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Articles

Proposed E-commerce Amendment Rules – Whether reasonable to comply with?

By **Sudish Sharma and Apeksha Bansal**

Introduction:

The Government of India, through its Ministry of Consumer Affairs, Food and Public Distribution, in exercise of its powers conferred under the Consumer Protection Act, 2019, had notified the Consumer Protection (E-Commerce) Rules, 2020 ('**E-commerce Rules**'). The Government has now, on 21 June 2021, proposed certain amendments to the E-commerce Rules and is receiving comments or suggestions from the stakeholders.

The proposed amendments, once notified, will not only impact the e-commerce operators (both marketplace as well as inventory-based model entities) but also entities which are engaged by such operators in fulfilment of orders placed by buyers on an electronic portal or mobile based application ('**Platform'**).

We discuss a few of the relevant proposals which will significantly impact the e-commerce industry below:

1) Definition of e-commerce entity[1]:

It means any person who owns, operates or manages digital or electronic facility or platform for electronic commerce, **including any entity engaged by such person for the purpose of fulfilment of orders placed by a user on its platform, and any 'related party' as defined under Section 2(76) of the Companies Act, 2013** but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity.

The proposed definition of e-commerce entity covers (a) any entity engaged by e-commerce entities for fulfilment of orders, and (b) related parties (as defined under the Companies Act, 2013).

The proposal, with the definition, has widened the ambit of e-commerce entities. It seems to now include third party service providers engaged by an e-commerce entity for fulfilment of orders placed by a buyer on the Platform. The obligations currently casted on e-commerce entities will apply on such entities as well.

2) Registration of e-commerce entity[2]:

As pe the proposal, the e-commerce entity which intends to operate in India is required to get registered with the Department for Promotion of Industry and Internal Trade (DIPP), within the prescribed period for allotment of a registration number. The said registration number, and invoice of everyday orders, are to be displayed prominently to the users in a clear and accessible manner by an e-commerce entity on the Platform.

[1] Rule 3 of the proposed E-commerce Rules

[2] Rule 4 of the proposed E-commerce Rules

However, as regards the display of registration number by proposed entities (i.e. third-party service providers engaged by an e-commerce entity to fulfil orders), the entities may not have a Platform to display the number. Therefore, in order to avoid ambiguity, a suitable clarification with respect to display of their registration number at the registered office, or at all the offices of such entities, should be issued by the Government.

Further, due to such a requirement, a regulatory compliance will now be imposed on e-commerce entities, especially the requirement of displaying invoices on Platform. It will require e-commerce entities to update their IT systems to reflect the requisite details.

3) Proposed definitions[3]:

I. Cross-selling:

It means sale of goods or services which are related, adjacent or complimentary to a purchase made by a consumer at a time from any e-commerce entity with an intent to maximize the revenue of such e-commerce entity.

As regards cross-selling, an e-commerce entity engaged in cross-selling of goods or services is required to disclose the following to its users in a clear and accessible manner on its platform:

(a) Name of the entity providing data for cross-selling, and

(b) Data of such entity used for cross-selling.

While undertaking cross-selling as a marketing strategy by an e-commerce entity, one needs to consider as to whether an e-commerce entity is required to disclose the name of seller or itself or merchandising profiler (engaged by e-commerce entity), as an entity providing data for cross-selling.

II. Fall-back liability:

It means (a) liability of a marketplace e-commerce entity, (b) where a seller registered with such entity fails to deliver the goods or services ordered by a consumer, (c) due to negligent conduct, omission or commission of an act by such seller and (d) which causes loss to the consumer.

In the foregoing event, the marketplace e-commerce entity will be subject to a fall-back liability.

It is worthwhile to note that such proposals will create additional liability on marketplace e-commerce entities for the default of the seller. The consumers will be able to reach out to the e-commerce entity irrespective of the terms and conditions displayed on the Platform, or as agreed with sellers by an e-commerce entity. To safeguard the interests of the entities, the agreements entered into by e-commerce entities with sellers may be suitably amended to include protective terms and conditions, including having an indemnity clause.

