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An e-newsletter from
Lakshmikumaran & Sridharan, India

November 2023 / Issue–146

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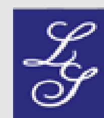

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Article

Cross-border payments for Indian businesses – Impact of RBI's new guidelines

By **Astha Sinha**

The RBI has recently issued a new regulatory framework for Payment Aggregators of Cross Border Transactions, which brings all entities facilitating cross-border payment transactions for import and export of goods and services under direct regulation of the RBI. Deliberating on the question of the need of such regulation, the article discusses plugging of the issue of alternative methods, tapping of illegal cross border transactions, due diligence by RBI, relaxation on import of services, and how this will ensure monitoring of revised TCS on Liberalised Remittance Scheme. The article also takes note of compliance requirements for non-bank entities and for import/export transactions. According to the author, all companies engaged in cross-border payments systems such as e-commerce entities, global direct-to-customer entities will be required to re-look at their payment partner agreements, money flow, KYC and reporting requirements.

Cross-border payments for Indian businesses – Impact of RBI's new guidelines

By Astha Sinha

Introduction

The Reserve Bank of India ('**RBI**') *vide* Notification No. RBI/2023-24/80 CO.DPSS.POLC.No.S-786/02-14-008/2023-24 dated 31 October 2023, has issued a new regulatory framework for Payment Aggregators of Cross Border Transactions ('**PA-CB Regulation**'). The said regulation shall govern all entities, including AD Banks, engaged in the processing / settlement of cross-border payment transactions for import and export of goods and services.

Prior to the introduction of the said notification, payment aggregators were governed by various circulars issued by the RBI which allowed for the said Online Payment Gateway Service Providers ('**OPGSP**') to enter standing arrangements with AD Banks for repatriation of export and import related remittances subject to conditions as were prescribed under the notifications.

With the onset of the PA-CB Regulation, all entities facilitating cross-border payment transactions ('**PA-CB**') for import and export of goods and services will come under direct regulation of the RBI.

The Regulation distinguishes the service providers into three kinds: (A) Export only PA-CB (**PA-CB-E**); (B) Import only PA-CB (**PA-CB-I**); and (iii) Export and Import PA-CB (**PA-CB-E&I**). The regulation specifies for specific conditions for each type of services provided.

Need of the PA-CB Regulations

Multiple-modes of cross border payments under one umbrella: Prior to the PA-CB Regulation, businesses had limited options of payment settlement of any import-export e-commerce transactions. It has been noted that businesses were opting for receipt of cross-border payments through correspondent banks, Money Transfer Service Scheme (MTSS), Rupee Drawing Arrangement (RDA) and postal channels as noted by the World Bank in its reports.

The PA-CB Regulations seem to be a direct attempt at plugging the issue of alternative methods of facilitation of payments by bringing all entities under the umbrella of PA-CB if any cross-border payment is being facilitated.

Tapping of illegal cross border transactions: Further, the requirement of compulsory registration with the FIU-IND has come at a time when the Mahadev betting app scam has been

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unearthed where cross-border payments were being made through varied side channels.

It is pertinent to note that this requirement is also a reflection of the compliance requirements under the RBI Master Direction - Know Your Customer (KYC), 2016 as amended in October 2023 which requires regulated entities to undertake diligence to identify accounts facilitating illegal cross-border transactions and report suspicious transactions to the Financial Intelligence Unit – India.

Further, the Delhi High Court in a recent pronouncement of *Paypal Payments Private Limited* v. *Financial Intelligence Unit India,* issued an interim order that fintech entities like Paypal are covered under the definition of 'payment system operators' under the Prevention of Money Laundering Act, 2002 and therefore must comply with the requirements under the same.

Thus, the PA-CB Regulations seem to be an attempt to plug any lacunae that existed so far so as to ensure that no transmission of money is being undertaken for illegal activities.

Due-Diligence of PA-CB: Prior to the PA-CB Regulations, Fintech entities engaged in facilitating cross-border transactions were only subject to the due-diligence of the AD Banks and subsequent transactions were merely required to be reported to the AD Bank. With the onset of the said regulations, all PA-CBs shall be under direct scrutiny of RBI and RBI shall also have visibility on transactions being facilitated through the same.

Relaxation on Import of Services: Under the OPGSP circular, cross-border payments were only permitted for import of goods and software. However, with the onset of the PA-CB Regulations, import of services other than software can also be facilitated which is a welcome introduction by the industry.

Monitoring of revised TCS on LRS: Revised TCS rates were introduced from 1 October 2023, for sending money overseas through the Liberalised Remittance Scheme ('**LRS**') for instances such as international travel and sending money abroad. With the onset of the PA-CB Regulations, the government has ensured a double check mechanism to monitor such transactions and ensure that all cross-border remittances are accounted for, and adequate tax is paid on the same.

