Corporate
amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

February 2024 / Issue–149

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Decoding Fiduciaries and Processors: The DPDPA lens

By **Sameer Avasarala and Bhavana Kulluru**

The article in this issue of Corporate Amicus dives deep into the understanding of certain key actors engaged in the processing of personal data – Data Fiduciaries and Data Processors. Observing that while Fiduciaries, by their nature, are expected to exercise decisional control over the purposes and means of processing, and Processors act on the former's instructions, the article outline various complex situations where the roles blur. It also notes that the European Data Protection Board recognizes that room exists for Processors to make certain decisions on the means of processing, and that a classification is drawn between 'essential' and 'non-essential' means. According to the authors, the Data Protection Board to be constituted under the Digital Personal Data Protection Act, 2023 may provide more clarity on the determination of Fiduciary and Processors, and whether a non-compliant Processor which exercises decisional control over processing is likely to be considered a Fiduciary. They in this regard note that while this may be contrary to the conscious removal of Processor liability under various drafts of the law, the approach to be adopted by the Government and/or the DPB may provide further clarity in the implementation stages.

Decoding Fiduciaries and Processors: The DPDPA lens

By Sameer Avasarala and Bhavana Kulluru

The Digital Personal Data Protection Act, 2023 ('**DPDPA**') is a comprehensive framework that provides for the processing of personal data of individuals ('**Data Principals**'). It applies to the processing of personal data within India, as well as outside India to the extent that it relates to the offering of goods or services to Indian residents. It proposes to establish the Data Protection Board ('**DPB**') and recognizes certain key actors engaged in the processing of personal data *viz.*

(a) ***Data Fiduciaries***: These are entities that determine the ***purposes and means*** of processing[1] personal data, either alone or in conjunction with others (**Fiduciaries**). A comparison with the EU General Data Protection Regulation ('**GDPR**') reveals that this is similar to the ambit of 'Controller'[2] under the GDPR, which is also identified based on the decisional control exercised with regard to the processing of personal data.

(b) ***Data Processors***: These are entities that process personal data on behalf[3] of Data Fiduciaries (**Processors**). They are expected to act on the instructions of the Data Fiduciaries and not exercise autonomy or decisional control over the purposes or means of processing of personal data.

Processor liability through various drafts

A swift review of the various drafts of the data protection law would reveal a change in approach towards regulating processors. From 2018[4] until 2022[5], various drafts of the Data Protection Bill not only recognized and provided certain direct obligations on processors (*such as implementing security measures*[6]) but also provided penal consequences attached to non-compliance, applicable to Processors, along with Fiduciaries.

In stark contrast, the DPDPA does not provide any direct obligations on Processors, instead, it mandates Fiduciaries to

[1] Section, 2(x), Digital Personal Data Protection Act, 2023.
[2] Article 4(7), General Data Protection Regulation, 2016.
[3] Section 2(k), Digital Personal Data Protection Act, 2023.
[4] Draft Personal Data Protection Bill, 2018.
[5] The Digital Personal Data Protection Bill, 2022.
[6] Section 8(5), Digital Personal Data Protection Act, 2023.

comply with various obligations and holds them responsible for ensuring Processor compliance. This necessitates Fiduciaries to employ necessary measures to monitor and ensure compliance through comprehensive agreements, periodic reviews, audits, and other measures at their disposal, from time to time.

Understanding Fiduciaries and Processors: The 'why' and 'how' of processing

It is evident that Fiduciaries, by their nature, are expected to exercise decisional control over the purposes and means of processing while Processors act on the former's instructions. However, this 'bright line' in identifying these roles may also blur in more complex situations involving the processing of personal data. We have outlined some of these situations below:

1. ***Credit Scoring Agencies***: As part of determining creditworthiness or overall loan eligibility, financial institutions often engage credit rating agencies to extract necessary information relating to the borrowers. While the purpose of processing is determined by the financial institutions, for example, to determine credit eligibility, such credit agencies still exercise certain discretion in determining finer means of processing, such as algorithmic decisions and methodologies, to achieve the broader purpose.
2. ***Marketplaces***: In the context of e-commerce marketplaces, while marketplace platforms determine the purposes of processing user data and the manner in which such data is processed, 'sellers' on such platforms also process user data, for example, for processing orders and facilitating delivery through logistics partners, often determining the 'why' and 'how' of processing in many cases.
3. ***Fraud Detection and Prevention Services***: Financial institutions often engage third parties at the time of customer onboarding, for assessing risk and complying with KYC and anti-money laundering regulations. In many instances, this may also involve engaging third parties to conduct such assessments. These entities exercise a reasonable degree of independence in processing personal data to provide intelligence and insights on the nature and extent of risk involved in onboarding.
4. ***Marketing and Analytics***: Many digital businesses may engage third-party service providers to assist them as part of their broader marketing strategies, ranging from

analytics to personalized marketing solutions. While the broader purposes of such processing are determined by digital businesses, the finer strategies for marketing and execution are often conceptualized and undertaken by such agencies pursuant to the analysis of datasets.

5. ***Wealth Management***: Wealth managers or firms are engaged in the management of assets and liabilities of individuals or groups of individuals. They may process personal data for a wide variety of purposes to help clients secure appropriate investment options. Similarly, they may also exercise reasonable discretion in the manner in which they process personal data and may determine the means of such processing independently.

Essential and Non-Essential means in the Controller-Processor interface

Similar to the DPDPA, the GDPR also emphasizes the role of Controllers and Processors[7] in applying duties and obligations thereunder. It also recognizes 'Joint Controllers'[8] when different entities jointly make determinations that qualify them as 'Controllers'. In this regard, the European Data Protection Board ('**EDPB**') has issued Guidelines 07/2020 ('**CP Guidelines**') which provide that:

> *"In broad terms, joint controllership exists with regard to a specific processing activity when different parties determine jointly the purpose and means of this processing activity. Therefore, assessing the existence of joint controllers requires examining whether the determination of purposes and means that characterize a controller are decided by more than one party."*[9]

While the distinction between Controllers and Processors is similar under the GDPR, the EDPB recognizes that room exists for Processors to make certain decisions on the means of processing. It is in this context that a classification is drawn between 'essential' and 'non-essential' means. In this regard, it specifies that:

(a) ***Essential means*** are those which are closely linked to the purpose and scope of processing. This necessitates

[7] Article 4(8), General Data Protection Regulation, 2016.
[8] Article 26, General Data Protection Regulation, 2016.
[9] Guidelines 07/2020 on the Concept of 'Controller' and 'Processor' in the GDPR, dated July 7, 2021.

examining which entity makes critical choices such as deciding what personal data is to be processed, the purpose of processing, security measures (*which is also required under the DPDPA*[10]), third parties that may have access to personal data, or whose information is to be processed.

For example, credit scoring agencies provided with customer information decide the nature of information and the manner in which such information is to be processed, with financial institutions supplying such data having little control over how such data is processed.

(b) ***Non-Essential means***, on the other hand, are decisions made on the practical aspects of implementation, such as the choice of software, implementation specifics, etc. These decisions typically do not impact the purposes or means by which personal data is processed.

For example, hosting providers exercise limited autonomy over the purposes and means for which personal data is processed. Instead, choice is primarily exercised by such entities about server specifications and other parameters.

Identifying controllers vis-à-vis processors

The determination of the controller-processor relationship (*or the equivalent under DPDPA*) is mostly determined on two aspects *viz.*

(a) ***Contractual Agreement***: The contractual agreement between a Data Fiduciary and Processor is one of the primary resorts to understanding autonomy and decisional control. Certain aspects such as processing upon express instructions, audit and inspection rights, subcontracting, periodic review, and incorporation of privacy principles (*such as retention limitation*) also remain relevant in determining the same.

(b) ***Conduct of Parties***: Apart from the contractual agreement, the conduct of Parties also remains important in determining the autonomy and decisional control. This may include modifying processing parameters without consultation with the Fiduciary or processing personal data for any secondary purposes.