[3] Rule 3 of the proposed E-commerce Rules

4) Appointment of officers[4]:

An e-commerce entity will now be required to appoint three categories of officers:

(a) *Chief compliance officer*: He will be responsible for ensuring compliance with relevant laws (Acts and Rules made thereunder). He will be liable in any proceedings with respect to any relevant third-party information, data or communication link made available or hosted by e-commerce entity. He should be managerial personnel or such other senior employee of an e-commerce entity who is a resident and citizen of India.

(b) *24x7 nodal contact person*: He will be liable for coordination with law enforcement agencies and officers to ensure compliance. He should be an employee of an e-commerce entity, other than the chief compliance officer. He should also be a resident and a citizen of India.

(c) *Resident grievance officer*: He should be an employee of an e-commerce entity, who is a resident and a citizen of India.

Similar obligations to appoint officers have been cast upon significant social media intermediaries by the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

5) Related parties and associated enterprise[5]:

By way of the proposed amendments, the marketplace e-commerce entity is to ensure that:

(a) it does not use any information collected through its Platform for unfair advantage of its related parties and associated enterprises;

(b) none of its related parties and associated enterprises are enlisted as sellers for sale to consumers directly; and

(c) nothing is done by related parties or associated enterprises which the e-commerce entity cannot do itself.

'Related parties' are the persons as defined under the Companies Act, 2013, whereas, the relationship of two or more enterprises as an associated enterprise depends upon factors, such as common chain of directors or managing partners, specified % of holding of the shareholders, specified % of ultimate beneficial ownership, right to veto, voting power, etc.

It is worthy to note that the related parties and associated enterprises should not be enlisted as sellers by a marketplace e-commerce entity, for sale to consumers directly.

The proposed amendment is likely to impact the present business model of various e-commerce entities, and such e-commerce entities may be required to re-visit their existing business models.

[4] Rule 5 of the proposed E-commerce Rules

[5] Rule 6 of the proposed E-commerce Rules

6) No sale by e-commerce entity to the seller[6]:

The proposed amendment restricts a marketplace e-commerce entity to sell goods or provide services to any person who is registered as a seller on its Platform.

The said amendment is likely to impact e-commerce entities where products are sold by an e-commerce entity (either in the capacity of manufacturer of product or trader of product) to the seller registered on the Platform.

On a concluding note, we would like to highlight that the proposed amendments in E-commerce Rules will impact the entire e-commerce industry. Appropriate steps may be taken by the concerned companies by re-visiting their present business models, amending existing agreements entered into with the sellers registered on the Platform, and the terms and conditions displayed on the Platform, in order to become ready and complaint with the proposed amendments in E-commerce Rules.

[The authors are Executive Partner and Principal Associate, respectively, in the Corporate and M&A practice at Lakshmikumaran & Sridharan Attorneys, Gurugram]

Notifications and Circulars

Indian Accounting Standards revised: The MCA has notified the Companies (Indian Accounting Standards) Amendment Rules, 2021 to further amend the Companies (Indian Accounting Standards) Rules, 2015. Notably, the COVID 19 related rent concession has been extended till 30 June 2022 (Ind AS 116 - Leases). The amendments which come into effect from 18 June 2021 also amend the following Indian Accounting Standards:

- Ind AS 101 First-time Adoption of Indian Accounting Standards
- Ind AS 102 Share-based Payment
- Ind AS 103 Business Combinations
- Ind AS 104 Insurance Contracts
- Ind AS 105 Non-current Assets Held for Sale and Discontinued Operations
- Ind AS 106 Exploration for and Evaluation of Mineral Resources
- Ind AS 107 Financial Instruments: Disclosures
- Ind AS 108 Operating Segments
- Ind AS 109 Financial Instruments
- Ind AS 111 Joint Arrangements
- Ind AS 114 Regulatory Deferral Accounts
- Ind AS 115 Revenue from Contracts with Customers
- Ind AS 1 Presentation of Financial Statements

[6] Rule 6 of the proposed E-commerce Rules

- Ind AS 8 Accounting Policies, Changes in Accounting Estimates and Errors
- Ind AS 12 Income Taxes
- Ind AS 16 Property, Plant and Equipment
- Ind AS 27 Separate Financial Statements
- Ind AS 34 Interim Financial Reporting
- Ind AS 37 Provisions, Contingent Liabilities and Contingent Assets
- Ind AS 38 Intangible Assets
- Ind AS 40 Investment Property

Small and Medium Sized Company – Definition revised in Accounting Standards: The MCA has also revised the definition of Small and Medium Sized Company (SMC) for the purpose of applicability of Accounting Standards. While the turnover limit has been increased from INR 50 crore to INR 250 crore for SMCs, the borrowing limit is now INR 30 crore instead of INR 10 crore. The new Companies (Accounting Standards) Rules, 2021 supersede the Companies (Accounting Standards) Rules, 2006 for this purpose.