Impact on Indian businesses

PA-CB Regulations have enabled non-bank entities to facilitate transactions directly between entities without having engaging with AD Banks to facilitate the same. However, this has come at the cost of being under the direct governance of RBI and heavy compliance requirements equivalent and more to a domestic payment aggregator.

Compliance requirements for non-bank entities under PA-CB Regulation

The PA-CB Regulation provides that non-banks that provide PA-CB services as on date of the circular must:

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(i) register with Financial Intelligence Unit-India ('**FIU-IND**') as a pre-requisite;

(ii) apply to the RBI for authorisation by 30 April 2024. It specifies that the entities shall be permitted to continue their services pending RBI authorisation;

(iii) comply with the '*Processing and Settlement of Export related receipts facilitated by Online Payment Gateways – Enhancement of the value of transaction*' guidelines issued by RBI vide circular dated 17 March 2020;

(iv) seek approval of the Department of Payment and Settlement Systems ('**DPSS'**), RBI and Central Office ('**CO'**) within 60 calendar days from the date of this circular or if it's a new business, prior to commencement of business. Further, in case the entity wants to change its activity category, then the same must also be informed to DPSS, RBI and CO at least 60 calendar days prior to the change;

Further, the non-bank PA-CBs must fulfil the following net worth criteria:

(i) Non-banks providing PA-CB services as on the date of this circular, must have a minimum net-worth of ₹15 crore at the time of submitting application to the RBI and a minimum net-worth of ₹25 crore by 31 March 2026;

(ii) New non-bank PA-CBs must have a minimum net-worth of ₹15 crore at the time of submitting application to the RBI for authorisation and must attain a minimum net-worth of ₹25 crore by end of the third financial year of grant of authorisation.

PA-CB compliances for import transactions:

- Import only PA-CBs are required to maintain an Import Collection Account ('**ICA**') with an AD Category-1 scheduled commercial bank.
- The PA-CB must receive all payments in an escrow account which must then further be transferred to the ICA from which the amount can be credited to the foreign merchant.
- The PA-CB may permit payment of imports through any payment instrument provided by authorised payment systems in India, except small PPIs.

PA-CB compliances for export transactions:

- Export only PA-CBs are required to maintain an Export Collection Account ('**ECA**') denominated in Indian Rupees and / or foreign currency (for which separate currency accounts are required to be maintained) with an AD Category-1 scheduled commercial bank in which the export proceeds can be credited in the relevant currency. From the ECA the payment is transferred to the account of the Indian merchant.
- Non-INR currency settlement is only allowed for directly onboarded merchants.

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All PA-CBs are required to conduct Customer Due Diligence for merchants directly on-boarded by it, which includes e-commerce marketplaces for both import and export transactions. In furtherance to this, for import, PA-CBs must conduct Buyer Due Diligence for buyers if goods or services more than INR 2,50,000 per unit is imported.

The PA-CBs are required to ensure that no payment is facilitated for the import or export of prohibited/restricted goods and services under the prevailing Foreign Trade Policy.

That being said, the PA-CB Regulation has introduced significant amount of transparency in all cross-border transactions and increased the accountability of the PA-CBs for transactions. Further, registration requirement with FIU-IND will help curb money laundering activities.

With the introduction of a system for streamlined movement of money through separate escrow accounts and a transparent methodology for settling of transactions through PA-CBs, there is a lot of confidence being instilled in businesses engaging in cross border transactions. Thus, while the Indian Businesses are delighted with the introduction of the said guidelines, Fintech companies will have to overcome the challenge of meeting the vast compliance requirements to operate in the said space.

All companies engaged in the cross-border payments systems such as e-commerce entities, global direct-to-customer entities will be required to re-look at their payment partner agreements, money flow, KYC and reporting requirements.

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Notifications & Circulars

- Limited Liability Partnership (Significant Beneficial Owners) Rules, 2023 notified
- Hybrid work – Special Economic Zones (Fourth Amendment) Rules, 2023 notified
- Simplified norms for processing investor's service requests by RTAs and norms for furnishing PAN, KYC details and nomination
- 'Fully Accessible Route' for investment by non-residents in government securities – Inclusion of Sovereign Green Bonds
- International Trade Settlement in Indian Rupees (INR) – Opening of additional current account for export proceeds

Limited Liability Partnership (Significant Beneficial Owners) Rules, 2023 notified

The Ministry of Corporate Affairs ('**MCA**') *vide* Notification dated 9 November 2023 has notified the Limited Liability Partnership (Significant Beneficial Owners) Rules, 2023 ('**Rules**') and these Rules mirror the provisions of Significant Beneficial Owners as provided under Section 90 of Companies Act, 2013. These Rules brought the following concepts:

