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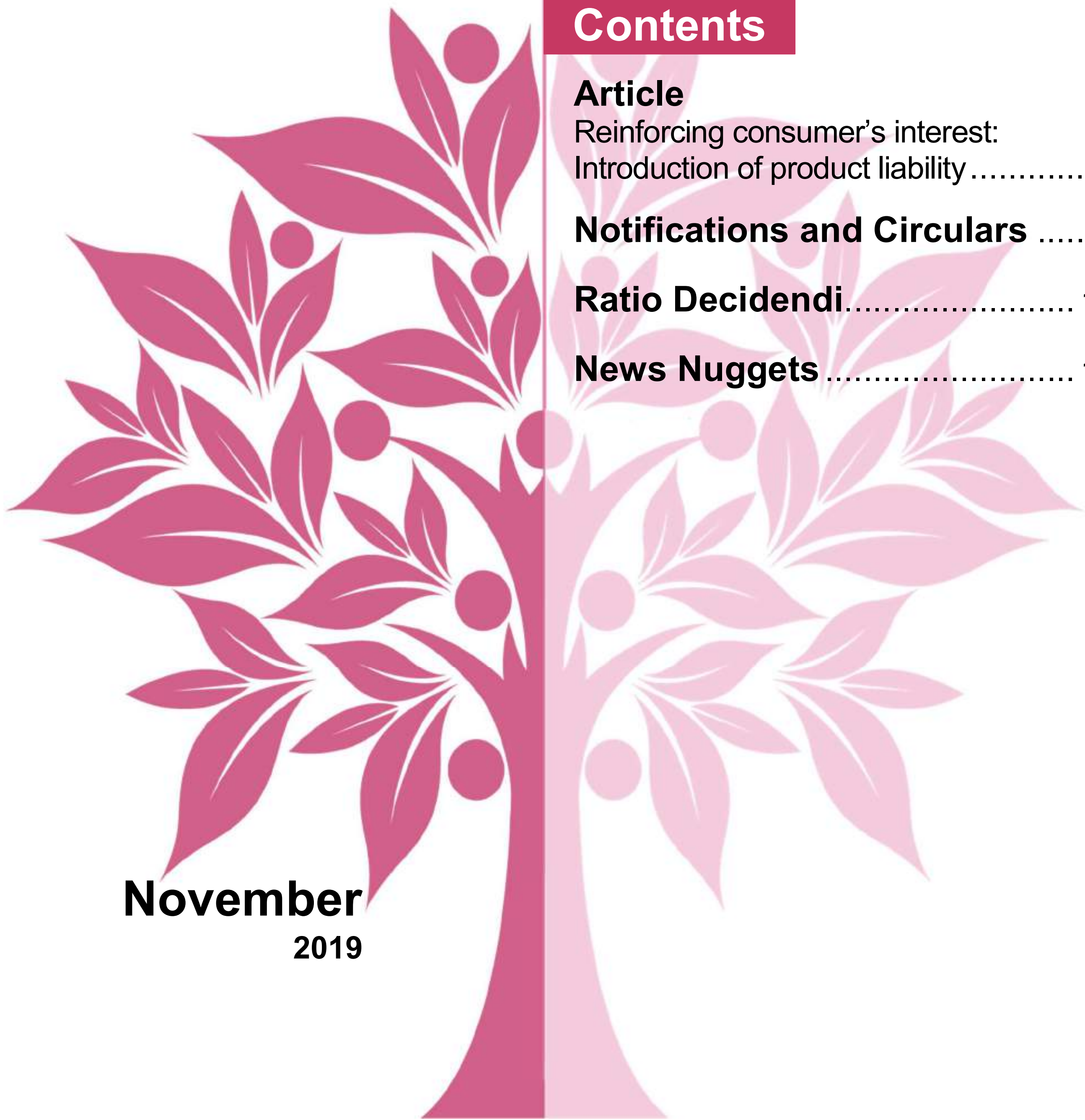

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Article

Reinforcing consumer's interest: Introduction of product liability

By **Sonia Abrol and Kritika Rastogi**

Overview:

The Parliament of India on August 6, 2019 has passed the much-awaited Consumer Protection Bill, 2019 and notified the same in the official gazette of India after it received the presidential assent on August 9, 2019.[1]

The Consumer Protection Act, 2019 ("New Regime") finally replaces and overhauls the Consumer Protection Act, 1986 ("Erstwhile Legislation") by making various amendments to the Erstwhile Legislation and by introducing many new provisions and concepts. Although repeated attempts were made from time to time during the past few years to amend the Erstwhile Legislation by introducing the Consumer Protection Bill 2011, the Consumer Protection Bill 2015 and the Consumer Protection Bill 2018, each time these bills lapsed and could not see the light of day until the New Regime came into effect.

While keeping the text of the preamble of the New Regime similar to that of the Erstwhile Legislation, the New Regime enhances the scope of 'protection accorded to the interests of consumers' by way of inserting new provisions related to (i) product liability i.e. where liability of the product manufacturer, product seller and product service provider in case of any defect found in the product has been determined separately; (ii) unfair contracts i.e. when rights of the consumers are significantly altered where a contract exists between manufacturer or trader or service provider on the one hand and a consumer on the other; (iii) setting up of separate regulatory body, i.e. Central Consumer Protection Authority for promoting, protecting and enforcing the rights of consumers as a class which may be violated due to unfair trade practices and misleading advertisements; (iv) establishment of mediation as an alternate and quick dispute resolution mechanism; and (v) preventing unfair trade practices of goods and services by covering e-commerce transactions.