Board meetings via Video Conferencing – MCA omits exclusions: The MCA has omitted Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014, with effect from 15 June 2021. This Rule had provided the list of matters which were not to be dealt with in any meeting held through video conferencing or other audio-visual means. It may be noted that, by an amendment in 2020, these specified meetings were allowed to be conducted *via* video conferencing or using other audio-visual means, till 30 June 2021. The list of specified meetings had covered approval of the annual financial statements, approval of the Board's report, approval of the prospectus, Audit Committee Meetings for consideration of financial statement including consolidated financial statement to be approved by the board under Section 134(1) of the Companies Act, 2013, and approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover. The Companies (Meetings of Board and its Powers) Amendment Rules, 2021 has been issued for the purpose of omitting the specification.

Renewal of name in databank of Independent Directors: The MCA has, through its notification dated 18 June 2021, notified an amendment to the Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019 ('**Rules**'). Companies (Creation and Maintenance of databank of Independent Directors) Amendment Rules, 2021 issued for the purpose, amends Rule 3(7)(a) of the Rules to insert the words 'or renewal'. Resultantly, the institute (being the Indian Institute of Corporate Affairs notified under the Companies Act, 2013) shall fix a reasonable fee to be charged from individuals also for renewal of their names in the data bank of independent directors. Further, as per new sub-rule 3(8) of the Rules, in case of delay on the part of an individual in applying to the institute for inclusion of his name in the data bank or for renewal, the institute shall allow such inclusion or renewal under Rule 6 of the Companies (Appointment and Qualification of Directors) Rules, 2014 after charging a further fees of one thousand rupees on account of such delay.

EGMs through VC/OAVM/postal ballot allowed till 31 December 2021: Considering Covid-19, the MCA has allowed companies to conduct their Extraordinary General Meetings (EGMs) through video conferencing or other audio-visual methods, or transact items through postal ballot, up to 31 December 2021. As per General Circular No. 10 of 2021, dated 23 June 2021, all other requirements provided in Circulars Nos. 14/2020, 17/2020, 22/2020, 33/2020 and 39/2020 shall remain unchanged.

Forms under Companies Act, 2013 and LLP Act, 2008 – Waiver of additional fees for non-charge forms and relaxations for specified charge forms: The MCA has granted additional time up to 31 August 2021 for filling of forms by Companies & LLPs (other than charge forms), which are due for filling during 1 April 2021 to 31 July 2021, without any additional fees. Accordingly, the due dates of Form DPT-3 & Form CFSS have been extended to 31 August 2021. As per General Circular No. 11/2021, dated 30 June 2021, only normal fees shall be levied up to 31 August 2021 for forms other than Forms CHG-1, CHG-4 and CHG-9.

Further, it may be noted that MCA has issued Circular No.12/2021, dated 30 June 2021 for relaxing time regarding filling forms related to creation or modification of charges. Accordingly, the period beginning from 1 April 2021 and ending on 31 July 2021 shall not be counted for filing Forms CHG-1 and CHG-9, where the due date for filing has not expired as on 1 April 2021, or where the due date falls between 1 April 2021 to 31 July 2021.

SEBI relaxes timelines for compliance with regulatory requirements: Considering the Covid-19 pandemic, the SEBI has, on 30 June 2021, once again relaxed various timelines for the following regulatory compliances.

- Maintaining call recordings of orders/ instructions received from clients – Till 31 July 2021.
- Client Funding Reporting – Till 31 July 2021.
- To operate the trading terminals from designated alternate locations – Till 31 July 2021.
- KYC application form and supporting documents of the clients to be uploaded on system of KRA within 10 working days – Till 31 July 2021. Documents may be uploaded on to the system of KRA within 15 working days from the said date. A 30-day time period is provided to SEBI registered intermediaries after 31 July 2021 to clear the backlog.
- Issue of Annual Global statement to clients – Till 31 July 2021. Relaxation is provided only if the client has requested for a physical statement.

