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Contents

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Article

Demystifying the Dark Patterns

By **Manan Chhabra, Sameer Avasarala and Jyotshna Yashaswi**

Dark Patterns are deceptive web or UI designs or patterns used in web-based or mobile-based platforms, intended to manipulate or trick the decision of a consumer by deceiving them to do something that is determinantal to his interest. The article in this issue of Corporate Amicus discusses how authorities in various jurisdictions including India have been trying to combat the issue pertaining to these deceptive practices by introducing new norms under the consumer protection laws, and data protection rules and regulations to maintain consumer's autonomy and transparency in online transactions. It also in this regard deliberates on the Central Consumer Protection Authority's recently notified Guidelines for Preventions and Regulations of Dark Patterns, 2023 which specify 13 dark patterns, and the Digital Personal Data Protection Act, 2023 which according to the authors is important since at the heart of many dark patterns lies the element of 'consent'. Further, according to them, implementation of these guidelines will be a challenge due to ambiguous explanations for some of the dark patterns listed in the Guidelines.

Demystifying the Dark Patterns

By Manan Chhabra, Sameer Avasarala and Jyotshna Yashaswi

Introduction

Dark Patterns can be referred to as the deceptive web or UI designs or patterns commonly used in web based or mobile based platforms, intended to manipulate, or trick the decision of a consumer by deceiving them to do something that is determinantal to his interest and something that the consumer otherwise would not do, compromising consumer's autonomy, decision-making power, and his privacy. Some of the widely used dark patterns include subscription trap, false urgency, and click and bait.

Although the term 'Dark Pattern' is a relatively new concept in the e-commerce domain, the issues persisting to its use in general online user interface have been long pressing. The concerned authorities in various jurisdictions including India have been trying to combat the issue pertaining to these deceptive practices by introducing new norms under the consumer protection laws, and data protection rules and regulations to maintain consumer's autonomy and transparency in online transactions.

Dark Patterns in foreign jurisdictions:

Some of the jurisdictions which have recognised the deceptive practice of dark patterns include:

United States:

In the United States, some of the consumer legislations provide for certain provisions that relate to curbing the practice of dark patterns. The Restore Online Shoppers' Confidence Act ('**ROSCA**') prohibits sellers of negative option subscriptions, i.e., a provision under which the customer's silence or failure to take an affirmative action to reject a product or services or to cancel the subscription is interpreted by the seller as acceptance of the offer.'[1] Further, the States of California followed by Colorado have banned the use of dark patterns or deceptive website designs by companies that trick users into selling their information or giving away their personal data.

Europe:

Similarly, the European Data Protection Board which oversees the implementation of the general data protection laws in the EU, published a Draft Guidelines 3/2022 on dark patterns in social media platform interfaces. The Guidelines aim to provide guidance and practical recommendations to developers and users to identify and forestall dark patterns that violate the General Data Protection Regulation ('**GDPR**').

United Kingdom:

The UK Competition and Markets Authority and Information Commissioner's Office jointly published a paper to

[1] S. 310.2 of the Federal Trade Commission's Telemarketing Sales Rule

lay out clarifications regarding online design practices ('**online choice architecture**') that are likely to influence consumer decisions, for product and user experience (UX) designers.

Singapore:

Currently, the Code of Advertising Practice in Singapore, formulated by the Advertising Standards Authority, relies on voluntary compliance from businesses. The UK-Singapore Digital Economy Agreement signed in June 2022 could prompt changes to the Consumer Protection (Fair Trading) Act, 2003. This amendment proposes to include specific provisions against black-and-white designs, referring to deceptive strategies aimed at misleading consumers.

Indian perspective

The Advertising Council of India ('**ASCI**') is a self-regulatory organization for the advertising industry to protect the interest of consumers against false and misleading advertisements. In November 2022, the ASCI released a discussion paper highlighting various kinds of dark patterns being used by digital platforms to manipulate consumer's choices and patterns. Subsequently, in June 2023 the ASCI issued guidelines on Deceptive Design Patterns in India ('**ASCI Guidelines**') to further the objective of the ASCI Code to ensure honesty from the advertiser and prevent the advertisers from taking advantage of vulnerable customers by any omission, exaggeration, implication, or ambiguity in the advertisements. The ASCI Guidelines were issued to combat the Dark Pattern in digital advertisement. The ASCI Guidelines talks about Drip Pricing, Bait and Switch, False Urgency, and Disguised Ads.

Recently, on 30 November 2023 the Central Consumer Protection Authority ('**CCPA**'), a regulatory body under the Consumer Protection Act, 2019 notified the Guidelines for Preventions and Regulations of Dark Patterns, 2023 ('**Guidelines'**). The Guidelines aim to protect the interest of the consumers focusing on this digital era.

The Guidelines will be applicable to all platforms systematically offering goods and services in India that includes any platform of foreign jurisdiction offering products and services in India, advertisers, and sellers in India. It further has classified dark patterns in the category of misleading advertisement as well as unfair trade practices and therefore attracting the provisions of the Consumer Protection Act, 2019. The Guidelines have specified thirteen dark patterns which have been listed below:

i. ***False Urgency***: Creating a false sense of urgency in the minds of the consumers to mislead them into making immediate purchase or taking actions which may lead to purchase of the items. This is done by showing false popularity of the products or deceiving the consumers by falsely portraying limited availability of the products.

   Illustration - Hurry Up!! Only 2 left in stock, 100 others are looking at this product.

ii. ***Basket Sneaking***: Inclusion of additional items (except for complimentary items), such as services, charity, or donation, at the time of checkout or the payment page without expressed consent of the consumer leading to an increase in the total amount

payable by the consumer for the selected product or service.

Illustration – Addition of travel insurance while purchasing a travel ticket.

iii. ***Confirm shaming***: Using phrase, audio, video to instil a sense of fear or shame, or ridicule or guilt in the mind of the consumer compelling them to do act in way that will lead to purchase or subscribe a product or service or continuing the subscription of a service.