[10] Section 8(5), Digital Personal Data Protection Act, 2023.

In light of the contractual arrangements and conduct of parties, there remains a possibility that the DPB may consider such Processors that have decisional control and autonomy as Data Fiduciaries under the DPDPA. Even if a Data Processing Agreement stipulates that a party exercises decisional control as a 'Processor', such an entity is likely to be considered a Fiduciary under the DPDPA[11], irrespective of the agreement to the contrary.

The DPB to be constituted under the DPDPA is likely to provide more clarity on the determination of Controllers and Processors under the DPDPA, and whether a non-compliant Processor which exercises decisional control over processing is likely to be considered a Fiduciary. While this may be contrary to the conscious removal of Processor liability under various drafts of the law, the approach to be adopted by the Government and/or the DPB may provide further clarity in the implementation stages.

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[11] Section 8(1), Digital Personal Data Protection Act, 2023.

Notifications & Circulars

- Prepaid Payment Instruments for making payments across various public transport systems – RBI amends Master Direction
- Clearing Corporation of India Limited included as a Financial Information Provider under Account Aggregator Framework
- Indian Banks on India International Bullion Exchange IFSC
- Gold imports through IIBX by Tariff Rate Quota holders under the India-UAE Comprehensive Economic Partnership Agreement
- Liquidator to deposit claims to unclaimed dividends/undistributed proceeds of stakeholders to the IBBI
- SEBI issues guidelines on returning and resubmission of draft offer documents submitted by issuers and lead managers under the ICDR Regulations
- SEBI issues circular on revised pricing methodology for institutional placements of privately placed Infrastructure Investment Trust ('InvIT')

Prepaid Payment Instruments for making payments across various public transport systems – RBI amends Master Direction

The Reserve Bank of India *vide* Circular No. RBI/2023-24/126 dated 23 February 2024 has amended Master Direction on Prepaid Payment Instruments (MD-PPIs) thereby revising paragraph 10.2 which deals with Prepaid Payment Instruments for Mass Transit System. While revising, it has permitted the authorised bank and non-bank PPI issuers to issue PPIs for making payments across various public transport systems. The PPIs shall contain the Automated Fare Collection application related to transit services, toll collection and parking; it shall be enabled only for payments across various modes of public transport such as metro, buses, rail, & waterways, tolls and parking; it can be issued without KYC verification of the holders; it can be reloadable in nature; the amount outstanding, in such PPIs shall not exceed INR 3,000/- at any point of time; it can have perpetual validity; however cash-withdrawal, refund or funds transfer shall not be permitted in such PPIs.

Clearing Corporation of India Limited included as a Financial Information Provider under Account Aggregator Framework

The Reserve Bank of India *vide* Circular No. RBI/2023-24/124 dated 22 February 2024 has included Clearing Corporation of India Limited as a Financial Information Provider. This inclusion comes in the backdrop of the RBI Retail Direct Scheme launched on 12 November 2021, to facilitate retail investors to invest in Government Securities. The Scheme enables individuals to open Retail Direct Gilt Accounts with the Bank and access the Government Securities market - both primary and secondary. To enable aggregation of financial information on Government Securities held by retail investors in their Retail Direct Gilt accounts under the Scheme, Clearing Corporation of India Limited has been included as a Financial Information Provider. This inclusion also led to the consequent modification in the definition of 'Financial Information Provider' in the Master Direction- Non-Banking Financial Company - Account Aggregator (Reserve Bank) Directions, 2016.

Indian Banks on India International Bullion Exchange IFSC

Reserve Bank of India *vide* Circular No. RBI/2023-24/120 dated 9 February 2024 has allowed branches, subsidiaries and joint ventures of Indian Banks in GIFT-IFSC to act as Trading Members ('**TM**') /Trading and Clearing Members ('**TCM**') of India International Bullion Exchange IFSC Limited ('**IIBX**'). It additionally allowed authorization of Indian Banks to import gold/silver to act as Special Category Clients ('**SCC**') of IIBX. This circular is issued to all Scheduled Commercial Banks (other than Regional Rural Banks) and contains instructions pertaining to permitted activities of TMs/TCMs and SCCs of IIBX. It additionally contains provisions on Risk Management and lays down the Procedure of Application to the RBI for conduction of TM/TCM/SCC activities.