1. Rule 2 clarifies that the provisions of these Rules are applicable to any Limited Liability Partnership under the Limited Liability Partnership Act, 2008;
2. The definition of holding a 'majority stake' in the LLP; 'reporting limited liability partnership', 'significant beneficial owner', 'significant influence', etc.
3. Rules 4 and 5 provide that every reporting LLP shall identify any individual who is a significant beneficial owner (SBO) and such individual to make a declaration in Form No. LLP BEN-1 to the LLP within 90 days from commencement of the Rules and if subsequently becomes an SBO, to make a declaration within 30 days accordingly. It further provides that every reporting LLP shall where its partner (other than an individual) holds not less than 10% of its contribution, voting rights, etc. shall give notice in Form No. LLP BEN-4 in accordance with the Section 90 of the Companies Act, 2013;
4. Rule 6 provides that upon receipt of declaration in Form No. LLP BEN-1, the reporting LLP shall file a return in Form No. LLP BEN-2 with the Registrar within 30 days from receiving such declaration;
5. Rule 7 mandates every reporting LLP to maintain a register of SBO in Form No. LLP BEN-3 and such register shall be open for inspection during business hours for not less than two hours;
6. Rule 8 provides for giving notice in Form No. LLP BEN-4 by every reporting LLP to identify SBOs in accordance with Section 90(5) of the Companies Act, 2013; and
7. Rule 10 provides that these Rules do not apply to such contribution held by the Central Govt., State Govt., or any local authority or any entities controlled by them; an investment vehicle registered with SEBI, AIF, REITS, InVITs or regulated by RBI, IRDAI or PFRDA.

Hybrid work – Special Economic Zones (Fourth Amendment) Rules, 2023 notified

Ministry of Commerce *vide* Notification dated 7 November 2023 has notified Special Economic Zones (Fourth Amendment) Rules, 2023 through which Rule 43A of Special Economic Zones (Fifth Amendment) Rules, 2022 in relation to 'Work from Home' has been now substituted with 'Hybrid Work'. This amended rule for 'Hybrid Work' is applicable up to 31st December 2024. The facility of 'hybrid work' shall cover all employees of the unit in contrast to the facility of 'work from home' or from any place

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outside the SEZ applicable earlier. The unit shall maintain a list of persons working in hybrid mode which may be submitted for verification to Development Commissioner. The amendment also defines the term 'hybrid working', which refers to a flexible work model whereby an employer may permit its employees to work from office or from any location outside the employer's office from time to time.

Simplified norms for processing investor's service requests by RTAs and norms for furnishing PAN, KYC details and nomination

Securities Exchange Board of India (SEBI) *vide* Circular SEBI/HO/MIRSD/POD-1/P/CIR/2023/181 dated 17 November 2023 has simplified norms for processing investor's service request by Registrars to an Issue and Share Transfer Agents (RTAs) and for furnishing PAN, KYC details and nomination by amending para 19.2 of the Master Circular for Registrars to an Issue and Share Transfer Agents dated 17 May 2023. Para 19.2 provided for freezing of such folios against which either of PAN, nomination, contact details, Bank a/c details and specimen signature has not been provided by holders of securities and details of such frozen folios are to be referred by RTA/listed company to the administering authority under Benami Transactions (Prohibitions) Act, 1988 and/or Prevention of Money Laundering Act, 2002. The amendments brought herein does away with this requirement of referring the frozen folios by RTAs to the aforementioned administering authorities and further the term 'freezing/frozen' is to be deleted. Accordingly, all listed companies, stockbrokers, RTAs are advised to comply and make changes to their by-laws accordingly and communicate the same by putting notice on their websites and create awareness to the stakeholders.

'Fully Accessible Route' for investment by non-residents in government securities – Inclusion of Sovereign Green Bonds

Reserve Bank of India (RBI) *vide* Circular RBI/2023-24/81 dated 8 November 2023 referred to Press Release on 'Issuance Calendar for Marketable Dated Securities for October 2023 - March 2024' dated 26 September 2023 notifying the issuance calendar for Sovereign Green Bonds for the fiscal year 2023-24 and reference to introduction of Fully Accessible Route (FAR) was also made *vide* A.P. (DIR Series) Circular No. 25 dated 30 March 2020, wherein certain specified categories of Central Government securities were opened fully for non-resident investors without any restrictions apart from being available to domestic investors as well. Through this circular, the RBI decided to also designate all 'Sovereign Green Bonds' issued by the Government in the fiscal year 2023-24 as 'specified securities' under the FAR.

International Trade Settlement in Indian Rupees (INR) – Opening of additional current account for export proceeds

Reserve Bank of India (RBI) *vide* FED Circular No. 8 dated 17 November 2023 referred to A.P. (DIR Series) Circular No. 10 dated 11 July 2022 wherein arrangement for invoicing,

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payment, and settlement of exports/imports in INR through Special Rupee Vostro Accounts with AD Category-I bank in India are specified. Referring to the above, *vide* this Circular, RBI has provided greater operational flexibility to the exporters by allowing AD Category-I banks who are maintaining Special Rupee Vostro Account to open an additional special current account for its exporter constituent exclusively for settlement of their export transaction.