Amongst all the significant and essential additions in the New Regime as highlighted above and for which no specific provisions were present in the Erstwhile Legislation, this article will specifically examine the concept of 'product liability' as being one of the foremost, prime and required additions. So far in India, no separate comprehensive legal framework or specific statute capturing the concept of product liability exists and the term has been understood in general parlance to mean liability of such party (i.e. manufacturer or vendor of the product or any person who is part of the chain of distribution of products from manufacturer to end consumer) from whom defective product has been sourced and then sold to the consumer. Also, certain statutes in India have in general safeguarded the interests of the consumers in connection with faulty or defective products i.e. the Indian Contract Act, 1872, the Sale of Goods Act, 1930 and the Drug and Cosmetics Act, 1940, etc. Since there is no particular statute for this and only sector specific laws with regard to the same exist, it is pertinent to note that reliance has always been placed on the principle of natural justice, equity and good conscience and upon the

[1] http://egazette.nic.in/WriteReadData/2019/210422.pdf

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decisions of the English landmark judgements. A prominent judgement from which Indian courts have also taken guidance often is '*Donoghue v. Stevenson*'[2] wherein the principle of 'duty to care' was established.

Understanding product liability viz-a-viz the New regime:

Although the Erstwhile Legislation touches upon product liability, no detailed doctrine was laid down for the same. Earlier, the principles governing treatment of product liability evolved through judgements of the Indian Courts. The New Regime, however, has come up with an independent chapter altogether, thereby broadening the horizon of the concept. Prior to examining what product liability actually is, it is important to note that term such as '*product*', '*product liability*', '*product liability action*', '*product manufacturer*', '*product seller*' and '*product service provider*' have also been introduced in the New Regime for ease of understanding.[3] It even defines what constitutes '*harm*' in relation to product liability.[4] With such clearly defined terms, the New Regime has left no scope for ambiguity of any sort.

The New Regime bifurcates the responsibility of the product manufacturer, product service provider and that of the product seller and provides clarity as to when any or all of them would be held liable, respectively, for any harm caused to or injury suffered by the consumer on account of defective products manufactured or sold or by deficiency in the services provided.[5] Furthermore, it takes a step forward and gives protection to such consumers or complainants by firstly, granting them a right to file a complaint against any of the above, as the case may be, and secondly, by allowing them to make a claim for compensation before a District Commission or State Commission or National Commission, as the case may be, for such harm caused.[6] Additionally, the New Regime sets out various conditions under which the product manufacturer, product service provider and the product seller would be held responsible and when product liability action can actually be initiated against each one of them respectively.

(i) In case of a manufacturer of a product, the circumstances under which he shall be held liable in a product liability action are, if the product (a) contains a manufacturing defect; or (b) is defective in design; or (c) suffers from a deviation from manufacturing specifications; or (d) does not conform to the express warranty; or (e) fails to contain adequate instructions of correct usage to prevent any harm or any warning regarding improper or incorrect usage. Also, even if the manufacturer proves that there was no negligence on his part in making express warranty of a product, he shall still be responsible in a product liability action.[7]

(ii) Similarly, the grounds on which a service provider of a product shall be responsible in a product liability action are, if (a) the service provided are faulty or imperfect or deficient or inadequate in quality, nature or manner of performance which is required to be provided by or under any law for the time being in force, or in accordance with any contract or otherwise; or (b) there has been an act of omission or commission or negligence or conscious withholding any information which caused harm; or (c) the service provider did not issue adequate instructions or warnings to prevent any

[2] Case Law citation: [1932] UKHL 100.
[3] Section 2(33), 2(34), 2(35), 2(36), 2(37) and 2(38) of Chapter I of the New Regime.
[4] Section 2(22) of Chapter I of the New Regime.
[5] Section 2(34) of Chapter I of the New Regime.
[6] Section 2(35) of Chapter I of the New Regime.
[7] Section 84 of Chapter VI of the New Regime.

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harm; or (d) the service did not conform to express warranty or the terms and conditions of the contract.[8]

(iii) Lastly, the scenarios under which a <u>product seller who is not a product manufacturer</u> shall be accountable are, if (a) he has exercised substantial control over the designing, testing, manufacturing, packaging or labelling of a product that caused harm; or (b) he has altered or modified the product and such alteration or modification was the substantial factor in causing the harm; or (c) he has made an express warranty of a product independent of any express warranty made by a manufacturer and such product failed to conform to the express warranty made by the product seller which caused the harm; or (d) the product has been sold by him and the identity of product manufacturer of such product is not known, or if known, the service of notice or process or warrant cannot be effected on him or he is not subject to the law which is in force in India or the order, if any, passed or to be passed cannot be enforced against him; or (e) he failed to exercise reasonable care in assembling, inspecting or maintaining such product or he did not pass on the warnings or instructions of the product manufacturer regarding the dangers involved or proper usage of the product to the consumer. [9]

In addition to the aforesaid provisions, the New Regime provides exceptions to product liability action against product seller and product manufacturer. Where the product would have been misused, altered, or modified at the time of the harm caused, no product liability action will be taken against the product seller. Similarly, certain events have been envisaged when no product liability action will be imposed on the product manufacturer, if it fails to provide adequate warnings or instructions, in case where (a) the product was purchased by an employer to be used at a workplace and the product manufacturer had provided warnings to such employer; or (b) the product was sold as a component to be used in another product and necessary instructions and warnings had been given by the manufacturer, and the harm was caused to the complainant from the use of the end product; or (c) the product was one which was legally meant to be used under the supervision of an expert or a class of experts and the product manufacturer had employed reasonable means to give warnings or instructions for usage to such expert or class of experts; or (d) the complainant was under the influence of alcohol or any prescription drug while using the product which was not prescribed a medical practitioner; or (e) such instructions or warnings are obvious or commonly known to a user or a consumer of such product or which the consumer should have known, taking into account the characteristics of such product.[10]

Conclusion:

In comparison to the Erstwhile Legislation, it is evident that the Government *vide* the New Regime has come up with extended definitions, endeavoured to tighten the erstwhile provisions and has introduced many new concepts as outlined above in the first section of this article. It has specifically widened the extent of 'product liability' with a view to streamline and provide sufficient safeguard to the end consumers of the

[8] Section 85 of Chapter VI of the New Regime.