Gold imports through IIBX by Tariff Rate Quota holders under the India-UAE Comprehensive Economic Partnership Agreement

Reserve Bank of India *vide* Circular No. A.P. (DIR Series) Circular No.14 dated 31 January 2024 has notified all Authorized Dealer Category – I ('**AD-I**') Banks to be permitted to remit advanced payment on behalf of Qualified Jewellers, notified by the International Financial Services Centres Authority for eleven days for import of gold through the India International Bullion Exchange IFSC Limited ('**IIBX**'). The circular requires all AD-I Banks to go through the notifications issued on Tariff Rate Quota ('**TRQ**') holders under the India-UAE Comprehensive Economic Partnership Agreement ('**CEPA**') to import gold under specific ITC(HS) codes through IIBX against TRQ. All valid TRQ holders under the CEPA would be permitted to remit advance payment for eleven days to import gold through IIBX against TRQ.

Liquidator to deposit claims to unclaimed dividends/undistributed proceeds of stakeholders to the IBBI

Insolvency and Bankruptcy Board of India ('**IBBI**') *vide* Circular No. IBBI/LIQ/68/2024 dated 13 February 2024 has notified that all stakeholders claims requesting for entitled amount before dissolution of a corporate person will be taken into account by the liquidator, in line with Regulation 39 of the Insolvency and Bankruptcy of India (Voluntary Liquidation Process) Regulations, 2017. The liquidator shall apply to the IBBI through

the form enclosed in the annexure to this circular, for compliance.

SEBI issues guidelines on returning and resubmission of draft offer documents submitted by issuers and lead managers under the ICDR Regulations

SEBI *vide* Circular No. SEBI/HO/CFD/PoD-1/P/CIR/2024/009 dated 6 February 2024 has notified guidelines for returning of draft offer documents as filed by issuers and lead managers under compliance with Schedule VI of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 ('**ICDR Regulations**'). The scope of the circular extends to the recognized stock exchanges and listed entities. The circular contains a list of requirements to be adhered to when making disclosures in the draft offer document and mentions that the document would also need substantial revision on key disclosures according to the clarifications included and corrective measures pertaining to the document in itself. It also lays down the detailed procedure of resubmission of the draft offer document and specifies that issues and lead managers shall ensure that resubmission is made only when existing insufficiencies are corrected, scrutinized in line with the ICDR Regulations and other applicable laws.

SEBI issues circular on revised pricing methodology for institutional placements of privately placed Infrastructure Investment Trust ('InvIT')

SEBI *vide* Circular No. SEBI/HO/DDHS/DDHS-PoD/P/CIR/2024/10 dated 8 February 2024 has proposed modifications in SEBI Master Circular for InvITs dated 6 July 2023. The guidelines for pricing of institutional placements for privately placed InvITs were reviewed and accordingly it has been decided that the floor price for institutional placements for privately placed InvITs shall be NAV per unit of such InvIT. Pursuant to this circular, Para. 7.9.1 and Para. 7.9.2 of the SEBI Master Circular for InvITs dated July 6 July 2023 has been modified to incorporate the revised pricing methodology for listed InvITs. Accordingly, Para. 7.9.1 is modified to include that the institutional placement by *public* InvIT shall be made at a price not less than the average of the weekly high and low of the closing prices of the units of the same class quoted on the stock

exchange during the two weeks preceding the relevant date. Further, Para. 7.9.2 is modified to include that the institutional placement by *privately* placed InvIT shall be made at a price not less than the NAV per unit, based on the full valuation of all existing InvIT assets conducted in terms of SEBI (Infrastructure Investment Trusts) Regulations, 2014.