Illustration – Using the phrase like 'I will stay unsecured' on a platform for booking travel tickets when a user does not purchase insurance.

iv. ***Forced action***: Pushing a user to buy additional goods or subscriptions to unrelated services or to share their personal information when purchasing a product or subscribing a product or service.

Illustration – Forcing a user to subscribe to a newsletter in order to purchase a product or service.

v. ***Subscription trap***: The process of intentionally making the cancellation of a subscription a cumbersome process for the user, hiding the option for cancellation of subscription, forcing a user to provide payment details for auto deduction of payment for availing a free subscription or making the instructions related to cancelation of a subscription confusing, ambiguous latent, and cumbersome.

Illustration – Entertainment applications forcing a user to opt for auto debit options in order to avail free subscription for a month.

vi. ***Interface interference***: Tactics used in designing elements to mislead a user from taking a desired action by manipulating the interface in ways that highlight certain information that is favourable to the platform and obscure other relevant information relative to the other information.

Illustration – An 'X' icon on the top-right corner of a pop-up screen leading to opening up of another advertisement rather than closing it.

vii. ***Bait and switch***: Advertising a particular outcome based on the action of the user but deceptively serving an alternate outcome. In simple words, it occurs when an advertisement presents a certain option to attract potential customers but is subsequently replaced by a different option.

Illustration - A seller offering a product at a cheap price which leads the customer to place an order of the same, leading to the product being unavailable and the seller presenting a similar option, which may be more expensive.

viii. ***Drip Pricing***: Practice of concealing certain elements of price and not revealing them upfront, revealing the price post confirmation of the purchase, offering a product or service for free and concealing the involvement of in-app purchases or preventing a user

from availing a service which is already paid for unless something additional is purchased.

Illustration - A consumer ordering food for price X on a platform but subsequently being charged a higher price Y due to it coming from a distance of 10 km away.

ix. ***Disguised advertisement***: Advertisements that are designed to look like other types of content, such as user-generated content or news articles, that blend in with the rest of the interface and trick customers into clicking on them. Disguised advertisement includes misleading advertisement as defined under the Consumer Protection Act, 2019, which includes falsely described products, giving false or misleading guarantee or information about the quality or quantity of the products, expressed or implied misrepresentation that would amount to unfair trade practices or deliberately concealing important information.

Illustration – Advertising a facial cream claiming to change the skin tone of a person from dark to fair.

x. ***Nagging***: Annoying the users with unauthorized and repeated interactions in the form of requests, information, options, or interruptions in their usage of a platform to effectuate a transaction for the sale of goods or services.

Illustration – Website asking a user to download their app again and again.

xi. ***Trick question***: Deliberating using ambiguous or vague language like double negative, confusing wording, or similar trick to deceive the consumer into taking a specific action or abstain them from taking a desired action.

Illustration – The asking of 'Do you opt out of receiving updates of our collection and discounts forever?' when giving the user an option to opt and using phrases like 'Yes, I would like to receive updates' and 'Not Now' instead of a simple Yes.

xii. ***SaaS billing***: Process of generating and collecting payments on a recurring basis from consumers by exploiting positive acquisition loops in recurring subscriptions to get money from users.

Illustration: Silent recurring transactions whereby the user's account is debited without being notified or simply stated auto-renewing monthly subscriptions without telling users.

xiii. ***Rogue Malwares***: Using ransomware or screen-ware to mislead users into believing that they have a virus in their software and aim to convince them to pay for a fake malware removal on their computer that actually installs a malware on their computer.

Illustration: Consumers downloading song from a pirated platform but keep getting pop-up of advertisement on them which are imbedded with malware.

Interface with the DPDPA

At the heart of many dark patterns outlined above lies the element of 'consent' to meet various requirements (*including data protection law*), which is obtained by using various patterns to induce, persuade, influence consent of users when undertaking various e-commerce operations. For example, in case of false urgencies, confirm sharing or forced action, users are incentivized through various means and methods to either purchase additional products, advance purchase plans or provide additional information. It is for this reason that the ambit and relevance of 'consent' under the recently-enacted Digital Personal Data Protection Act, 2023 ('**DPDPA**') remains important.

Recognizing new frontiers of consent in data protection to deal with issues such as deception and consent fatigue, the DPDPA calls for a standard of consent that is free, specific, informed, unconditional and unambiguous with clear and affirmative actions indicating such consent. While the particulars of what may constitute valid consent may further be elucidated through rule-making, free and informed consent remains central. The European Data Protection Board (*or erstwhile Article 29 WP*), time and again, issued guidance on free and informed consent and emphasized on real exercise of choice.

Such real exercise of choice must be without deception, intimidation, coercion or significant negative consequences for failure to provide consent in accordance with the specified terms. To this end, mechanisms which request consent on a take-it-or-leave-it basis are also looked upon and examined carefully. In recognition of the above, the DPDPA recognizes and implements certain guardrails around such consent:

(a) The DPDPA requires Fiduciaries (*entities determining means and purposes*) to prove valid notice was provided and consent was provided by the individual in accordance with the requirements therein i.e., in a free and informed manner. Therefore, Fiduciaries may be called upon to demonstrate validity of notice and consent and must therefore, also store such records in a retrievable / auditable form.

(b) It also limits the processing of personal data to the extent required for a particular purpose. Such limitation would continue to apply regardless of whether a user has provided consent for collection of personal data beyond such purpose.

For example, while a user who downloads a telemedicine application may provide consent for making available telemedicine services and accessing contact list, such consent shall be valid only to the extent that processing is undertaken for providing telemedicine services, and not for the latter.

Conclusion

The framework introduced by the CCPA will have an acute impact on the sellers, advertisers and platforms from both India and outside using deceptive user interface designs to induce consumers in buying products or availing services or subscription which they never intended to purchase or avail.

The market players will have to ensure that they are in compliance with the Guidelines and accordingly instruct the software developers to design the user interface to ensure it restricts usage of any dark pattern and also revisit their existing user interface to remove any design which adversely affects consumer autonomy.