[9] Section 86 of Chapter VI of the New Regime.

[10] Section 87 of Chapter VI of the New Regime.

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products, bearing in mind the principles laid down by the Indian courts in the past while considering cases involving 'product liability'. Nonetheless, the New Regime is still at a nascent stage and how successful it will prove in providing systematic, timely and effective implementation of the intention of the legislature is to be seen.

[The authors are Joint Partner and Associate, respectively, in Corporate Advisory team, Lakshmikumaran & Sridharan, New Delhi]

Notifications and Circulars

Guidelines for registered intermediaries to combat Money Laundering and Terrorism Financing transactions: Securities and Exchange Board of India ("SEBI") *vide* its Master Circular #SEBI/HO/MIRSD/DOP/CIR/P/2019/113 dated 15th October 2019 has issued guidelines on Anti-Money Laundering Standards ("AML") and Combating the Financing of Terrorism ("CFT")/ Obligations of Securities Market Intermediaries under the Prevention of Money Laundering Act, 2002 ("PMLA") and Rules framed there under. The said Guidelines are applicable to all the intermediaries who are registered under the provisions of Section 12 of the SEBI Act, 1992 and their branches/subsidiaries located outside India.

The Guidelines have taken into account the requirements of PMLA as applicable to the intermediaries and have outlined relevant measures and procedures to guide the intermediaries in preventing Money Laundering ("ML") and Terror Financing ("TF"), for which the senior management of a registered entity has been entrusted to establish appropriate policies and procedures ensuring compliance with relevant statutory and regulatory requirements and assess their effectiveness by a separate review process.

The Guidelines direct the registered intermediaries to adopt client acceptance policies and procedures, undertake client due diligence measures and have a system for identifying, monitoring and reporting suspected ML and TF transactions to the authorities, and endeavour to develop awareness and vigilance among the employees to guard against ML and TF.

SEBI restricts Mutual Funds to invest in unlisted Commercial Papers: SEBI *vide* it's Circular #SEBI/HO/IMD/DF2/CIR/P/2019/104 dated 1st October 2019 has reviewed investment norms for Mutual Funds ("MFs") in debt and money market instrument, in order to enhance transparency and disclosure of investment by MFs. The MFs are henceforth restricted to invest in unlisted debt instruments including Commercial Papers ("CP"), however, an exception has been carved out for investment in unlisted Non-Convertible Debentures ("NCDs") not exceeding 10% of the debt portfolio of the scheme subject to the condition that such NCDs shall have a simple structure.

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Further exception has been created for government securities, money market instruments and derivative products used by MFs for hedging. Existing investment of debt funds in unlisted debt has been allowed to be held till maturity. These norms will be implemented within a month after the framework for listing of CPs is operationalized or 1 January 2020, whichever is later.

A specific restriction on investment in debt instruments having structured obligations/credit enhancements has been prescribed, i.e. not exceeding 10% and 5% for group companies. In terms of sector exposure, circular has brought down the limit from 25% to 20% and the additional limit for Housing Finance Companies (HFCs) from 15% to 10%. In addition, the regulator also capped the exposure to a sponsor group to 10% of a scheme's portfolio, which can be enhanced to 15% with approval from the board of trustees. It has also mandated MFs to have a credit risk assessment policy and early warning system in place for deterioration in the credit risk profile of the issuer.

SEBI introduces a new framework for issuance of Depository Receipts: SEBI *vide* its circular #SEBI/HO/MRD/DOP1/CIR/P/2019/106, dated October 10, 2019 has introduced a framework for issuance of Depository Receipts ("DR") by companies listed or to be listed in India ("DR Framework"). The DR Framework sets out requirements for DR issuances by companies after 10th October 2019, in addition to requirements under the Companies Act, 2013 and the rules thereunder, the Depository Receipts Scheme, 2014 and the foreign exchange regulations. The following are the eligibility requirements of the DR Framework:

(i) Only listed companies are permitted to issue DRs on the back of equity shares or debt securities listed in India and certain companies undertaking a domestic initial public offering are also permitted on successful completion of IPO.

(ii) The DR Framework also permits existing shareholders to exit by way of a DR issuance. Where the initial listing of DRs includes such secondary sales, the issuer is required to provide an opportunity to all its shareholders to tender their shares to participate in such DR issuance.

Customary eligibility requirements apply including the listed company being in compliance with the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and the listed company and associated persons (such as the promoter) are not being debarred from accessing capital markets.

Other features/modifications of the DR Framework are:

(i) DR offer document must be filed by an intermediary with SEBI and the stock exchanges for their review at the time of initial listing of DRs.

(ii) Indian residents and non-resident Indians, are not allowed to be permissible holders or their beneficial owners.

(iii) Standalone DR issuances are to be priced based on the corresponding mode of issue to domestic investors.

(iv) DR issuances have always been subject to foreign investment limits, the DR Framework now requires shareholders to adopt limits up to which DRs can be issued (both primary and secondary) and further specifies that the listed company should comply with minimum public shareholding norms in India, after excluding the permissible securities held by the depository.

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Resignation of statutory auditors from listed entities and their material subsidiaries: SEBI *vide* Circular CIR/CFD/CMD1/114/2019 dated 18th October 2019 has issued norms to be followed in the event of resignation of statutory auditors from listed entities and their material subsidiaries.

Accordingly, if the auditor resigns within 45 days from the end of a quarter of a financial year, then the auditor shall, before such resignation, issue the limited review/audit report for such quarter. If the auditor resigns after 45 days from the end of a quarter of a financial year, then the auditor shall, before such resignation, issue the limited review/ audit report for such quarter as well as the next quarter. Further, if the auditor has signed the limited review/ audit report for the first three quarters of a financial year, then the auditor shall, before such resignation issue the limited review/ audit report for the last quarter of such financial year as well as the audit report for such financial year.