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Ratio Decidendi

- Writ petition is not maintainable against an arbitral award passed under Section 18 of MSME Development Act – Supreme Court
- Doctrine of promissory estoppel cannot be pressed with respect to a Resolution Plan approved by the CoC in its commercial wisdom – NCLAT
- Arbitration – No requirement for filing a separate formal application under Section 8 when an objection has been duly raised in the written submissions – Delhi High Court

Writ petition is not maintainable against an arbitral award passed under Section 18 of MSME Development Act

The Supreme Court of India has held that a writ petition under Article 226 or 227 of the Constitution is not maintainable against an award passed under Section 18 of the Micro Small and Medium Enterprises Development Act, 2006 ('**MSMED Act**'). The Supreme Court further held that recourse under an arbitral award passed by a Micro and Small Enterprises Facilitation Council ('**MSEFC'**) under Section 18 of the MSEMED Act is available only under Section 34 of the Arbitration and Conciliation Act, 1996 ('**A&C Act**').

Brief facts:

M/s. SR Technologies ('**Respondent No. 2**') (Originally Claimant) is registered under the MSMED Act, 2006. In a dispute, the MSEFC awarded Respondent No. 2 the principal sum of INR 40,29,862 along with interest at the rate of three times the bank rate prevailing as on the date of the award from the appointed day till the date of final payment. This award was challenged in a petition under Article 226 read with Article 227 of the Constitution by India by Glycols Limited and Anr. ('**Appellants**') (originally Respondent) wherein a Single Judge of the High Court of Telangana allowed the writ petition and set aside the award because the claim was barred by limitation. In an appeal preferred by Respondent No. 2 (Originally Claimant), the Division Bench of Telangana High Court reversed the view of the Single Judge. The Division Bench held that the Writ Petition instituted by the Appellant was not maintainable in view of the specific remedies provided under the MSMED which is a special statute. The High Court held that the Appellant ought to have taken recourse to the remedy under Section 34 of the A&C Act, and having failed to do so, a writ petition could not be entertained. The Division bench, however, while declaring that the writ petition was not maintainable, had held that the claim of Respondent No. 2 was time-barred.

The Appellants, *vide* a Special Leave Petition (SLP), challenged the above judgment of the Division Bench of the Telangana High Court. The Supreme Court upheld the decision of the Division Bench. It held that no remedy lies against an arbitral award passed by MSEFC through a writ petition under Article 226 or 227 of the Constitution.

Submission by the Appellant:

- The Appellant submitted that the view of the MSEFC to the effect that the provisions of the Limitation Act, 1963 have no application suffers from perversity. Hence, a petition under Article 226 of the Constitution ought to have been entertained.

Submission by the Respondent:

- The Respondent submitted that the judgment of the Telangana High Court was correct in holding that no remedy is possible against an award passed by MSEFC before a High Court in writ jurisdiction. The only remedy is to challenge the Award in terms of Section 34 of the Arbitration and Conciliation Act, 1996 after depositing

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75% of the amount of the Award as mandated by Section 19 of the MSMED Act.

Decision:

The Hon'ble Supreme Court noted that in terms of Section 19 of the MSMED Act, an application for setting aside an award of the MSEFC cannot be entertained by any court unless the appellant has deposited seventy-five percent of the amount of the award with the MSEFC.

In view of the provisions of Section 18(4) of the MSMED Act, where the MSEFC proceeds to arbitrate upon a dispute, the provisions of the A&C Act are to apply to the dispute as if it is in pursuance of an arbitration agreement under sub-section (1) of Section 7 of the A&C Act. Hence, the remedy provided under Section 34 of the A&C Act would govern an award of the Facilitation Council.

The Court further opined that an added condition is imposed by Section 19 of MSMED Act 2006 to the effect that an application for setting aside an award can be entertained only upon the appellant depositing seventy-five per cent of the amount in terms of the award with the Council.

In light of the above, the Hon'ble Court did not accept the submission made by the Appellants and held that Section 18 of the MSMED Act 2006 provides for recourse to a statutory remedy for challenging an award under the A&C Act. However, recourse to the remedy is subject to the discipline of complying with the provisions of Section 19. Therefore, entertaining a petition under Article 226/227 of the Constitution, filed with an intention to obviate compliance with the requirement of pre-deposit under Section 19, would defeat the object and purpose of the special enactment legislated by Parliament.

Hence, the Supreme Court upheld the judgement of the Division Bench of Telangana High Court.