The impact of such dark patterns is also likely to vitiate consent and allied requirements which may be relevant in processing of personal data, with the advent of the DPDPA. The DPDPA deals with such issues by not only providing specificity of consent (*thereby avoiding broad-based consent*), but also limiting collection and such consent to purpose of collection.

Failure to comply will lead to a penalty under the Consumer Protection Act, 2019 for violation of Guidelines notified by CCPA, of up to INR 10 lakh (One million) for an initial offense and up to INR 50 lakh (Five million) for subsequent violations. Additionally, they can be prohibited from endorsing any product or service for up to one year for the first offense and up to three years for repeated violations, apart from potential consequences under data protection laws.

Although these Guidelines are a right step towards ensuring that the consumers in India make informed decisions when purchasing goods or service through an online platform however, implementation of these guidelines will still be a challenge as the platforms or advertisers may take the advantage of ambiguous explanations for some of the dark patterns listed in the Guidelines.

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Notifications & Circulars

- Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2023 notified
- Credit of units of Alternative Investment Funds (AIFs) in dematerialized form – SEBI notifies process
- Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals, and Bankruptcy Trustees (Recommendation) (Second) Guidelines, 2023 notified
- E-mandates for recurring transactions – Limits for execution of e-mandates without Additional Factor of Authentication (AFA) increased for particular categories
- Liberalised Remittance Scheme (LRS) for Resident Individuals – Reporting of monthly return and daily transactions

Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2023 notified

RBI has *vide* Notification No. FEMA 14(R)/2023-RB dated 21 December 2023 notified Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2023 ('**New Regulations**') in supersession of Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016 ('**Old Regulations**').

Following are the key changes in the New Regulations when compared with the Old Regulations:

(a) the New Regulations, as notified, are concise in nature and the manner of receipt and the manner of payment has been combined into one regulation/provision;

(b) the New Regulations provide for segregation of the transactions / manner of receipt and payment under two categories i.e., 'Trade Transaction' and 'Transactions other than Trade Transaction';

(c) the New Regulations have done away with the specific requirements of receipt and payment for the Islamic Republic of Iran, which indicates that it can be treated in the bracket of 'other countries';

(d) the New Regulations have removed one of the manners for receipt and payments i.e., through FCNR / NRE account and SNRR account; and

(e) the New Regulations have not provided for any specific requirements for receipt and payments for Asian Clearing Union (ACU) members countries under 'Transactions other than Trade Transaction'.

Credit of units of Alternative Investment Funds (AIFs) in dematerialized form – SEBI notifies process

Securities Exchange Board of India (SEBI) *vide* Circular No. SEBI/HO/AFD/PoD1/CIR/2023/186 dated 11 December 2023 has specified the process to be followed for dematerialising/crediting the units issued, in cases where investors are yet to provide demat account details to AIFs. It specified that managers of AIFs and Depositories shall reach out to investors to provide their demat account details so that the units are credited to such accounts. Further, in case of investors who have not provided such details, the units shall be credited to a separate demat account named 'Aggregate Escrow Demat Account'; Units of AIFs held in Aggregate Escrow Demat Account can be redeemed and proceeds shall be distributed to respective investors' bank accounts with full audit trail; and the Managers of AIFs shall maintain investor-wise KYC details of units held in Aggregate Escrow Demat Account, including name, PAN and bank account details, along with audit trail of the transactions. The circular also clarifies with respect to issuance and credit of units of AIFs in demat form in the following manner:

Details	Schemes with corpus ≥ INR 500 crore as on 31 October 2023	Schemes with corpus < INR 500 crore as on 31 October 2023 and schemes launched after 31 October 2023, irrespective of corpus
Investors who have provided their demat account details	Units issued after 31 October 2023, shall be in demat form and credited only to investors demat accounts	Units issued after 30 April 2024, shall be in demat form and credited only to investors demat accounts
Investors who have not provided their demat account details	For investors on-boarded prior to 1 November 2023, units shall be credited in Aggregate Escrow Demat Account temporarily, till investors provide their demat account details	For investors on-boarded prior to 1 May 2024, units shall be credited in Aggregate Escrow Demat Account temporarily, till investors provide their demat account details

Details	Schemes with corpus ≥ INR 500 crore as on 31 October 2023	Schemes with corpus < INR 500 crore as on 31 October 2023 and schemes launched after 31 October 2023, irrespective of corpus
Completion of credit of demat units to a) demat accounts of investors who have provided demat account details and b) Aggregate Escrow Demat Account, for those who have not provided demat account details	Latest by 31 January 2024	Latest by 10 May 2024

All depositories must modify their Bye-laws, Rules, and Regulations to accommodate these provisions, including the creation of Aggregate Escrow Demat Accounts for AIFs and adopt implementation standards to comply with these circulars.

Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals, and Bankruptcy Trustees (Recommendation) (Second) Guidelines, 2023 notified

Insolvency and Bankruptcy Board of India (IBBI) has *vide* its guidelines issued on 8 December 2023 provided the procedure for preparing panel of Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees as specified under Sections 16(4), 34(6), 97(4), 98(3), 125(4), 146(3) and 147(3) of the Insolvency and Bankruptcy Code, 2016. The guidelines aim to streamline the process by proactively preparing and sharing a panel of IPs in advance, thus minimizing administrative delays in their appointment.

The guidelines provide for the following-

1. ***Eligibility of IPs***: An IP can only if included in the panel if there is no disciplinary proceeding initiated by IBBI or IPA; is not convicted in the last three years; has submitted expression of interest and his consent to act as IRP, RP, Liquidator, and Bankruptcy trustee; and holds an Authorization for Assignment (AFA).
2. ***Submission of Expression of Interest (EOI)***: To be submitted by the IPs in Form A (Expression of Interest to act as an IRP, Liquidator, RP, and BT in any process relating to any corporate or Individual Debtor), which shall be deemed to be an unconditional consent to act as an IRP, Liquidator, RP, or BT.
3. ***Creation of Panel***: The Board will create a unified panel of Insolvency Professionals (IPs) eligible for appointment as IRP, Liquidator, RP, and BT. This panel will be shared with the National Company Law Tribunal (NCLT) and Debt Recovery Tribunal (DRT) as per the provided guidelines. The validity of the panel will be six months.
4. ***Scoring criteria***: In case of tied scores, IPs will be ranked based on their registration date with the Board. The IP with an earlier registration date takes precedence over those registered later.
5. ***Conditions for IPs***: Inclusion of the IP's name in the panel signifies acceptance to serve as IRPs, Liquidator, RP, or BT upon appointment by the National Company Law Tribunal or Debt Recovery Tribunal, as applicable; IPs shall not withdraw such consent unless permitted by the aforementioned tribunals; and IPs shall not submit resignation during the validity period of the Panel.

