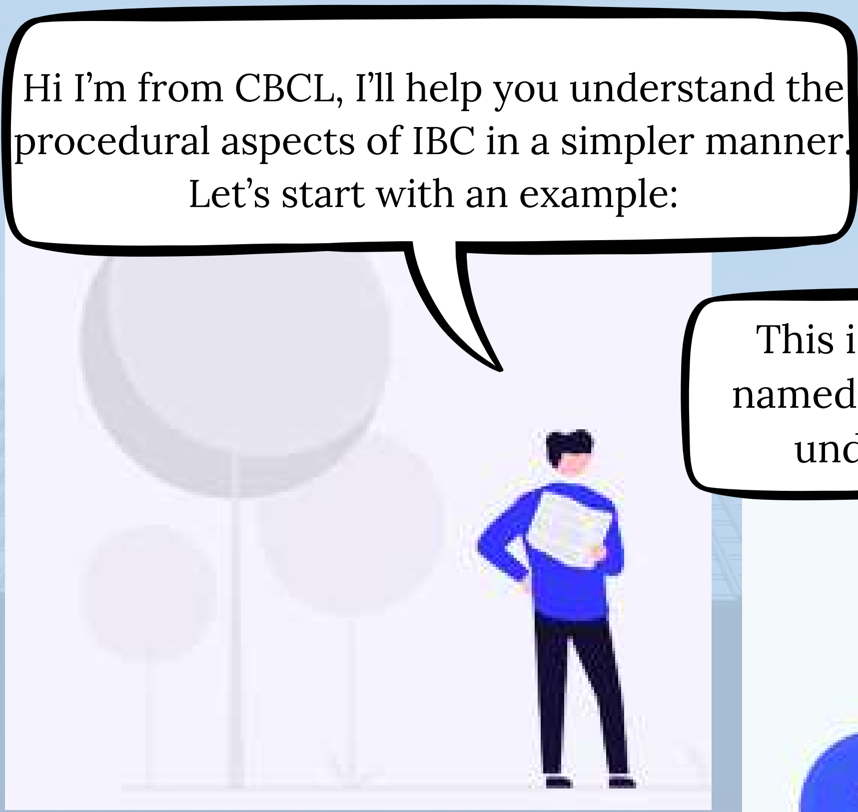
Clue: Shares

- P. Bayola Kiran[25]

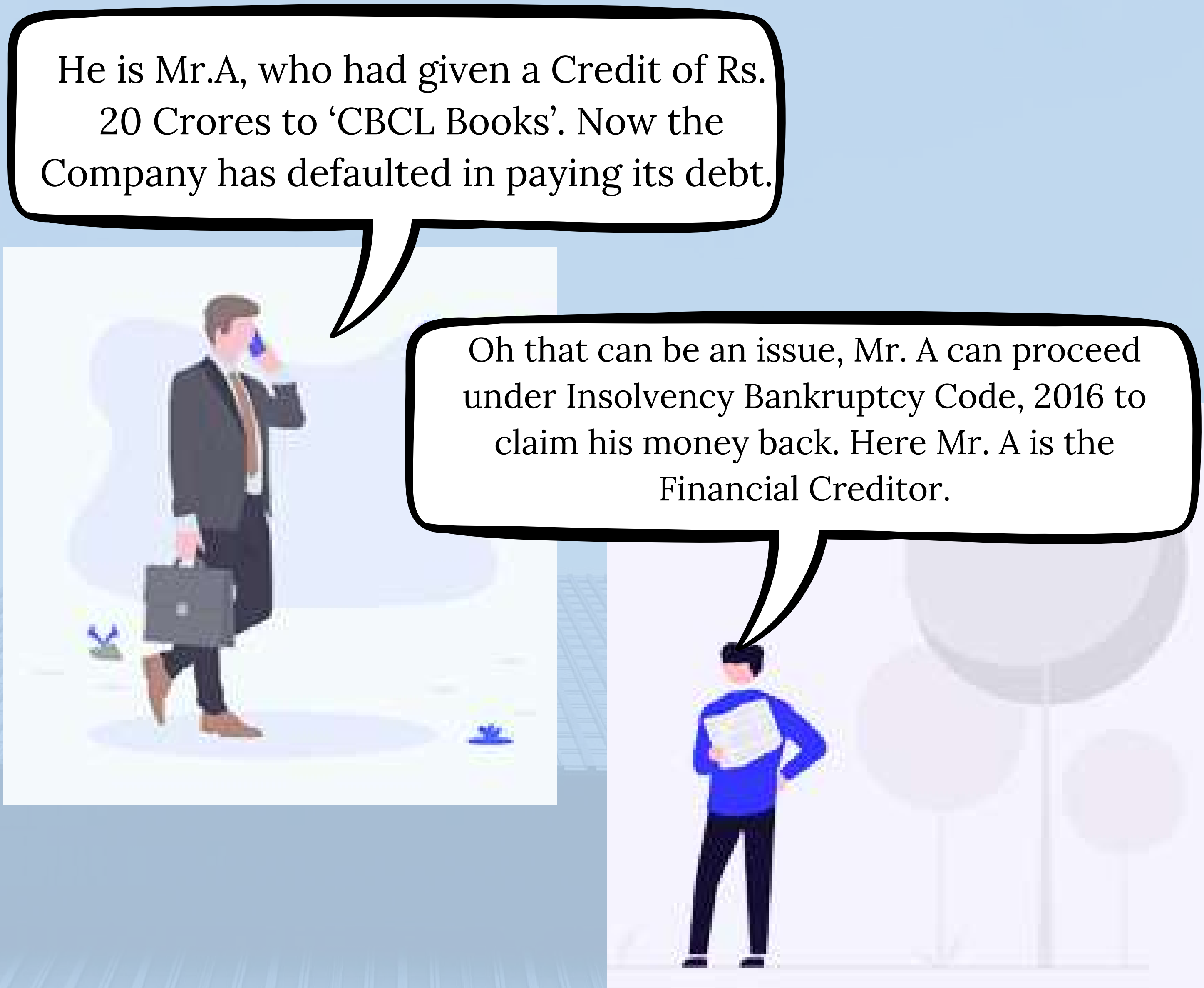
[25] Assistant Professor at Damodaram Sanjivayya National Law University, Visakhapatnam and Co-convenor of the CBCL DSNLU.

Answer: The name of the legislation is in 'Corporate Governance: Principles and Challenges', which starts from Page No.30. Electricity Act 2003, IBC 2016, SEBI 1992, SCRA 1956

IBC PROCEDURE: PART 01



Who is a Corporate Debtor?
It is defined under Section 3(8) of IBC,2016. In simple terms Corporate Debtor is a corporate person who owes to pay debt to any person.



Who is a Financial Creditor?

It is defined under Section 5(7) of IBC,2016. In simpler terms Financial Creditor is a person to whom financial debt is owed.

What is Section 7 of IBC,2016?

Section 7 of IBC,2016 explains the procedure in which Financial Creditor can initiate proceedings against the Corporate Debtor.

Stay tuned for next newsletter to dive into the procedure to help him

---

- S. Krishna Vamsi[26]

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