[*India Glycols Limited and Anr.* v. *MSEFC, Medchal- Malkajgiri and Ors.* – SLP No. 9899 of 2023, dated 6 November 2023, Supreme Court]

Doctrine of promissory estoppel cannot be pressed with respect to a Resolution Plan approved by the CoC in its commercial wisdom

Brief facts:

Sivana Reality Private Limited ('**Corporate Debtor/CD**') launched a project called 'Samriddhi Garden' ('**Project**') at Bhandup, Mumbai. The Corporate Debtor secured a loan of INR 130 crore from LIC Housing Finance Limited (**'LICHFL**') on 15 September 2017. The Project of the CD was mortgaged to LICHFL to secure the term loan. As per the terms of the mortgage deed, any sale or third-party right in relation to the Project could have only been created with prior written consent or upon obtaining a No Objection Certificate ('**NOC**') from LICHFL. In August 2018, Fervent Synergies Limited ('**Appellant**') and the CD entered into agreements to sell 10 flats in the Project carried out by the CD.

In August 2020, a Corporate Insolvency Resolution Process (**'CIRP'**) was initiated against the CD. Thereafter, the Appellant filed its claim with respect to the 10 flats sold to it by the CD in August 2018. The Interim Resolution Professional (**'IRP'**) *vide*

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email dated 13 September 2020 informed the Appellant that its claim has been admitted as a 'Financial Creditor', which is under verification. On 3 June 2021, the Resolution Professional ('**RP'**) called on the Appellant to submit an NOC with respect to flats sold to it by the CD. The Appellant's claim was rejected because of the failure to obtain NOC from LICHFL. Subsequently, the RP informed the Appellant that its claim as a Financial Creditor was restored based on the decision taken by the Committee of Creditors ('**CoC'**).

The approved Resolution Plan (**'Plan'**) categorized Financial Creditors as homebuyers who have not obtained NOC from LICHFL as 'affected homebuyers' and those who have as 'unaffected homebuyers'. Under the approved Resolution Plan, the Appellant filed an Interim Application objecting to the differential treatment provided to affected and unaffected homebuyers. The objection raised by the Appellant was rejected by the Adjudicating Authority, and thereafter the Appellant approached the NCLAT.

Contentions of Appellant:

The Appellant contended that the classification between affected and unaffected homebuyers is erroneous and illegal in nature. The Appellant further argued that the Resolution Professional had previously accepted their claim for 10 flats that were sold to them *via* email on 30 June 2021. Hence, as per the Doctrine of Promissory Estoppel, the allotment of these 10 flats should not have been interfered with or reduced as has been done in the current Resolution Plan. Hence, the Respondents are bound by the doctrine of promissory estoppel, and the claim that the RP admitted cannot be denied in the Resolution Plan. The Appellants relied on the judgment of the Supreme Court in the case of *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.* and *Manuelsons Hotels (P) Ltd.* v. *State of Kerala*.

Contentions of Respondents:

The RP defended such classification and submitted that the Appellant belongs to the class of creditors who have approved the Resolution Plan and, therefore, should not be allowed to question the Resolution Plan. The successful Resolution Applicant reiterated the same while relying on the order given by NCLAT in the case of *Sabari Reality Pvt. Ltd.* v. *Sivana Realty Pvt. Ltd. & Ors.*

The LICHFL backed the impugned order and argued that no relief should be granted to the Appellant since it has not challenged the order passed by Hon'ble NCLT, Mumbai, approving the Plan. Further, it was argued that since the Deed of Mortgage was entered prior to the agreement for the sale of those 10 flats, no allotment could have been done without obtaining an NOC from LICHFL. Basis the Deed of Mortgage, the allotment to the Appellant by the CD was not valid, and therefore, such homebuyers have been separately dealt with in the Plan.

Analysis and decision by NCLAT:

The NCLAT held NCLT's reliance on the judgment of the Hon'ble Supreme Court in the case of *Jaypee Kensington Boulevard Apartments* in rejecting the objection of the Appellant against the Plan, to be correct. It emphasised that the CoC approved the Plan with a 99.96% vote, and the majority of the homebuyers had voted in favour of the Plan.

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The NCLAT also rejected the contention of the Appellant with respect to the classification of homebuyers by referring to its recent order in the case of *Sabari Reality Pvt. Ltd.* v. *Sivana Realty Pvt. Ltd.* & Ors., which upheld the classification based on affected and unaffected homebuyers.

Further, with respect to the contention by the Appellant in relation to the doctrine of promissory estoppel, the Hon'ble NCLAT bench referred to the judgment of the Hon'ble Supreme Court in the case of *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P* which has elaborated the doctrine of promissory estoppel, its nature, and scope. The NCLAT also referred to the judgment of *Manuelsons Hotels (P) Ltd.* v. *State of Kerala,* reiterating the doctrine.

The NCLAT observed that acceptance of claims of a Financial Creditor is one aspect of the scheme under the IBC, 2016. The preparation of the Resolution Plan by a Resolution Applicant which is based on the list of creditors, the admitted claims of creditors and other such information derived from the Information Memorandum is a step subsequent to acceptance of the claim of creditors by a RP. The NCLAT further emphasized that the doctrine cannot be pressed against the Resolution Applicant who submits the Plan based on the information made available to him through the Information Memorandum prepared by RP. NCLAT further clarified that the Resolution Applicant has not extended any promise to accept the claims of the creditors of the CD in toto therefore the Resolution Plan prepared by the Resolution Applicant and approved by CoC will not be subject to the doctrine of promissory estoppel.