E-mandates for recurring transactions – Limits for execution of e-mandates without Additional Factor of Authentication (AFA) increased for particular categories

RBI *vide* its Circular CO.DPSS.POLC.No.S-882/02.14.003/2023-24, dated 12 December 2023 referenced its previous circular

CO.DPSS.POLC.No.S-518/02.14.003/2022-23 dated 16 June 2022, which had outlined certain provisions regarding the relaxation in Additional Factor of Authentication (AFA) for e-mandates/standing instructions on cards, Prepaid Payment Instruments, and Unified Payments Interface for recurring transactions up to ₹15,000, subject to specific conditions. The Circular dated 12 December has now increased the limits for execution of e-mandates without Additional Factor of Authentication (AFA). As per the Statement on Developmental and Regulatory Policies, effective immediately, the limit for particular categories i.e., (a) mutual fund subscriptions; (b) insurance premium payments; and (c) credit card bill settlements, has been raised from INR 15,000 to INR 1,00,000 per transaction.

Liberalised Remittance Scheme (LRS) for Resident Individuals – Reporting of monthly return and daily transactions

RBI *vide* RBI/2023-24/93 A.P. (DIR Series) Circular No.11, dated 22 December 2023 has announced that with effect from 26 December 2023, the submission of monthly return and daily transactions through the XBRL site will be discontinued and shifted to the Centralised Information Management System (CIMS), which is the Bank's new data warehouse. The AD Banks need to comply with the new assigned return codes and timelines as specified.

Ratio Decidendi

- Arbitration clauses present in unstamped/inadequately stamped agreements are enforceable, but inadmissible in evidence – Supreme Court
- Group of Companies Doctrine is valid in Indian Arbitration jurisprudence – Supreme Court
- Insolvency – Sections 95 to 100 of Insolvency and Bankruptcy Code, 2016 are constitutionally valid – Supreme Court

Arbitration clauses present in unstamped/inadequately stamped agreements are enforceable, but inadmissible in evidence

A Seven-Judge Constitutional Bench of Hon'ble Supreme Court, on 13 December 2023, held that the arbitration clauses in unstamped/inadequately stamped agreements are enforceable. The Court overruled a Five-Judge Bench decision passed in April 2023, which by a 3:2 majority had held that unstamped arbitration agreements are not enforceable in nature.

Brief facts:

On 11 January 2021, in *N.N. Global Mercantile Pvt. Ltd.* v. *Indo Unique Flame Ltd.*, (2021) 4 SCC 379 ('***NN Global 1***'), a Three-Judge Bench of the Supreme Court determined the enforceability of an arbitration agreement contained within an unstamped work order. The Apex Court held that an arbitration agreement would be considered separate from the underlying commercial contract and hence, would not be considered void or non-existent. The document being unstamped is a curable defect under the Indian Stamp Act, 1899 ('**Stamp Act**'). The Court thus adopted a view in variance to the settled principle of an arbitration agreement being considered invalid, as observed in the case of *SMS Tea Estates Pvt. Ltd.* v. *Chandmari Tea Co. Pvt. Ltd.*, (2011) 14 SCC 66 ('***SMS Tea Estates***'). The Court also referred to the case of *Vidya Drolia* v. *Durga Trading Corpn.,* (2021) 2 SCC 1, where the question pertained to whether the statutory bar under Section 35 of the Stamp Act would also render the arbitration agreement contained in the instrument invalid. This reference was answered in the subsequent judgement of *N.N. Global Mercantile Pvt. Ltd.* v. *Indo Unique Flame Ltd.,* (2023) 7 SCC 1 *('**NN Global 2**'*), where the majority Three-Judge Bench held that that *NN Global 1* did not represent the correct position of law.

In *NN Global 2*, the judgement of *SMS Tea Estates* was upheld, along with other concurring judgements while the minority wrote a dissenting judgement, against the overturning of *NN Global 1*. The majority bench in *NN Global 2* based their rationale for rendering arbitration agreements in unstamped documents void on the fact that an unstamped agreement is not an enforceable contract and simply does not exist in law, furthering that the arbitration agreement contained in such unstamped agreement would also not exist, due to the instrument being void in itself. The Court further acting under Section 11 of the Arbitration and Conciliation Act, 1996 ('**A&C Act**') held that the same cannot disregard the mandate of Sections 33 and 35 of the Stamp Act that mandate examining and impounding of an unstamped/inadequately stamped instrument.

In light of the *NN Global 2* judgement and other concurring precedents, the proceedings were brought under a seven-judge bench of the Supreme Court to consider the correctness of the view adopted in the *NN Global 2* judgement.

Contention of the Petitioners:

- The Petitioners broadly contend that the *NN Global 2* judgement does not lay down the correct position of law. Section 11(6A) of the A&C Act expressly confines the jurisdiction of courts to examination of the existence of an arbitration agreement. Going into the unstamping of the agreement would exceed the jurisdiction given to courts and go against the ideology of minimal court intervention in cases of arbitration. This would thus defeat the legislative purpose of the Act.
- The Petitioners further contend that the deficiency in stamping of an instrument is a curable defect and the effect of the same ceases to operate as soon as the state secures the revenue interest.
- Petitioners also contended that the doctrine of separability recognizes that an arbitration agreement is a self-contained agreement and has to be considered distinct from the underlying contract. Thus, the unstamping of the instrument in this case would not render the arbitration agreement contained within the same, void.