In case of any concern with the management of the listed entity/material subsidiary such as non-availability of information/non-cooperation by the management which may hamper the audit process, the auditor shall approach the Chairman of the Audit Committee of the listed entity and the Audit Committee shall receive such concern directly and immediately without specifically waiting for the quarterly Audit Committee meetings. In case the auditor proposes to resign, all concerns with respect to the proposed resignation, along with relevant documents shall be brought to the notice of the Audit Committee. In cases where the proposed resignation is due to non-receipt of information / explanation from the company, the auditor shall inform the Audit Committee of the details of information / explanation sought and not provided by the management.

Further, upon resignation of the auditor, the Audit Committee is required to deliberate upon all the concerns of the auditor as soon as possible, but not later than the date of the next Audit Committee meeting and communicate its views to the management. The listed entity shall ensure the disclosure of the Audit Committee's views to the stock exchanges as soon as possible but not later than twenty-four hours after the date of such Audit Committee meeting.

Framework for listing of Commercial Paper: SEBI *vide* circular SEBI/HO/DDHS/DDHS/ CIR/P/2019/115 dated 22nd October 2019 has issued the framework for listing of Commercial Paper (CP). The said framework is based on the recommendation of Corporate Bonds & Securitization Advisory Committee ('CoBoSAC'), chaired by Shri H.R. Khan.

Accordingly, all issuers of CPs are required to disclose:

i) all default/s and/or delay in payments of interest and principal of CPs, (including technical delay), debt securities, term loans, external commercial borrowings and other financial indebtedness including corporate guarantee issued in the past 5 financial years including in the current financial year.

ii) ongoing and/or outstanding material litigations or regulatory restrictions.

iii) Any material event/development having implications on the financials/credit quality including any material regulatory proceedings against the Issuer/promoters, tax litigations resulting in material liabilities, corporate restructuring event which may affect the issue or the investor's decision to invest / continue to invest in the CPs.

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Continuous disclosure: Issuers who have listed their specified securities and are required to comply with provisions of Chapter IV of SEBI LODR Regulations and also have outstanding listed CPs shall prepare and submit financial results in terms of Regulation 33 of SEBI LODR Regulations and additional line items as required under Regulation 52(4) of SEBI LODR Regulations. Issuers who have listed NCD's, NCRPS or both and are required to comply with provisions of Chapter V of SEBI LODR Regulations and also have outstanding listed CPs or who only have outstanding listed CPs shall prepare and submit financial results in terms of Regulation 52 of SEBI LODR Regulations.

Material Events: The issuer of CPs shall disclose the following details to the stock exchange(s) as soon as possible but not later than 24 hours from the occurrence of an event (or) information:

i) details such as expected default/ delay/ default in timely fulfilment of its payment obligations for any of the debt instrument;

ii) any action that shall affect adversely, the fulfilment of its payment obligations in respect of CPs;

iii) any revision in the credit rating;

iv) a certificate confirming the fulfilment of its payment obligations, within 2 days of payment becoming due.

Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2019: The Ministry of Corporate Affairs ("MCA") *vide* Notification dated 22nd October 2019 has issued Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2019 ('Amendment Rules') to amend Rule 6 of Companies (Appointment and Qualification of Directors) Rules, 2014.

Accordingly, every individual who has been appointed as an independent director in a company, on the date of commencement of the Amendment Rules, shall within a period of three months from such commencement; or who intends to get appointed as an independent director in a company after such commencement, shall before such appointment, apply online to the Indian Institute of Corporate Affairs for inclusion of his name in the data bank for a period of one year or five years or for his life-time.

Every individual whose name is so included in the data bank shall pass an online proficiency self-assessment test conducted by the institute, within a period of one year from the date of inclusion of his name in the data bank, failing which, his name shall stand removed from the databank of the institute. However, the mandatory assessment is not applicable to an individual who has served for a period of not less than ten years as on the date of inclusion of his name in the databank as director or key managerial personnel in a listed public company or in an unlisted public company having a paid-up share capital of rupees ten crore or more.

Companies (Creation and Maintenance of databank for Independent Directors) Rules, 2019 notified: Ministry of Corporate Affairs *vide* Notification dated 22nd October 2019 has issued Companies (Creation and Maintenance of databank for Independent Directors) Rules, 2019 to prescribe rules for the creation, maintenance of databank of independent directors and duties of the institute i.e., Indian Institute of Corporate Affairs.

The said rules authorise the institute to conduct an online proficiency self-assessment test for independent directors covering companies law, securities laws, basic accounting, and such other law as may be relevant to the functioning

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independent directors. Further, the institute is required to prepare basic study material, conduct online classes including audio-visuals and provide an option for individuals to take advanced tests in topics specified herein earlier.

Debt and Non-Debt Instruments identified by Central Government under FEMA: The Ministry of Finance *vide* its Notification #S.O. 3722(E) [F.No. I/14/EM/2015] dated 16th October 2019 has determined various instruments as *Debt Instruments* and *Non-Debt Instruments.* The notification was necessitated pursuant to enforcement of amendments to FEMA as proposed under the Finance Act, 2015. Pursuant to the said 2015 amendment, RBI will govern capital account transactions involving debt instruments and the Central Government will govern capital account transactions involving non-debt instruments.

Accordingly, the following are classified as Debt Instruments:

i) Government bonds;

ii) corporate bonds;

iii) all tranches of securitization structure which are not equity tranche;

iv) borrowings by Indian firms through loans;

v) depository receipts whose underlying securities are debt securities; and

vi) all other instruments which are not specified in the notification.

Non-Debt Instruments are as follows:

i) all investments in equity in incorporated entities (public, private, listed and unlisted);

ii) capital participation in Limited Liability Partnerships (LLPs);

iii) all instruments of investment as recognized in the FDI policy as notified from time to time;

iv) investment in units of Alternative Investment Funds (AIFs) and Real Estate Investment Trust (REITs) and Infrastructure Investment Trusts (InVITs); investment in units of mutual funds and Exchange-Traded Fund (ETFs) which invest more than fifty percent in equity;

v) the junior-most layer (i.e. equity tranche) of securitization structure;

vi) acquisition, sale or dealing directly in immovable property;

vii) contribution to trusts; and

viii) depository receipts issued against equity instruments.