Ratio Decidendi

- Award passed by Micro Small Enterprise Facilitation Council cannot be challenged in a writ petition under Article 226 or 227 – Delhi High Court
- Arbitration agreement stipulating multiple choices of seat of arbitration does not make the arbitration clause void – Delhi High Court
- Disbursal of debt amount directly to Corporate Debtor is not mandatory to be considered as a Financial Debt under IBC Section 5(8) – NCLAT
- Corporate Debtor who benefits from any loan disbursed in contravention of Section 186 of Companies Act, 2013 by the Financial Creditor, cannot deny liability to repay such loan – NCLT Kolkata
- Regardless of prior attachment order under PMLA, tainted properties of the Corporate Debtor would always be available to fulfil objectives of IBC – NCLT Kolkata
- Directors of company cannot be parties to arbitration against the company – Delhi High Court

Award passed by Micro Small Enterprise Facilitation Council cannot be challenged in a writ petition under Article 226 or 227

The Division Bench of the Delhi High Court has held that an arbitral award passed under Section 18 of the Micro Small Medium Enterprises Development Act, 2006 ('**MSMED Act**') cannot be challenged under Articles 226 and 227 of the Constitution of India on the ground that the arbitrator lacked inherent jurisdiction.

The Appellant had filed the present Letters Patent Appeal against the order passed by the Single Judge Bench of the Delhi High Court in a Writ Proceeding initiated under Articles 226 and 227 of the Constitution, wherein it declined to interfere in the award passed in an arbitration proceeding under Section 18 of the MSMED Act.

The Appellant contended that the award passed by MSEFC is *non-est* in law and deserves to be set aside due to lack of inherent jurisdiction since the respondent was not registered under the MSMED Act. Hence, it was unfair for the Appellant to deposit 75% of the award amount to challenge the award under Section 34 of the Arbitration and Conciliation Act, 1996.

The Delhi High Court relied on the judgment of the Supreme Court in *Deep Industries Ltd.* v. *ONGC* [(2020) 15 SCC 706], wherein it was held that the High Court should be extremely circumspect in interfering with arbitral proceedings. Further reliance was also placed on *India Glycols Limited and Anr.* v. *Micro and Small Enterprises Facilitation Council, Medchal – Malkajgiri and Ors.*, wherein the Supreme Court had unequivocally held that Writ Petition filed under Articles 226 & 227 of the Constitution of India ought not to be entertained because of Section 18 of MSMED Act.

Based on the above two judgments, the High Court held that entertaining Writ Petitions under Article 226/227 of the Constitution to obviate compliance with the requirement of pre-deposit under Section 19 would defeat the object and purpose of the special enactment, which has been legislated upon by Parliament. Hence on the said pretext, the LPA was dismissed. [*State Trading Corporation of India Limited* v. *Micro and Small Enterprises Facilitation Council Delhi and Anr.* – LPA 91/ 2024 and CM APPL.6119/2024 & CM APPL. 6201//2024, Judgment dated 08 February 2024, Delhi High Court]

Arbitration agreement stipulating multiple choices of seat of arbitration does not make the arbitration clause void

The Delhi High Court has held that an arbitration clause is not void under Section 29 of the Indian Contract Act if the arbitration agreement stipulates multiple choices for the seat of arbitration.

A Purchase Order ('**PO**') was executed between the parties for handling the transportation of coal. The PO appendix provided a transport agreement and an arbitration clause. Due to a shortfall in the amount transported, the Petitioner invoked the said arbitration clause. The arbitration clause stipulated that "*The seat of arbitration shall be [Local Jurisdiction in Goa/ Local Jurisdiction Karnataka/ Delhi]*"

The Respondent *inter alia* contended that there was no arbitration agreement between the parties as the Respondent had started loading, etc., on terms of the Letter of Intent, which had similar terms to the PO. Moreso, since the PO had not been signed, they were not bound by the arbitration process. They further contended that the arbitration clause, due to having multiple seats, is hit by Section 29 of the Indian Contract Act, 1872, and hence, Section 20 of the Civil Procedure Code, 1908 should determine the jurisdiction.