The NCLAT considering the facts of the present case has held that the Plan complies with Section 30(2) of the IBC, 2016 and provisions of CIRP Regulations and thus, it cannot be rejected on the grounds of promissory estoppel. The Tribunal concluded that promissory estoppel cannot be applied to a Resolution Plan approved by the CoC in its commercial wisdom.

Therefore, based on the above reasoning, the NCLAT upheld the order passed by the Adjudicating Authority and dismissed the appeal filed by the Appellant.

[*Fervent Synergies Ltd.* v. *Manish Jaju* – Order dated 2 November 2023 in Company Appeal (AT) (Insolvency) No. 1338 of 2023, NCLAT]

Arbitration – No requirement for filing a separate formal application under Section 8 when an objection has been duly raised in the written submissions

Brief facts:

On 2 May 2005, Madhu Sudan Sharma & Ors. ('**Appellants**') and Omaxe Ltd. ('**Respondent**') executed a Memorandum of Understanding ('**MoU**') concerning purchasing 29 bighas of land from the Respondent. The MoU stated that in case of failure to obtain necessary permission from statutory authorities by the Appellants, the Respondent would have the option to terminate the said MoU. The Appellants shall be bound to refund the amount paid by the Respondent along with additional costs and fees. Subsequently, the Appellants

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failed to perform their obligations and were liable to refund the amount paid by the Respondent, along with other charges. A cheque of INR 65 lakh handed over to the Respondent as security money was also dishonoured by the Bank. Thereafter, a legal proceeding under Order XXXVII of the Civil Procedure Code, 1908 ('**CPC**') was initiated by the Respondent for recovery of the amount paid by him.

The Appellants requested leave under Order XXXVII of the CPC to defend the suit, raising an objection regarding its maintainability as the MoU contained an arbitration clause for dispute resolution. The Court granted conditional leave to the Appellants to defend the suit. The Appellants complied with the instructions. However, the Court held that the same was done beyond the specified timeframe, implying that the leave condition was not complied with.

The suit was decreed in 2012, and the Appellants filed for review of the decree before the ADJ, which was dismissed. However, the order was assailed to Division Bench through Regular First Appeal. Upon payment of certain costs, the Division Bench allowed the Appellants to file their written statements where they reiterated their objection to the maintainability of the suit. However, the said objection has not been considered since the Ld. ADJ was of the view that the objection was raised belatedly under Section 8, and it was not included in the filing of their initial statements. Considering the same, the Suit was again decreed in favour of the Respondent in 2019 **('Impugned Order').** Against the same, the present proceeding was initiated before the Hon'ble Delhi High Court.

Contention of the Appellant:

The Appellants raised an objection contending that the suit was not maintainable before the Court due to the presence of an arbitration clause in the MoU. This objection was raised under Section 8 of the A&C Act in the written submissions and in the application filed under Order XXXVII of the CPC before the written submissions, where they sought leave to defend the suit.

Contention of the Respondent:

The Respondents contended that the petition filed under Section 8 was raised beyond the specified timeframe, despite it being required to be brought up before the submission of initial statements in the case. They further contended that the mere mention of an objection under Section 8 is not sufficient, and a separate formal application raising the objection must be filed. Appellants contesting the suit and proceeding for trial, according to the Respondents, constitute waiver of their rights under Section 8 of the A&C Act.

Analysis and decision by Court:

The Hon'ble Court held that the objection against maintainability under Section 8 was not raised belatedly and, in fact, mentioned in the first instance under the written submissions filed by the Appellants. Furthermore, the application under Order XXXVIII filed before the written submissions indicated that the objection was raised under the specified timeframe according to the provisions of Section 8 under the A&C Act.

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The Hon'ble Court held that mere mention of the objection under the written submissions is sufficient, and filing a separate formal application is unnecessary while objecting to Section 8 of the A&C Act. The Court placed reliance on the judgment of *Sharad P. Jagtiani* v. *Edelweiss Securities Ltd.,* 208 (2014) DLT 487, where it was held that the explicit extraction of the arbitration clause by the Appellants in their written submissions is in direct compliance with the provisions under Section 8, and the filing of a separate formal application is not required.

With respect to the contention on waiving of rights by the Appellant, the Court held that a party could not be deemed to have waived off its right to arbitration merely because it continued to contest the suit, especially in situations where they raised objections towards the maintainability of the suit and the Court's jurisdiction in this regard. Thus, the appeal was allowed, stating that the rights of the Appellant were not waived off and the objection raised in accordance with Section 8 of A&C Act was not raised belatedly. The Hon'ble Court held that the extraction of the arbitration clause is sufficient and there is no requirement to file a separate application under Section 8.