Foreign Exchange Management (Debt Instruments) Regulations, 2019 notified: Reserve Bank of India *vide* Notification #FEMA 396/2019-RB, dated 17th October 2019, in supersession of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 (“Erstwhile Regulation”) has issued the new FEMA (Debt Instruments) Regulations, 2019 (“Regulations”) to regulate investment in India by a Person Resident Outside India. Some of the key features of the new Regulations are:

i) The term 'Debt instrument' was not specifically defined in the Erstwhile Regulations. Under the new Regulation, 'Debt Instrument' means the instrument specified under the Schedule I of the Regulations.

ii) Erstwhile Regulations required citizens of Bangladesh or Pakistan to take prior approval of the Government for making any investment in India. However, the new Regulations doesn't impose any such restriction on the citizens of Bangladesh & Pakistan in Regulation 5.

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iii) There is no change with respect to provisions for Taxes and Remittance of sale proceeds, however, a new provision has been inserted which provides that an authorized dealer may allow remittances - both inward and outward - related for permitted derivatives transactions.

Foreign Exchange Management (Non-debt Instrument) Rules, 2019 notified: The Ministry of Finance vide its notification #S.O. 3732(E) [F.No. 1/14/EM/2015] dated 17th October 2019 has issued Foreign Exchange Management (Non-debt Instruments) Rules, 2019 ("New Rules").

The Rules are made in supersession of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 ("Erstwhile Regulations"). The Rules prescribe the general conditions and specific restrictions applicable to all investors resident outside India.

The term "capital instruments" has been deleted and replaced with "equity instruments" throughout the New Rules. The definition of equity instruments now includes convertible debentures, which formed part of capital instruments in the Erstwhile Regulations. A new definition of "hybrid instruments" has been introduced to mean hybrid instruments such as optionally or partially convertible preference shares or debentures and other such instruments as specified by the Central Government, which can be issued by an Indian company or trust to a person resident outside India.

The definition of an e-commerce entity under the Erstwhile Regulations included a foreign company as defined under section 2(42) of Companies Act, 2013. Under the New Regulations, the definition of an e-commerce entity has been modified to limit it to a company incorporated or existing as per the Companies Act, 2013.

With effect from 1 April 2020, the aggregate FPI limit shall be the FDI sectoral caps as applicable to the Indian company. The aggregate limit, may be decreased (only prior to 31st March 2020) or increased with the approval of its board of directors and its shareholders by a special resolution. However, once the aggregate FPI limit has been increased to a higher threshold, the Indian company cannot reduce the same to a lower threshold.

The FPIs investing in breach of the prescribed limit shall have the option of divesting their holdings within 5 trading days from the date of settlement of the trades causing the breach. In case the FPI chooses not to divest, then the entire investment in the company by such FPI and its investor group shall be considered as investment under FDI. Under the New Regulations, an NRI or a OCI may without limit purchase or sell units of domestic mutual funds on non-repatriation basis which invest more than 50% in equity.

Consequent to the New Regulations, RBI has issued Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 to prescribe mode of payment and reporting requirements for investment in India by a person resident outside India.

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Ratio Decidendi

NCLAT permits Dutch Trustee (counter-part of an insolvency resolution professional under IBC) to participate in meetings of the Committee of Creditors as observer

A Corporate Insolvency Resolution Process has been initiated against Jet Airways (India) Limited ('Corporate Debtor'), one in India where the registered office is located and another in the Netherlands, where the regional hub of the 'Corporate Debtor' is situated. In accordance with the law of Netherlands, an Administrator in Bankruptcy of Jet Airways (India) Ltd. ("Administrator") was appointed by a competent court.

The said Administrator approached NCLT-Mumbai bench at the admission stage of insolvency proceedings stating that insolvency proceedings have already begun against the Corporate Debtor in the Netherlands and two parallel proceedings in two different jurisdictions will lead to complications and delays in resolution of insolvency of the Corporate Debtor.

The Administrator further contended that even though Sections 234 and 235 have not been notified by the Government of India, there is no bar under the IBC for the NCLT to recognise the insolvency proceedings in a foreign jurisdiction. Sections 234 and 235 deal with agreements with foreign countries and letters of requests to a foreign country during the insolvency proceedings, where the assets of the debtor are located outside India. The NCLT – Mumbai bench *vide* Order dated 20th June 2019 has held that the order of the foreign court is a nullity and such order cannot be given effect and therefore has admitted the insolvency petition under Section 7 of the IBC.

Aggrieved by the order of NCLT – Mumbai bench, the Administrator has approached NCLAT with an undertaking that he will cooperate with the proceedings pending in India and will not sell, alienate, transfer, lease or create any third-party interest on the offshore movable and immovable assets of the 'Corporate Debtor' which are or may be taken into his possession.

Pursuant to the said undertaking by the Administrator, NCLAT admitted the appeal and stayed the order of NCLT – Mumbai bench as far as it dealt with the declaration that the offshore proceeding is not maintainable. Further, the appellate tribunal has held that the assets of *the 'Corporate Debtor', if any situated outside the country for the control and custody of the same as in the present case can only be taken with an arrangement with the Administrator*. Therefore, NCLAT directed the parties to agree upon an arrangement and place the draft agreement before it.

Pursuant to NCLAT directions, the Administrator and the Resolution Professional have filed their arrangement termed as "*Cross Border Insolvency Protocol*'. However, the Resolution Professional at the insistence of COC had not agreed to the proposal of permitting the Administrator to participate in the meetings of the CoC as an observer. While disposing the said appeal on 26th September 2019, NCLAT in a first such instance under IBC has modified the terms of Cross Border Insolvency Protocol to permit the Administrator to attend the proceedings as an observer with no voting rights.