SEBI relaxes minimum vesting period under SEBI (Share Based Employee Benefit) Regulations, in case of death of employee(s): The SEBI, *vide* the Circular dated 15 June 2021, has relaxed the requirements of minimum vesting period under the SEBI (Share Based Employee Benefit) Regulations, 2014 in case of death of employee(s). In view of the Covid-19 pandemic and to provide relief to the families of the deceased employees of listed companies, SEBI has clarified that the minimum vesting period of 1 year shall not apply in case of death (for any reason) of an employee, and the benefit granted to such employee(s) shall vest with his/her legal heir or nominee on the date of death of the employee. This relaxation shall be available to all such employees who have deceased on or after 1 April 2020.

SEBI (Delisting of Equity Shares) Regulations, 2021 notified: In supersession of the SEBI (Delisting of Equity Shares) Regulations, 2009, the SEBI has introduced the SEBI (Delisting of Equity Shares) Regulations, 2021. The new delisting regulations, effective from 10 June 2021, have introduced provisions relating to the delisting of equity shares of a listed subsidiary company of a listed holding company pursuant to a scheme of arrangement under the Companies Act, 2013.

Securities Contracts (Regulation) Rules revised: The Department of Economic Affairs in the Ministry of Finance has amended the Securities Contracts (Regulation) Rules, 1957. As per latest amendments, effective from 18 June 2021, a company which is desirous of getting its securities listed on a Stock Exchange shall offer and allot to public in terms of an offer document at least such percentage of securities issued by the company equivalent to the value of INR 5000 Crore, and at least 5% of each such securities issued by the company, if the post issue capital of the company calculated at offer price is above INR 1 lakh Crore. Further, the Company shall increase its public shareholding to at least 10% within a period of 2 years, and at least 25% within a period of 5 years from the date of listing of the securities. Also, according to another amendment in Rule 19, a company which is desirous of getting its securities listed on a Stock Exchange shall offer and allot to public, in terms of an offer document, at least 10% of each class or kind of equity shares or debentures convertible into equity shares (securities) issued by the company, if the post issue capital of the company calculated at offer price is above 4 thousand crore *but less than or equal to 1 lakh crore*.

Ratio Decidendi

Secured Creditor cannot challenge approved resolution plan on ground that higher amount should be paid based on security interest

The Supreme Court has held that a dissenting secured creditor cannot challenge a resolution plan approved under the Insolvency and Bankruptcy Code, 2016 ('**IBC**'/ '**Code**') with an argument that higher amount should have been paid to it based on the security interest held by it in the corporate debtor.

Brief facts:

a. The Appellant company, by way of an appeal under Section 62 of the IBC, challenged the order passed by the National Company Law Appellate Tribunal ('NCLAT'), whereby the Appellate Tribunal had rejected its challenge to the order passed by the National Company Law Tribunal ('NCLT') in approval of the resolution plan in the corporate insolvency resolution process (CIRP) concerning the Corporate Debtor.

b. When the resolution plan submitted by Respondent No.1 was taken up, the Appellant company, being a secured financial creditor of the corporate debtor, expressed its reservation on the shares being proposed, particularly with the value of security interest held by it and chose to remain a dissentient financial creditor.

c. However, a substantial majority of other financial creditors voted in favor of the resolution plan and, therefore, the resolution plan got an approval of the financial creditors with a 93.35% majority. Further, the Adjudicating Authority found the plan to

be feasible and viable with judicious distribution to the stakeholders according to their entitlements.

Submissions:

a. The contention raised in the present case was that the approved resolution plan failed the test of being 'feasible and viable' inasmuch as the value of secured asset, on which security interest was created by the corporate debtor in the Appellant's favor, was not taken into consideration.

b. It was further contended by the Appellant that, after amendment to sub-section (4) of Section 30 of the Code, the Committee of Creditors (CoC) was required to take into account the order of priority amongst other creditors as laid down in Section 53(1) of the Code, including the priority and value of security interest of a secured creditor.