The Delhi High Court held that since the PO was part of the email communication and the invoice raised by the Respondent, there is a valid Arbitration Clause under Section 7(4)(b) of the Arbitration & Conciliation Act, 1996. The Court also opined that merely offering a choice of multiple seats of arbitration does not create a bar as such since the intention to arbitrate is evident. The Court also placed reliance on the judgment of *Indus Mobile Distribution (P) Ltd.* v. *Datawind Innovations (P) Ltd*. [AIR 2017 SCC 2105], while holding that in case of multiple seats, the parties would be at liberty to approach any of the said jurisdictions. [*Vedanta Limited* v. *Shreeji Shipping Limited* – Arb. P. 342/2023, Judgement dated 8 February 2024, Delhi High Court]

Disbursal of debt amount directly to Corporate Debtor is not mandatory to be considered as a Financial Debt under IBC Section 5(8)

The National Company Law Appellate Tribunal ('**NCLAT**') has held that the definition of Financial Creditor under Section 5(8) of the Insolvency and Bankruptcy Code, 2016 ('**IBC**'), does not

require the debt to be directly disbursed to the Corporate Debtor.

The Corporate Debtor was a company manufacturing Aluminium die cases. It entered into a Business Support Agreement ('**BSA**') with Uno Minda Limited (Respondent No.1) for the acquisition of a 100% stake of the Corporate Debtor by Respondent No. 1. It was further agreed that Respondent No.1 should provide funding for the supply of raw materials and critical capital working requirements as unsecured debts payable by the promoter ('**Promoter**') of the Corporate Debtor.

Respondent No. 1 filed an application under Section 7 of IBC for initiation of CIRP of the Corporate Debtor based on the BSA, which was allowed by the NCLT. The Promoter filed the present appeal before the NCLAT seeking to dismiss the Petition on the ground that the Corporate Debtor did not provide the financial assistance directly as it was to be repaid by the Promoter.

The NCLAT held that the payment of raw material made by a third party at the instructions of a Corporate Debtor or financial assistance towards working capital constitutes 'Financial Debt' under Section 5(8) of IBC. NCLAT further clarified that disbursal of funds is required but should not necessarily be disbursed only to the corporate debtor. Therefore, any disbursal made on behalf of the Corporate Debtor or at the instructions of the Corporate Debtor may also be tantamount to disbursal made to the Corporate Debtor as it is the ultimate beneficiary of such disbursal. [*Rajeev Kumar Jain* v. *Uno Minda Limited* – Company Appeal (AT) (Insolvency) No. 947 of 2022, Judgement dated 2 January 2024, NCLAT]

Corporate Debtor who benefits from any loan disbursed in contravention of Section 186 of Companies Act, 2013 by the Financial Creditor, cannot deny liability to repay such loan

The Kolkata Bench of the National Company Law Tribunal ('**NCLT**') has rejected the Corporate Debtor's request to dismiss the Section 7 application filed by the Financial Creditor under the Insolvency and Bankruptcy Code.

A loan agreement was executed between the parties, pursuant to which a loan of INR. 27 crore was advanced by Urban Infraprojects Private Limited (Financial Creditor) to EDCL Infrastructure Limited (Corporate Debtor).

The Corporate Debtor *inter alia* contended that the Financial Creditor violated Section 186(2) of the Companies Act 2013. Per the said section, a company can only give a loan up to a

maximum of 60% of its paid-up share capital. In the present case, the Financial Creditor's paid-up capital was only INR 10 lakh. However, the loan disbursed by it was INR. 27 lakh, which was way beyond the 60% limit. Hence, the Corporate Debtor claimed that the debt was void. For the same, the Corporate Debtor *inter alia* relied on the judgment of *UKG Steels Pvt. Ltd.* v. *Exotic Buildcon Pvt. Ltd.* in CP (IB) 573/ND/2021 to claim that a loan given in contravention of Section 186 of the Companies Act, 2013 is not legally enforceable debt.