[*Jet Airways (India) Ltd. (Offshore Regional Hub/Offices)* v. *State Bank of India & Anr.* - Company Appeal (AT) (Insolvency) No. 707 of 2019]

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Time-barred winding up petitions will not be benefitted by Section 238A of the IBC

Brief Facts:

On 20th August 2009, a share purchase agreement was executed between MCX and IL&FS, whereby IL&FS agreed to purchase of 442 lakh equity shares of MCX-SX from MCX. La-Fin as a group company of MCX issued a letter of undertaking to IL&FS on 20th August 2009 to repurchase the shares of MCX-SX after a period of one year but before a period of 3 years from the date of investment.

In August,2012, IL&FS issued a letter to exercise its option to sell its entire holding in MCX-SX and called upon La-Fin to purchase these shares in accordance with the Letter of Undertaking. On 16th August 2012, La-Fin replied that it was under no legal or contractual obligation to buy the aforesaid shares.

Subsequently, IL&FS filed a suit before the Hon'ble Bombay High Court for specific performance of the Letter of Undertaking, which passed an injunction order restraining La-Fin from alienating its assets pending disposal of the suit and subject to the attachments made by Economic Offences Wing, Mumbai ("EOW") during the pendency of the suit. On 3rd November 2015, a statutory notice under Section 433 and 434 of the Companies Act, 1956 was issued by IL & FS to La-Fin, referring to the attachment by the EOW, and stating that La-Fin was obviously in no financial position to pay the sum of INR 232,50,00,000/- which, according to IL & FS, was owed to them as of 31st October 2015.

On 18th November 2015, a reply was given by La-Fin to the aforesaid notice referring to the pending suit, and stoutly disputing the fact that any amount was due and payable. The reply went on to state that La-Fin was otherwise commercially sound and that the statutory notice issued under Sections 433 and 434 of the Companies Act, 1956 was only a pressure tactic.

On 21st October 2016, a winding up petition (hereinafter referred to as the "Winding up Petition") was then filed by IL & FS against La-Fin in the Bombay High Court Under Section 433(e) of the Companies Act, 1956. Due to the introduction of IBC, 2016, the case was transferred to NCLT as an application u/s 7 and the statutory form was filled up by IL&FS indicating that the date of default was 19th August 2012. The said application has been admitted with the observation that the bar of limitation would not be attracted as the Winding up Petition was filed within three years of the date on which the Code came into force, viz., 1st December 2016. An appeal to NCLAT was dismissed upholding the view of NCLT. Aggrieved by dismissal by NCLAT, the current appeal was preferred before the Supreme Court.

Submissions:

Relying on earlier judicial pronouncements, the appellants argued that Limitation Act, 1963 would apply to all Section 7 applications that are filed under IBC and that the residuary Article, i.e., Article 137 of the Limitation Act would be attracted to the facts of the present case. It was further argued that the Winding up Petition was filed on 21st October 2016, i.e., beyond the period of three years prescribed (as the cause of action had arisen in August 2012), it is clear that a time-barred winding up petition filed under Section 433 of the Companies Act, 1956 would not suddenly get resuscitated into a Section 7 petition under the IBC, by virtue of the transfer of such petition.

The respondents argued that the cause of action for the suit and the cause of action for the Winding up Petition filed were separate and distinct. It was argued that the cause of action for filing the Winding up Petition arose only in

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2015/2016, after attachment of the assets of La-Fin; and as stated in the Winding up Petition, after La-Fin's assets had fallen from being worth around INR 1000 crores in 2013 to only being worth around INR 200 crores in October 2016. Relying upon the judgement of Bombay High Court in *Madhusudan Gordhandas & Co. vs. Madhu Wollen Industries Pvt. Ltd.* [AIR 1971 SC 2600] the respondent further argued that an insolvency petition could have been filed only upon loss of substratum of La-Fin and the substratum was lost when assets which were worth over INR 1000 crores in 2013, had in 2016 become only worth INR 200 crores.

Held:

The Supreme Court has held that the Winding-up Petition itself refers La-Fin as being worth approximately INR 200 crores as of October 2016, which again does not correlate with 3rd November 2015, being the date on which the statutory notice under Sections 433 and 434 was issued. Further, the Court noted that La-Fin's disappearance of substratum or the commercial insolvency of the La-Fin has not been pleaded. Whereas, in Form-1, upon transfer of the winding up proceedings to the NCLT the date of default is stated as 19th August 2012 making it clear that three-years from that date had long since elapsed when the Winding up Petition Under Section 433(e) was filed on 21st October 2016.

Accordingly, it was held that the Winding up Petition filed on 21st October 2016 being beyond the period of three-years mentioned in Article 137 of the Limitation Act is time-barred and cannot, therefore, be proceeded with any further. In holding so, the Apex Court relied upon its judgement in *B.K. Educational Services Private Limited vs. Parag Gupta and Associates* [AIR 2018 SC 5601] wherein it was held that the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of IBC and Article 137 of the Limitation Act gets attracted and that "the right to sue", therefore, accrues when a default occurs. The impugned judgments of the NCLAT and NCLT are therefore set aside.

[*Jignesh Shah and Ors.* v. *Union of India* and Ors. - 2019 (13) SCALE 61]

Winding up order is not irrevocable, and the proceedings can be transferred to NCLT under IBC

Brief Facts:

Shyam Metalics & Energy Ltd. (respondent No. 1 herein), filed a winding up petition under Sections 433(e) and 433(f) of the Companies Act, 1956 on the ground of appellant's (Action Ispat & Power Pvt. Ltd.) inability to pay its debts. On 27.08.2018, the winding up petition was admitted and Official Liquidator ("OL") was appointed. The OL was directed to secure the assets/books of the Appellant and take a stock thereof, to inform the creditors, contributories and all other concerned parties.