[*Madhu Sudan Sharma & Ors.* v. *Omaxe Ltd.* – Judgement dated 6 November 2023 in RFA 823/2019 and CM 41007/2019, Delhi High Court]

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News Nuggets

- Arbitration – Denial of an arbitration clause in reply to an arbitration notice will not disentitle a party from involving Section 8, in a suit
- Arbitration – Court not to insist for bank guarantee in cases where enforcement of an arbitral award is not frustrated, in a petition under Section 9
- Arbitration – Court can extend the mandate of an arbitral tribunal even if the application for extension is made after expiry of time limit provided
- Arbitration clause in original contract is also applicable to additional work carried out in absence of a formal agreement
- Insolvency – 10-day demand notice period cannot be excluded while calculating limitation period for filing a petition under Section 9 of IBC
- Insolvency – Time spent in obtaining a legal opinion and engaging a legal counsel is not 'sufficient cause' for condonation of delay in filing appeal
- Insolvency – Claims cannot be entertained once the resolution plan has been approved by CoC, even if the same is pending before NCLT

Arbitration – Denial of an arbitration clause in reply to an arbitration notice will not disentitle a party from involving Section 8, in a suit

The Delhi High Court has held that Section 8 of the Arbitration and Conciliation Act, 1996 (**A&C Act**) is mandatory in nature, i.e., to mean that a court is bound to refer a dispute to arbitration if there exists a valid arbitration agreement between the parties and either of them makes an application for reference to arbitration. In *ANR International Pvt Ltd* v. *Mahavir Singhal* dated 3 November 2023, the parties had entered into an agreement for supply and all the tax invoices issued therefrom had contained an arbitration clause. When a dispute arose between the parties, the respondent issued a notice under Section 21 of the A&C Act. However, the appellant denied the existence of an arbitration clause and rejected the claim of the respondent. Thereafter, the respondent moved to the District Judge, Commercial Court against the appellant for the recovery of the unpaid money. However, the appellant chose to file an application under Section 8 of the A&C Act thereby praying for a reference of the dispute to arbitration. In this regard, the Commercial Court rejected the application made by the appellant stating that the appellant was approbating and reprobating because it had initially denied the existence of the arbitration agreement and therefore, cannot plead otherwise now. Now, the High Court has held that the arbitration agreement between the parties shall not cease to exist merely because the appellant had denied its existence as a reply to the arbitration notice. The High Court also held that the doctrine of approbation and reprobation cannot be invoked by the Commercial Court in order to decline a party from referring a dispute to arbitration. Accordingly, the High Court allowed the application filed by the appellant under Section 8.

Arbitration – Court not to insist for bank guarantee in cases where enforcement of an arbitral award is not frustrated, in a petition under Section 9

The Delhi High Court has held that a court exercising powers under Section 9 of the Arbitration and Conciliation Act, 1996 (**A&C Act**) cannot order for furnishing of bank guarantees to thereby secure the claims of a party during the pendency of arbitration proceedings, unless it is shown that the party is alienating its assets or acting in a manner that would frustrate the enforcement of the arbitral award. In *Skypower Solar India Pvt. Ltd.* v. *Sterling and Wilson International FZE,* FAO(OS)(COMM) 29 of 2022 dated 10 November 2023, the respondent had filed an application under Section 9. The Single Judge *vide* an order directed the appellants to furnish a bank guarantee in order to thereby secure 50 percent of the disputed amount. Aggrieved by the said order, the appellant appealed and contended that the direction was in contradiction with the principles laid down in Order XXXVIII Rule 5 of the Code of Civil Procedure and that there was no evidence/proof to show that the appellants were alienating its assets or acting in a manner that would render the award unenforceable. The Division Bench held that before any court made an order for securing the amount in dispute in an arbitration, it has to be ascertained whether a party is acting in a manner that could prove detrimental to the enforcement of an arbitral award. It also held that the Single Bench's order to furnish a bank guarantee was similar to that of an order of attachment before judgment as provided under Order XXXVIII Rule 5 of CPC, and that while the Single Bench was not unduly bound by the provisions of CPC, it however, could not pass any order in disregard to the principles of CPC.

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Arbitration – Court can extend the mandate of an arbitral tribunal even if the application for extension is made after expiry of time limit provided

The Delhi High Court has held that a court exercising powers under the Section 29A of the Arbitration and Conciliation Act, 1996 (**A&C Act**) **is** empowered to extend the mandate of an arbitrator even in cases where the application for such extension has been filed beyond the time limit fixed for making the award. The High Court in *ATC Telecom Infrastructure Pvt Ltd* v. *BSNL* dated 6 November 2023, while disagreeing with the view taken by the High Court of Calcutta in *Rohan Builders (India) Pvt. Ltd.* v. *Berger Paints India Limited* held that Section 29A does not have any rigid deadline for the completion of the arbitral proceedings and that it provides certain flexibility to the parties to the agreement and the court to extend the time period thereunder in appropriate cases. The High Court noted that the words *'the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period'* provided under the said section clearly indicate that a court shall have the power to extend the mandate of the arbitral tribunal even when the said period has expired.