Per Contra, Financial Creditor relied on the judgment of NCLT Mumbai in the matter of *Pegasus ARC* v. *Whiz Enterprise Private Limited* in CP No. 530/(IB)-MB-V/2021, wherein it was held that a Corporate Debtor who executed the agreement and was aware of the facts and circumstances, cannot allege contravention of Section 186 of the Companies Act, 2013 against the lender to evade payment.

The NCLT noted that the Corporate Debtor was not aggrieved on the contravention of Section 186 of the Companies Act, 2013 by the Financial Creditor. The real aggrieved party in such a violation would be the shareholder/stakeholder of the Financial Creditor and Regulators. Therefore, it is not open for the Corporate Debtor to take shelter under contravention of Section 186 of the Companies Act, 2013, and refuse to repay the money borrowed. [*EDCL Infrastructure Limited* v. *Urban Infraprojects Private Limited* – dated 8 February 2024, NCLT Kolkata Bench]

Regardless of prior attachment order under PMLA, tainted properties of the Corporate Debtor would always be available to fulfil objectives of IBC

The National Company Law Tribunal ('**NCLT**'), Kolkata Bench has ordered initiation of CIRP against the Corporate Debtor, R.P. Info System Limited, pursuant to Section 7 application under IBC filed by the Financial Creditor, namely, State Bank of India.

The Corporate Debtor's account was declared fraudulent by a consortium of 17 banks formed to provide credit facilities to the Corporate Debtor. The entire business of the Corporate Debtor collapsed. Thereafter, its assets were attached by the Enforcement Directorate, and with respect to that, a case was pending before the Special CBI Court in Kolkata.

The Corporate Debtor contented that the Adjudicating Authority cannot interfere with the process of trial by the CBI Court till it culminates either in the vesting of the assets in the Central Government or the release of the assets. Further, the Corporate Debtor pointed out that the assets are no longer available for resolution or liquidation under the IBC.

NCLT held that the properties attached under PMLA before initiating the CIRP should still be available to fulfil the objectives of IBC. Hence, the attachment order under PMLA will not bar admission under IBC.

The Tribunal reiterated the principles laid down in the case of *Deputy Director Directorate of Enforcement Delhi* v. *Axis Bank and Ors*, as well as the case of *Rajiv Chakrabarty, RP of EIEL* v. *Directorate of Enforcement*, and observed that PMLA and IBC subserve completely different, divergent and distinct purposes. Further, the subject property attached under PMLA can be released if and when the Corporate Debtor is admitted to CIRP, and rights of the creditor's secured interest remain secured, which the creditor is entitled to enforce. [*State Bank of India* v. *R.P. Info Systems Limited* – Company Petition (IB) No. 652/KB/2019, 19 February 2024, NCLT Kolkata Bench]

Directors of company cannot be parties to arbitration against the company

The Delhi High Court in its recent decision has held that Directors of a company cannot be made parties to the arbitration proceedings initiated against the company.

The Court for this purpose distinguished the Supreme Court's decision in the case of *Cox and Kings Limited*, wherein the Constitution Bench of the Apex Court had made the 'Group of companies' doctrine applicable to the Indian jurisprudence and held that 'parties' as defined under Section 2(1)(h) read with Section 7 of the Arbitration and Conciliation Act, 1996 includes non-signatories as well as signatory parties.

The High Court observed that to bind a non-signatory to an arbitration agreement, there must exist a common intention between the parties to do so. According to the Court, it must examine the relationship of the parties and the circumstances of the same to competently impute to them the intended meaning behind them.

The Court noted that the relationship between Respondent No. 1 (the company) with Respondent 2 and 3, beings its directors, was that of Principal and Agent as specified under Section 182 of the Indian Contract Act, 1872, and hence, no intention to bind a non-signatory to the agreement between the parties could be discerned.

Further, taking note of Section 230 of the Indian Contract Act, the Court observed that subject to a contract to the contrary, an

agent cannot be held liable for the acts done of a known principal.