Meanwhile, State Bank of India (respondent No. 2 herein), a secured creditor of the Appellant Company, made an application under section 7 of IBC seeking CIRP of the appellant company and further sought the transfer of the winding up proceedings pending before the High Court to the NCLT. The said application for transfer of proceedings to NCLT was opposed by the ex-management and OL claiming that the OL had already sealed the registered office of the company and a factory premises and had incurred heavy expenditure in securing the factory premises.

The Company Judge vide the impugned order dated 14th January 2019 held that the power to transfer a petition to NCLT under Section 434(1)(c) of the Companies Act, 2013 is discretionery and has to be exercised in the facts and circumstances of the case so as to

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expeditiously deal with the proceedings/winding up. The Company Judge further observed that liquidation was at the initial stage and apart from sealing off the office and factory premises, further exercise was yet to be carried out hence the it was held that such transfer was in the interest of justice, as well as in the interest of the appellant company and the creditors involved. Hence, the earlier order ordering winding up and appointment of OL was revoked. Aggrieved by the revocation, the appellant company filed the present appeal before the Hon'ble High Court of Delhi.

Submissions:

According to the appellant, vide the order dated 27th August 2018, the High Court had already passed for the "winding up", resultantly, the company stood wound up and hence the company petition could not be transferred to NCLT and the OL alone has jurisdiction to liquidate the assets of the appellant company and settle the claims of all the creditors.

Per contra, the Respondent No.2 submitted that vide the order dated 27th August 2018, the High Court merely "admitted" the winding up petition but did not pass a liquidation order. The OL was given only the limited mandate to take over all the assets, books and records of the company. Hence, the liquidation proceedings had not commenced, and the winding up had not been achieved.

Held:

It was observed by the Court that since the winding up order has been passed by the High Court, it was the creditors, more particularly the secured creditors, who had the prerogative of decision making. The stake of the creditors is much higher, and it is their claims which would have to be first met before turning to the ex-management. Therefore, when the plea of a secured creditor to transfer the proceedings to NCLT is pitted against the plea of ex-management claiming the contrary, the court would lean in favour of the creditors, unless strong reasons are shown in favour of the ex-management.

The fifth proviso to section 434(1)(c) states that the transfer of winding up proceedings (on whichever ground preferred), could be sought by a person or parties to the proceedings and if such an application is moved, the Court *may* by order transfer such proceedings to the Tribunal. Thus, an application for transfer is maintainable and the court *may* transfer the proceedings.

Further, it was observed that on the day when the winding up order is passed, the company does not stand dissolved. The process of winding up entails series of steps that have to be undertaken to complete the process. Hence, such an order of winding up can be recalled by the court in exercise of the inherent powers of the court recognized in Rule 9 of the Company Court Rules, 1959.

Therefore, in the interest of justice and equity and keeping in mind the special nature of the IBC, the High Court upheld the order of the Company Judge ordering transfer of proceeding to NCLT. Hence, the appeal was dismissed.

[*Action Ispat & Power Pvt. Ltd.* v. *Shyam Metalics & Energy Ltd*. - Co. App 11/2019, decided on 10-10-2019, Delhi High Court]

Competition – DG's report finding contravention of provisions, not binding on CCI

The Delhi High Court has rejected the contention that if the report of the Director General (DG) recommends that there are contraventions of provisions of Competition Act, the Competition Commission of India (CCI) cannot close the case straightway. It observed that there is no provision in the Competition Act which mandates that the

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CCI must accept the report of the DG recommending that there are contraventions of the provisions of the Act. Terming the contentions of violation of Section 26 and 27 by the CCI, as without any merit, the Court was of the view that DG's report is recommendatory and not binding on the CCI, and that the Commission can differ with the DG's findings and reject the same. Earlier, the CCI had not accepted the DG's report and after hearing the parties had decided to close the case.

The High Court hence also rejected the plea that it was incumbent upon CCI to pass an order directing further inquiry under Section 26(8) of the Competition Act in the event it did not agree with the report submitted by the DG. The High Court also noted that the impugned order passed by CCI was final and no appeal is provided under the Competition Act against such an order. It also noted that the contention that the impugned order was an order under Section 27 was also rejected by the COMPAT earlier and that the petitioner had accepted the order. Further, upholding the CCI order on merits, the Court examined various clauses of the contract and held that the entire approach of the DG in expressing its subjective opinion on various clauses was flawed.

It observed that in order for any term or condition of a contract to be considered as unfair, as contemplated under Section 4(2)(a)(i) of the Competition Act, it must be established to be patently unfair and one that no party, who has any negotiating ability, would accept the same. The Court was of the view that clauses which are commonly used and are found in various commercial contracts, would not fall within the scope of Section 4(2)(a)(i).

[*Saurabh Tripathy* v. *CCI* – Judgement dated 10-10-2019 in W.P.(C) 2079/2018, Delhi High Court]

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News Nuggets

Draft guidelines for setting up, authorisation and operation of Authorised Vehicle Scrapping Facilities (AVSF) issued

The Ministry of Road Transport and Highways has *vide* Notification dated 14th October 2019 notified the draft guidelines for setting up, authorisation and operation of Authorised Vehicle Scrapping Facilities (AVSF) in the country. The draft is open for suggestions / public comments till November 15. The draft guidelines *inter alia* provide the authorisation procedure, criteria, and manner of scrapping vehicles.

Draft notification to recognise all medical devices as drugs issued

The Ministry of Health and Family Welfare vide notification dated 18th October 2019 has proposed to notify all medical devices as drugs and thereby regulate them as per Drugs and Cosmetics Act, 1940 and Medical Devices Rules, 2017 made thereunder. The draft is open for comments within 30 days from the date of publication.