Arbitration clause in original contract is also applicable to additional work carried out in absence of a formal agreement

The High Court of Jammu & Kashmir and Ladakh has held that an arbitration clause forming part of an original agreement between two parties shall also govern the additional work carried therefrom, without a formal agreement too. In *A K Engineers and Contractors Pvt. Ltd.* v. *Union Territory of J&K* dated 1 November 2023 expansion of scope of work happened without a formal agreement or even an amendment to the original agreement. When disputes pertaining to payments arose, the petitioner invoked the arbitration clause of the original agreement and filed a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (**A&C Act**). The High Court observed that that though there was no agreement for the additional work, nor any amendment was made to the original agreement, the respondent indulged in administrative actions such as revision of the Detailed Project Report, approval of the design for a two-lane bridge, and execution of the work according to the revised DPR. Therefore, the High Court held that the act of any contractor (petitioner) being asked by the employer (respondent) to expand the scope of work without executing a formal agreement for such expansion shall be governed by the terms of the original agreement between the parties and the arbitration clause therein shall be applicable to the extended scope of work.

Insolvency – 10-day demand notice period cannot be excluded while calculating limitation period for filing a petition under Section 9 of IBC

The National Company Law Tribunal, Mumbai Bench (**NCLT**) has noted that the Insolvency and Bankruptcy Code, 2016 (**IBC**) has no provision that states that the 10-day period of demand notice is liable to be excluded while computing the period of limitation for filing a petition under Section 9 of IBC. In *WPIL Ltd.* v. *Gammon India Ltd.* (Applicant and Corporate Debtor, respectively) dated 31 October

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2023, the Applicant placed reliance on the judgement of the Apex Court in *Disha Constructions and Ors.* v. *State of Goa and Ors.* wherein it was held that notice period under Section 80 of the Code of Civil Procedure, 1859, shall be discounted from the period of limitation, and prayed that the 10-day period of the demand notice in the present case should also be excluded for the purposes of computing the limitation for filing the petition under the Section 9 of IBC. However, the NCLT dismissed the said petition and stated that there is no such provision under the IBC, which is a complete code in itself.

Insolvency – Time spent in obtaining a legal opinion and engaging a legal counsel is not 'sufficient cause' for condonation of delay in filing appeal

The National Company Law Appellate Tribunal, Chennai Bench (**NCLAT**), has held that the time spent for procuring legal guidance and engaging a legal counsel would not qualify as a 'sufficient cause' to condone the delay in filing an appeal as provided for in the proviso to Section 61(2) of Insolvency and Bankruptcy Code, 2016 (**IBC**). In *Anish Lawrence & Anr.* v. *Renahan Vamakesan* dated 1 November 2023, the appellant filed an appeal against the order of the adjudicating authority on the 45th day of attaining the order copy and had submitted that the delay in filing the appeal shall be condoned as the cause for the delay was due to the time taken in finding a legal counsel who would advise them on the matter and thereby file the appeal. However, the NCLAT held that the reason provided by the appellant would not call for a 'sufficient cause' which acts as a reason for the appellate authority to condone the delay in filing of an appeal provided under the proviso to the Section 61(2) of the IBC. The NCLAT also observed that the appellant could have approached the appellate authority well within the time-period of 30 days as the appeals were filed *via* e-filings.

Insolvency – Claims cannot be entertained once the resolution plan has been approved by CoC, even if the same is pending before NCLT

The National Company Law Appellate Tribunal, Principal Bench, New Delhi (**NCLAT**), **has** dismissed an appeal and ruled that no claims can be entertained after the Committee of Creditors (**CoC**) of the corporate debtor have approved the resolution plan, even if such resolution plan is pending before the adjudicating authority for an approval. In *Suraksha Realty Ltd.* v. *Anuj Bajpai Resolution Professional of Panache Aluminium Extrusion Pvt. Ltd.* dated 1 November 2023, the appellant filed his claim at a date later than what was prescribed by Interim Resolution Professional and filed an application before the adjudicating authority to admit his claim. When the adjudicating authority dismissed the application, the appellant filed the present appeal and submitted that, since the resolution plan was still pending for approval before the adjudicating authority, the claims raised by him should be considered. The NCLAT while relying upon a judgement of the Apex Court in *R.P.S. Infrastructure Ltd.* v. *Mukul Kumar and Anr.* passed September 2023, held that claims cannot be entertained after the approval of the resolution plan by the CoC, even if the same is still pending for approval before the adjudicating authority.

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