Contention of the Respondents:

- The Respondents contend the maintainability of the curative petition filed before the Supreme Court on the basis of the absence of a live cause or matter to justify the invocation of the Supreme Court's jurisdiction.
- They further contend that Section 11(6A) of the A&C Act is not confined to determining the existence of an arbitration agreement. The 'examination' mentioned under this section involves both aspects of existence and validity, that need to be sought out with reference to the arbitration agreement.
- Furthermore, the Respondents contend that Section 33 of the Stamp Act casts a mandatory requirement on courts to impound an unstamped/inadequately stamped instrument under Section 11 of the A&C Act.

Analysis and decision by Court:

The Hon'ble Supreme Court examined the provisions of the Indian Stamp Act and the A&C Act and looked into the aspects of separability of an arbitration agreement, the harmonious construction of the A&C Act and the Stamp Act, the doctrine of competence-competence and the A&C Act's silence on stamp duty.

Sections 33 and 35 of the Stamp Act state that any person with authority to receive evidence must impound an instrument that is not duly stamped and the same is inadmissible as evidence. However, the Court held that admissibility of a document has to be separate from its enforceability under law. The only challenge in this regard was the harmonizing of the provisions of the Stamp Act and A&C Act. The A&C Act is observed to have primacy with respect to arbitration agreements and is a special law. Through a catena of judgements including *Gulzari Lal Marwari* v. *Ram Gopal,* 1936 SCC OnLine Cal 275, that upheld the validity of an instrument despite inadequate stamping, the Court thus concluded that there is a distinction between inadmissibility and voidness.

Looking into the purpose of the Stamp Act and the A&C Act, it was held that the Stamp Act was a fiscal statute that raised revenue for the State and the A&C Act was formulated for efficient dispute resolution. Furthermore, Section 5 of the A&C Act mentions minimal judicial supervision in the arbitration process where the Arbitral Tribunal holds exclusive jurisdiction. Hence, the Court will exceed jurisdiction if it decides the validity of a stamped agreement under Section 5. The competence-competence principle guides Courts to restrict intervention at the referral stage and abstains Courts from considering any challenge to the Tribunal's jurisdiction, until the arbitrators have addressed the same.

The Court further held that stamping of an instrument does not fall within the determinations under Sections 8 and 11 of the A&C Act, and that the referral Court, in any arbitration-related matter, must only ascertain the prima-facie existence of an arbitration agreement. Thus, the objections regarding the stamping would fall under the jurisdiction of the Arbitral Tribunal. The judgements of *NN Global 2* and *SMS Tea Estates* were thus overturned, and it was stated that unstamped/inadequately stamped agreements would be enforceable in nature, but inadmissible as evidence, and the arbitration agreement contained within such documents would be valid.

[In Re: *Interplay Between Arbitration Agreements Under The Arbitration And Conciliation Act 1996 And The Indian Stamp Act 1899* – Judgement dated 13 December 2023 – 2023 SCC OnLine SC 1666]

Group of Companies Doctrine is valid in Indian Arbitration jurisprudence

A Five-Judge Constitution Bench of the Hon'ble Supreme Court has upheld the validity of the Group of Companies Doctrine ('**Doctrine**') in the jurisprudence of Indian Arbitration. The doctrine provides that an arbitration agreement which is entered into by a company within a group of companies may bind non-signatory affiliates, if the circumstances demonstrate the mutual intention of the parties to bind both signatories and non-signatories.

Brief facts:

In Indian Arbitration jurisprudence, the Doctrine was recognized for the first time in the Judgement of *Chloro Controls India (P) Ltd* v. *Severn Trent Water Purification Inc*., (2013) 1 SCC 641**,** ('***Chloro Controls'***) wherein a joinder of non-signatory parties to arbitration on the basis of the Doctrine was allowed as parties 'claiming through or under' a signatory party, if the circumstances demonstrate the mutual intention of the parties on the basis of the composite nature of the transaction, to direct commonality of subject-matter, and direct relationship of the non-signatory to the signatory parties.

However, in the case of *Cox and Kings* v. *SAP India Pvt. Ltd. & Anr* ('***Cox and King 1'***), the Hon'ble Chief Justice observed the discrepancies regarding the application of the Doctrine and its implications going forward. Consequently, the matter was referred to the Constitution Bench to seek clarity on the following two questions:

a) Whether the phrase 'claiming through or under' in Sections 8 and 11(6) of the Arbitration & Conciliation Act, 1996 ('**Act**'), could be interpreted to include the 'Group of Companies' doctrine; and

b) Whether the 'Group of Companies' doctrine as expounded by the *Chloro Controls* case and subsequent judgments is valid in law.

Concurrently, the following questions of law were posed for determination by the Larger Bench:

a) Whether the Doctrine should be read into Section 8 of the Act or whether it can exist in Indian jurisprudence independent of any statutory provision;

b) Whether the Doctrine should continue to be invoked on the basis of the principle of 'single economic entity';

c) Whether the Doctrine should be construed as a means of interpreting implied consent or intent to arbitrate between the parties; and

d) Whether the principles of alter ego and/or piercing the corporate veil can alone justify pressing the Doctrine into operation even in the absence of implied consent.

Submissions by the Petitioners:

- The application of the Doctrine hinges upon the implicit or inferred consent of the non-signatory to be legally bound by the arbitration agreement.
- The definition of 'party' within Section 2(1)(h) of the Act should not be confined solely to the signatories of an arbitration agreement. Instead, it should be interpreted expansively to encompass non-signatories based on the factual context and circumstances surrounding the case.
- Section 7 of the Act acknowledges that the defined legal relationship between parties need not always be contractual. Additionally, Section 7(4)(b) suggests that a non-signatory may be obligated by an arbitration agreement if, within written communication, it demonstrates an intent to be bound by said agreement.
- Ideally, the Doctrine should be employed by the Arbitral Tribunal. During the reference stage, the Court's role should be limited to forming a *prima facie* opinion, leaving the determination of whether non-signatories should be included in the arbitration agreement to the Arbitral Tribunal.