Directing the matter to be referred to arbitration, without the Directors, the Court rejected the contention that Respondent No.2 and 3 were not parties to the Arbitration Agreements and thus, the matter cannot be referred to arbitration. [*Vingro Developers Pvt. Ltd.* v. *Nitya Shree Developers Pvt. Ltd.* – Judgement dated 24 January 2024 in ARB.P. 667/2023, Delhi High Court]

News Nuggets

- Visa and Mastercard halt business payments via commercial cards pursuant to RBI directions
- SEBI looking to increase scrutiny on entities raising capital through the IPO route for purpose of repayment of debts
- Budget 2024-25 outlines timely funds, technology, and training for MSMEs
- Union Budget 2024-25 provides a big push to the semi-conductor and electronics manufacturing sectors
- Competition Commission of India approves three major deals
- SEBI provides relief to high-risk FPIs

Visa and Mastercard halt business payments via commercial cards pursuant to RBI directions

The Reserve Bank of India ('**RBI**') has directed the card networks like Visa and Mastercard to stop all the card-based commercial payments made by small entities and business corporations. While the exact reason behind RBI's move is unclear, it is being touted that the direction has come amid RBI's concerns regarding flow of money through non-KYC-ed merchants who are not otherwise authorised to accept card payments. [*Source: Times of India*, published on 14 February 2024]

SEBI looking to increase scrutiny on entities raising capital through the IPO route for purpose of repayment of debts

According to report in the Business Line, Securities and Exchange Board of India ('**SEBI**') has found that a majority of entities intending to get listed on the stock market are citing debt repayment as the reason for raising fresh capital. The report also stated that the regulator requires the entities to be clear about the objects of the issue and provision of adequate details as to how the fresh capital will be spent. [*Source: The Week*, published on 8 February 2024]

Budget 2024-25 outlines timely funds, technology, and training for MSMEs

The Finance Minister while presenting the interim Union budget on 1 February said that the Micro, Small and Medium Enterprises ('**MSMEs**') are an 'important policy priority' for the Central government and the budget outlaid to ensure timely and adequate finances, relevant technologies and appropriate training for the MSMEs in order to boost their growth and also help them compete globally. [*Source: BusinessToday*, published on 1 February 2024]

Union Budget 2024-25 provides a big push to the semi-conductor and electronics manufacturing sectors

The Union Budget 2024-25 has increased the outlay on semiconductors and the display manufacturing units under 'Modified Program for Development of Semiconductors and Display Manufacturing Ecosystem in India' (**Scheme**) to INR 6,903 crore. Under the Scheme, the capital expenditure on land, buildings, plants, equipment, cleanrooms, transfer of technology, and Research & Development are covered for support for a period of over six years. The total allocations for various schemes under the Ministry of Electronics and

Information Technology (**MEITY**) has also been increased. [*Source: moneycontrol.com*, published on 1 February 2024]

Competition Commission of India approves three major deals

The Competition Commission of India ('**CCI**'), on 24 January 2024 cleared three major deals namely the proposed acquisition of Taiwan-based Wistron's operations in India by Tata Electronics; the proposed acquisition of up to a 38 per cent stake in MG Motor India Private Limited by JSW Ventures Singapore Pte Limited; and the acquisition of a 31.27 per cent of additional stake in Religare Enterprises by four entities of promoter of Dabur India, the Burman family which would enable them to become the majority shareholders in Religare. The 31.27 per cent acquisition in Religare is through 5.27 per cent of stock market purchase and the remainder of 26 per cent is through an open offer. [*Source: Telegraph India*, published on 25 January 2024]

SEBI provides relief to high-risk FPIs

It is reported that in its latest move, SEBI has informally advised that the Foreign Portfolio Investors ('**FPIs**') with disproportionately high exposure to a single corporate group will get 10-30 days from the end of January to comply with the new disclosure norms on the beneficial owners or to liquidate such holdings. It has also been reported that if the FPI fails to do so within the timeline, they will get another six months to trim down their holdings to the admissible limits. [*Source: The Financial Express*, published on 25 January 2024]

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