As per the draft notification, following devices intended for use in human beings or animals

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will be recognized, with effect from 01st December 2019, as drugs, namely - devices used alone or in combination, including a software or an accessory, intended by its manufacturer to be used specially for human beings or animals which does not achieve the primary intended action in or on human body or animals by any pharmacological or immunological or metabolic means, but which may assist in its intended function by such means for one or more of the specific purposes of:

i) diagnosis, prevention, monitoring, treatment or alleviation of any disease or disorder;

ii) diagnosis, monitoring, treatment, alleviation or assistance for, any injury or disability;

iii) investigation, replacement, modification or support of the anatomy or of a physiological process; supporting or sustaining life;

iv) disinfection of medical devices; and control of conception

MCA allows filing of e-form DIR-12 by 'ACTIVE non-compliant' company in certain cases

The MCA has notified the Companies (Incorporation) Eighth Amendment Rules, 2019 vide notification dated 16th October 2019 wherein Rule 25A has been amended. Pursuant to the amendment an 'ACTIVE non-compliant' company can now file e-form DIR-12 in case of appointment of directors, where (i) the total number of directors are less than the prescribed minimum number on account of disqualification under section 164 of the Act; (ii) appointment of director in a company where DINs of director(s) have been deactivated; and (iii) appointment of director for implementation of the orders of court/tribunal under the Companies Act, 2013/ IBC. Earlier, only cessation of the director was permitted to such companies.

Further, Rule 28 (Shifting of registered office within the same state) has also been amended to include sub-rule 2 and 3, wherein the Regional Director shall examine the application filed under sub-rule 1, and pass appropriate orders within 15 days of the receipt of application. The certified copy of such order shall be filed in Form No. INC-28 with the Registrar of the state withing 30 days of such receipt of order.

Scheme for Compromise and Arrangement under Sec 230-232 Companies Act, 2013 is permissible during liquidation under IBC

The NCLAT in an appeal filed by Jindal Steel and Power Ltd against the order of NCLT dated 15th May 2018 has held that an application under Section 230 to 232 of the Companies Act, 2013 for compromise and arrangement with creditors is maintainable during the pendency of the liquidation proceedings under the IBC. However, the Promoters who are ineligible under Section 29A IBC are not entitled to file an application for compromise and arrangement in their favour under Section 230 to 232 of the Companies Act, it has clarified.

Corporate debtor undergoing liquidation cannot initiate CIRP against another corporate debtor

The NCLAT vide an order dated 01st October 2019 has held that a 'Corporate Debtor' in respect of whom a liquidation order has been made is not eligible under Section 11(d) of the IBC to make an application to initiate CIRP under Sections 7 or 9 of IBC. Therefore, no application under Sections 7 or 9 of IBC can be filed by the 'Corporate Debtor', which is under liquidation.

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IBC shall have an over-riding effect over the Tea Act, 1953

The Supreme Court vide order in *Duncans Industries Limited vs. A. J. Agrochem* has held that IBC which is subsequent legislation to the Tea Act, 1953, and shall have an over-riding effect over the Tea Act, 1953. The submission on behalf of the appellant that before initiation of proceedings under Section 9 of the IBC, the consent of the Central Government as provided under Section 16G(1)(c) of the Tea Act is to be obtained was rejected on the ground that such an interpretation would frustrate the main object and purpose of the IBC, namely, to complete the "corporate insolvency resolution process" in a time-bound manner.

Food safety in and around school premises – FSSAI issues draft regulations

FSSAI in the Ministry of Health and Family Welfare has notified the draft Food Safety and Standards (Safe food and healthy diets for School Children) Regulations, 2019. The draft Regulation enlists various responsibilities of school authorities to ensure safe food and healthy diets on school premises, and for promotion of safe and healthy foods in and around the school premises. It also provides for general guidelines for providing safe and wholesome food to children. The general guidelines for selection of foods also lists products which should be eaten adequately and moderately, and products availability of which should be discouraged.

Arbitration – Plea of unequal bargaining is no ground to disallow application under Section 45

Delhi High Court has held that plea of unequal bargaining cannot be a ground to disallow application under Section 45 of the Arbitration & Conciliation Act 1996. It observed that since parties entered into agreement at their own volition, they cannot absolve themselves from performing their part of contract. It noted that the exclusive distribution agreement was a well negotiated international commercial arbitration agreement. Court in *Jes & Ben Groupo (P) Ltd v. Hell Energy Magyarorzag Kft.* observed that plaintiffs cannot be allowed to nullify the effect of the arbitration agreement only on the basis of an allegation of fraud simpliciter, without any corroborative material to justify such allegations. It also held that the plaintiff's allegation regarding malpractices and predatory practices were within the scope of adjudication by the arbitrator and that these allegations do not *prima facie* render the agreement to be null and void, inoperative and incapable of being performed. Court also observed that *Forum non Conveniens* alleged by the parties cannot make a subject matter non-arbitrable or incapable of being performed.

Arbitration – Production of additional evidence when permissible u/s.34

Supreme Court has held that application under Section 34 (for setting aside arbitral award) of Arbitration and Conciliation Act will ordinarily not require anything beyond the record that was before arbitrator and that cross-examination of persons swearing into the affidavits should not be allowed unless absolutely necessary. Setting aside the High Court Order, Court in *Canara Nidhi Ltd v. M Shashikala* observed that there were no special averments in the affidavit filed by respondents along with application under Section 151 of CPC which could indicate need for cross examination except stating that it intended to adduce additional evidence. It noted that the respondents failed to make averments which could elucidate that it is an exceptional case.

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Data privacy - Consent to store and access cookies must be specific

CJEU has recently held that the consent of storage and access of cookies on a user's device must be specific and that the same cannot be constituted by expecting the user to deselect pre-checked checkbox to deny the consent. It observed that the decision is unaffected by whether or not the information stored or accessed on the user's equipment is personal data. Court in the case involving *Planet49 GmbH* further held that the service provider must provide user with the duration of the operation of cookies and whether or not third parties have access to these cookies.

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

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

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

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

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

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

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

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

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

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

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

ALLAHABAD
3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.P.)
phone . +91-0532 - 2421037, 2420359
Email:lsallahabad@lakshmisri.com

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