Submissions by the Respondents:

- As per Section 7 of the Act, an arbitration agreement must be in writing. Hence, an arbitration agreement cannot be established solely on the implied consent of a non-signatory.
- The Group of Companies Doctrine and single economic entity doctrine are fundamentally rooted in economic principles and lack foundation within Contract law or Company law. Consequently, they cannot be utilized to ascertain the intent of non-signatories to be bound by an arbitration agreement.
- For the Group of Companies Doctrine to bind a non-signatory to an arbitration agreement:

a) Mutual intention of all parties, including non-signatories, to be bound by the arbitration agreement is necessary.

b) The non-signatory's acceptance must be absolute, either explicitly expressed or implied through actions like negotiation, performance, or termination of the contract.

- Contracts involving multiple parties result from meticulous negotiations after thorough consideration. Imputing intentions to parties contrary to the express terms of the agreement would undermine the purpose of memorializing their understanding in a negotiated written document.
- An arbitration agreement that specifically identifies the executing parties and outlines the agreed-upon arbitral procedure cannot be interpreted to extend its scope to encompass third parties.
- The *Chloro Controls* case incorrectly neglected to assess whether implied consent derived from a non-signatory's conduct fulfils the requirement of a clear intention to arbitrate.
- Furthermore, *Chloro Controls* erroneously asserted that Courts have the discretion to refer non-signatory parties to arbitration under Sections 8 or 45 of the Act in exceptional circumstances. Introducing such discretion creates ambiguity in arbitration practices within India.

Analysis and decision by the Court:

The Court held that the definition of 'parties' within the Arbitration Act, particularly when read in conjunction with Section 7, encompasses both signatory and non-signatory parties involved in the arbitration agreement. This distinction becomes evident when considering the Act's delineation between a 'party' and 'persons claiming through or under' a party to the arbitration agreement.

It is notable that relying solely on concepts like piercing the corporate veil or alter ego is not deemed to be sufficient to warrant the application of the Doctrine. Instead, Courts or Tribunals seeking to invoke this Doctrine are required to assess and consider a comprehensive set of factors outlined in the *Oil and Natural Gas Corporation Ltd* v. *Discovery Enterprises Pvt. Ltd.,* (2022) 8 SCC 42. These include (i) the mutual intent of the parties; (ii) the relationship of a non-signatory to a party which is a signatory to the agreement; (iii) the commonality of the subject matter; (iv) the composite nature of the transactions; and (v) the performance of the contract.

Therefore, exclusively relying on the principle of a single economic entity is regarded as insufficient grounds for applying this Doctrine. The interpretation of the Group of Companies Doctrine, as seen in the *Chloro Controls* case to link it with the phrase 'claiming through or under,' has been viewed as incorrect and incongruent with well-established principles in Contract and Company law. The Supreme Court further advised the Courts at the referral stage to defer to the Arbitral Tribunal for the determination of whether a non-signatory is bound by the arbitration agreement.

Furthermore, the Court also observed that the Doctrine is based on determining the mutual intention to join the non-signatory as a 'veritable' party to the arbitration agreement. The Court held that once a Tribunal comes to the determination that a non-signatory party is a party to the arbitration agreement, such a non-signatory party can then apply for interim measures under Section 9 of the Act.

[*Cox and Kings Ltd.* v. *SAP India Pvt. Ltd. & Anr.* – 2023 INSC 1051, dated 6 December 2023, Supreme Court]

Insolvency – Sections 95 to 100 of Insolvency and Bankruptcy Code, 2016 are constitutionally valid

The Hon'ble Supreme Court held that Sections 95 to 100 of the Insolvency and Bankruptcy Code, 2016 **('IBC')** cannot be held as unconstitutional. The Apex Court held that the Sections 95 to 100 do not violate Articles 14 and 21 of the Constitution of India by not affording an opportunity of hearing to the personal guarantors before the insolvency petition filed by creditors is admitted against them and the moratorium is automatically applied against them as soon as the insolvency petition is filed.

Brief facts:

A Three-Judge Bench of the Hon'ble Supreme Court dismissed a batch of 384 writ petitions ('**Writ Petitions**') filed under Article 32 of the Constitution of India, 1950, assailing the constitutionality of Sections 95-100 ('**Impugned Provisions**') of the IBC pertaining to initiation of insolvency proceedings against individuals and partnership firms as codified in Part III of the IBC**.** Writ Petitions were filed before the Supreme Court, challenging the constitutionality of the Impugned Provisions for alleged violation of Articles 14 and 21 of the Constitution. The allegations pertaining to the violation of Articles 14 and 21 were based on the fact that the scheme of Insolvency resolution process **('IRP')** under Part III with respect to partnership firms is different from the scheme of Corporate Insolvency Resolution Process **('CIRP')** for body corporates under Part-III of the IBC.

Submission by the Petitioners:

- After filing of an application under Section 95 of the IBC the following should not automatically take place (a) An automatic interim moratorium; (b) The automatic appointment of a resolution professional subject to worthiness; (c) The resolution professional seeking information from the guarantor; and (d) The resolution professional examining the information received and submitting a report; as none of the above steps, once performed, is reversible under Section 100 which is the first stage at which two crucial steps take place (a) it is the first time at which a judicial body adjudicates; and (b) it is the first stage at which the guarantor is furnished with a hearing by the adjudicating authority.
- A judicial aspect is involved even before the resolution professional begins the task outlined in Section 99, for determining the jurisdictional requirements for the existence and continuity of a debt. Secondly, following the appointment of the resolution professional under Section 97(5), wide-ranging powers are granted by Section 99(4) to demand information not only from the debtor but also

from third parties. As a result, the submission emphasizes the need for a judicial determination by the adjudicating authority before the stage outlined in Section 100.

- Petitioners seek natural justice by a judicial body at the stage of section 97(1) similar to the exercise of the adjudicating authority which discharges its functions under section 7 or 9 of the IBC.
- Without incorporating a requirement for a hearing before the adjudicating authority prior to the appointment of a resolution professional, the provisions of Sections 95 to 100 would be arbitrary and violative of Article 14.

Submissions by the Respondents:

- The requirement of observing the principles of natural justice arises at the adjudicatory stage under Section 100 of IBC. Plainly read and properly implemented, there is no significant civil consequence on a debtor or personal guarantor before the stage of adjudication under Section 100 of IBC. Therefore, there is no breach of natural justice under Chapter III of Part III of the IBC
- The process which is followed by the resolution professional is only for the purpose of collating facts and submitting a report together with recommendations to the adjudicating authority which does not possess the character of a submission which binds the adjudicating authority;
- Even during the course of the process, which is followed by the resolution professional, the statute has indicated sufficient engagement for the debtor with the resolution professional.
- The imposition of a moratorium under Section 96 is intended to insulate the debtor and, unlike the moratorium under Section 14 or 101, is of no prejudice to the debtor; and
- Consistent with the timelines which are provided by the IBC, it would be inappropriate to read compliance with the principles of natural justice at a stage anterior to Section 100 since it would dislocate the entire scheme of the IBC.

Analysis and decision by the Court:

The Hon'ble Supreme Court, in the present judgement, rejected the arguments presented by the Petitioners and affirmed the constitutionality of the challenged provisions based on the following reasons.

The adjudicatory function of the adjudicating authority commences, under Part III, after the submission of a recommendatory report by the resolution professional. Evidently, bearing in mind the clear differences between the CIRP under Part II and the insolvency resolution process for individuals and partnership under Part III, the legislature has carefully calibrated: (i) The role of the resolution professional; (ii) The imposition of the moratorium; and (iii) The stage at which the adjudicating authority steps in under Part II, on one hand, and Part III, on the other. This is based on an intelligible differentia between the nature of the insolvency resolution process in the case of a corporate debtor, on one hand, and individuals or partnerships, on the other.

The resolution professional appointed under Section 97 serves a facilitative role of collating all the facts relevant to the examination of the application for the commencement of the insolvency resolution process which has been preferred under Section 94 or Section 95.

The report to be submitted to the adjudicatory authority is recommendatory in nature on whether to accept or reject the application. No hearing should be conducted by the adjudicatory authority to determine 'jurisdictional facts' at a stage when it appoints a resolution professional under Section 97(5) of the IBC. No such adjudicatory function is contemplated at that stage. The resolution professional may exercise the powers vested under Section 99(4) of the IBC to examine the application for insolvency resolution and to seek information on matters relevant to the application to facilitate the submission of the report recommending the acceptance or rejection of the application.

There is no violation of natural justice under Section 95 to Section 100 of the IBC as the debtor is not deprived of an opportunity to participate in the process of the examination of the application by the resolution professional.

No judicial determination takes place until the adjudicating authority decides under Section 100 whether to accept or reject the application. The report of the resolution professional is only recommendatory in nature and hence does not bind the adjudicatory authority when it exercises its jurisdiction under Section 100. The adjudicatory authority must observe the principles of natural justice when it exercises jurisdiction under Section 100 to determine whether to accept or reject the application. The purpose of the interim moratorium under Section 96 is to protect the debtor from further legal proceedings.

The provisions of Section 95 to Section 100 of the IBC are not unconstitutional as they do not violate Article 14 and Article 21 of the Constitution.

[*Dilip B Jiwrajka* v. *Union of India & Ors.* – 2023 SCC OnLine SC 1530]

News Nuggets

- Arbitration – Court cannot examine admissibility or relevance of evidence when exercising powers under Section 27
- Arbitration – Cancellation of a conveyance deed is an arbitrable matter, being an action in personam
- Insolvency – NCLT to refrain from affixing 'date of hearing' on an order, if 'date of pronouncement' is different
- Insolvency – Promoter is eligible to submit Resolution Plan even if MSME Registration is obtained post commencement of CIRP
- Insolvency – Date of default or pleadings can be amended at any stage of the matter

Arbitration – Court cannot examine admissibility or relevance of evidence when exercising powers under Section 27

The Delhi High Court has held that a Court exercising powers under Section 27 of the Arbitration and Conciliation Act, 1996 ('**A&C Act**') cannot opine on the relevancy or admissibility of the evidence, when the Court is approached for the same. In *Steel Authority of India Ltd.* v. *Uniper Global Commodities*, O.M.P.(E)(COMM.)22/2023 dated 1 December 2023, SAIL filed a petition under Section 27 of the A&C Act for receiving directions from the Court to allow a witness to appear before the Arbitral Tribunal, to adduce the evidence presented on their behalf. In the present case, the Petitioner had chartered a vessel for cargo transport at Haldia Port and due to certain infrastructural damages in the vessel, it was rendered unfit for berthing and discharging the goods at the port. The River Pilots of the Haldia Port had refused to board the said Vessel and even the concerned officer of the Kolkata Port Trust had issued an e-mail to the Petitioner confirming in this regard. Consequently, the Respondent claimed demurrage for the period of vessel's stay at the Haldia Port, which was objected by the Petitioner. Against the petition filed, the Tribunal issued an order to seek assistance in taking evidence from Port, Kolkata about the email, which can assist the Petitioner to support its demurrage refusal claim. Further, the order stated that the *Tribunal is not required to go into relevance or materially of the evidence sought to be produced.*

When approached, the Court mentioned that the general principle of not disturbing orders of the Arbitral Tribunal under Section 27 shall be followed however commented that the Arbitral Tribunal must always exercise direction and scrutinize the relevance of all evidence produced before it. Referring to the case of *Thiess Iviinecs India* v. *NTPC Limited,* 2016 SCC OnLine Del 1819 among other precedents, the Court stated that while exercising powers under Section 27 of the A&C Act, the Court can only assist the Arbitral Tribunal in taking evidence and cannot determine the materiality and weight of the same. The Court does not hold an adjudicatory role in this regard, and it is the Arbitral Tribunal's responsibility to form a *prima facie* view on the relevance and admissibility of evidence in matters before it. The High Court, thus, dismissed the petition and directed the Arbitral Tribunal to consider the relevancy of evidence before allowing the petitioner to seek the High Court's assistance in the matter.

Arbitration – Cancellation of a conveyance deed is an arbitrable matter, being an action in *personam*

The Supreme Court has allowed arbitration between two parties in a property dispute based on the arbitration clause contained in the tripartite agreements. In *Sushma Shivakumar Daga & Anr.* v. *Madhurkumar Ramkrishnaji Bajaj & Ors.,* Civil Appeal No. 1854 of 2023 dated 15 December 2023, the Court held that cancellation of a deed is an action *in personam* and is hence, an arbitrable matter. The Appellants had sought for the

cancellation of the conveyance deed and registered development agreements, that did not contain an arbitration clause. However, since these agreements were results of tripartite agreements entered into by the petitioner containing an arbitration clause, the Respondents sought arbitration of the dispute. The Respondents filed an application under Section 8 of the Arbitration & Conciliation Act, 1996 ('**A&C Act**') for reference of the parties to arbitration, which was earlier allowed by the Trial Court and allowed through appeal in the Bombay High Court. The Supreme Court in the present appeal, examined the Tripartite Agreements and concurred with the judgements of the lower courts stating that the source of the Conveyance Deed and Development Agreements were contained in the Tripartite Agreements and an arbitration agreement was thus, present. The Court referred to the case of *Vidya Drolia* v. *Durga Trading Corporation,* (2021) 2 SCC 1, stating that a four-fold test was laid down in the case for determination of the arbitrable nature of a dispute. It stated that when an application is filed under Section 8 or Section 11 of the A&C Act, only those issues which are 'manifestly non-arbitrable' or when there is explicit absence of an agreement, would render the applications void. Referring to the case of *Deccan Paper Mills* v. *Regency Mahavir Properties, (*2021) 4 SCC 786, the Court finally held that cancellation of a deed was an action *in personam*, not *in rem*. In light of the same and in presence of an arbitration agreement, the Court dismissed the appeal.

Insolvency – NCLT to refrain from affixing 'date of hearing' on an order, if 'date of pronouncement' is different

The Supreme Court has held that when a matter is heard by the National Company Law Tribunal on a particular date, but the order is pronounced on another date, then NCLT must refrain from affixing the date of hearing on the order. The Court in this regard noted that the requirement of pronouncement of order cannot be dispensed with, since under the NCLT Rules, 2016 there is a distinction between 'hearing' and 'pronouncement'. In *Sanjay Pandurang Kalate* v. *Vistra ITCL (India) Limited and Others* dated 16 December 2023, the Appellant was the erstwhile Director of Corporate Debtor, and an interlocutory application was filed by the Appellant before NCLT, alleging that reply to Section 7 petition on behalf of the Corporate Debtor was filed by Respondent No. 2 without authorization of the Board of Directors or intimation to the Appellant. The order was uploaded by the NCLT Registry on 30 May 2023, though the order carried the date of 17 May 2023 (date of hearing). The NCLAT dismissed the appeal for being barred by limitation while holding that the limitation has to be computed from 17 May 2023. The Supreme Court opined that the limitation runs from the date of pronouncement of the order and held that the limitation would not run from the date on which the hearings were concluded. Since no order was passed before 30 May 2023, there was no occasion for the Appellant to file an application for a certified copy on 17 May 2023. The Bench further noted that '*Time for filing an appeal would commence only when the order appealed from was uploaded since prior to that date no order was pronounced*.' The order for the NCLAT was thus set aside.

Insolvency – Promoter is eligible to submit Resolution Plan even if MSME Registration is obtained post commencement of CIRP

The Supreme Court has held that the Promoter of a Corporate Debtor is eligible to submit a resolution plan in terms of Section 240A of the Insolvency and Bankruptcy Code, 2016**,** even if the Corporate Debtor was registered as Micro Small Medium Enterprise ('**MSME**') after commencement of Corporate Insolvency Resolution Process. In the case of *Hari Babu Thota* v. *(xyz)* dated 14 December 2023, the Corporate Debtor was admitted into CIRP and subsequently it got registered as a MSME. The Appellant who was appointed as the Resolution Professional of the Corporate Debtor submitted a resolution plan however the application was dismissed, it being barred under the manner provided in Section 29A of the IBC, which restricts certain persons from becoming a resolution applicant including Promoters. The Supreme Court observed that Section 240A of the IBC provides that the bar under Section 29A to submit a plan by Promoters would not apply in the CIRP of an MSME Corporate Debtor. The Court referred to the judgment in *Arcelormittal India Private Limited* v. *Satish Kumar Gupta & Ors.* and stated that ineligibility under Section 29A(c) occurs at the time of submitting the resolution plan and not at initiation of CIRP proceedings and since while submitting the resolution plan the Corporate Debtor was granted the MSME status, it would not affect the eligibility criteria, and the exemption status of MSME from certain provisions of Section 29A would prevail from this point.

Insolvency – Date of default or pleadings can be amended at any stage of the matter

The National Company Law Tribunal, New Delhi Bench, has allowed the application of the Applicant for amendment of the date of default and held that the amendment of pleadings (including date of default) in a Corporate Insolvency Resolution Process ('**CIRP**') application filed under Section 7 of Insolvency and Bankruptcy Code, 2016 ('**IBC**') can be done at any stage of the matter. In the case of *Piramal Enterprises Ltd.* v. *Kay Jay Leasing* dated 13 December 2023, during the pendency of the CIRP, the Corporate Debtor filed an Interlocutory Application for dismissal of the Company Petition on the ground that the petition is barred under Section 10A of IBC. Thereafter, the Applicant filed another Interlocutory Application for rectification of the date of default, and both applications were heard together. The Applicant contended that in Part IV of Section 7 application, the date of defaults committed by the Corporate Debtor was mentioned and that the same were continuing in nature and one of the defaults had occurred on 30 September 2020. Further, various defaults also occurred even after the said date of 30 September 2020. Therefore, the Applicant sought rectification of the date of default i.e., 30 September 2020 as mentioned in Part IV of the Section 7 application. NCLT allowed the application and observed that the Corporate Debtor has defaulted and non-fulfilled its payment obligations under the Loan Agreement and the defaults are continuing in nature.

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