Decision:

a. The Court opined that the appeal remained totally bereft of substance and did not merit admission as the process of consideration and approval of resolution plan are essentially matters of commercial wisdom of the CoCm and the scope of judicial review remains limited to the four corners of Section 30(2) of the Code for the Adjudicating authority, and Section 30(2) read with Section 61(3) for the Appellate Authority.

b. Once it is found that all the mandatory requirements have been duly complied with and taken care of, the process of judicial review cannot be stretched to carry out quantitative analysis *qua* a particular creditor or any stakeholder, who may carry his own dissatisfaction and the same cannot be taken up as a ground of appeal.

c. Therefore, the provisions of Section 30(4) do not make out any case for interference with the resolution plan at the instance of the appellant.

[*India Resurgence Arc Private Limited* v. *Amit Metaliks Ltd. and Anr.* – Civil Appeal No. 1700 of 2021, Supreme Court]

NCLT can refuse insolvency application if there are signs of collusion and *mala fide* intent

The NCLAT has recently ruled that, where it appears that an application has been filed collusively with a *mala fide* intent and not with the purpose of insolvency resolution, then despite fulfilling all the conditions of Section 7(5) of the Insolvency and Bankruptcy Code, 2016 ('**Code**'), the Adjudicating Authority can exercise its discretion in rejecting the application relying on Section 65 of the Code.

Brief facts:

a. The Appellant is a Financial Creditor of the Respondent and had advanced a loan to the Respondent. The Appellant had filed a Section 7 application under the Code, thereafter, against the Respondent on account of the default committed by the Respondent/Corporate Debtor in repaying the loan amounts.

b. The Section 7 application was complete in all aspects and met all the requirements under the Code and Regulations thereunder. Despite that, the Adjudicating Authority dismissed the impugned application on the ground that the application has been filed by the creditor in collusion with the Corporate Debtor with a *mala fide* intent.

Submissions:

a. The Appellant submitted that the Adjudicating Authority has overreached and exceeded its authority and jurisdiction in passing the impugned order as there is no basis for the finding that there is a collusion of parties. The impugned order has been passed in contravention of the law, provisions of the Code and Regulations made thereunder. Under Section 7(5) of the Code, no discretion is vested in the Adjudicating Authority to reject the Section 7 application if a default has occurred, and the Application is complete. Further, Section 65 of the code cannot be applied to the present case, because there is no relation between the parties, and the Appellant has demonstrated existence of default recognized by the Adjudicating Authority.

b. The Respondent further submitted that an unsecured loan was sought from the Appellant but due to business losses and economic recession, the Respondent Company was not able to recover the amounts, and thus was not able to repay the loan. The Respondent also disagreed with the allegations of collusion, mentioned in the impugned order, as there has been a proper disbursement of the amount.

Decision:

a. The NCLAT held that the use of phrase 'it may' under sub-section (5) of Section 7 itself leaves the scope of discretion exercised by Adjudicating Authority in admitting or rejecting applications.

b. Further, in the given situation where it appears that the Application has been filed collusively with mala fide intent, and not for the purpose of insolvency resolution, , the Adjudicating Authority can exercise its discretion in rejecting the application relying on Section 65 of the Code.

c. Section 65 of the Code provides for punishment for fraudulent or malicious initiation of proceedings. It does not mean that Section 65 will not be applicable to prevent such fraudulent or malicious initiation of proceedings. When a statute makes a provision for punishment for any wrong, it also contains a deemed power to prevent it. Therefore, it cannot be said that section 65 will be applicable only after initiation of the Corporate Insolvency Resolution Process (CIRP) fraudulently or with malicious intent.

d. The NCLAT observed that the Adjudicating Authority must exercise discretion carefully to prevent and protect the Corporate Debtor from being dragged into *mala fide* CIRP.

[*Hytone Merchants Pvt. Ltd.* v. *Satabadi Investment Consultants Pvt. Ltd.* – Judgment dated 30 June 2021 in Company Appeal (AT) (Insolvency) No. 258 of 2021, NCLAT]

Foreign State cannot claim sovereign immunity against enforcement of arbitral award arising from a commercial transaction

The Delhi High Court, in an interesting judgment on arbitration laws, has held that a Foreign State cannot claim sovereign immunity to resist the enforcement of an arbitral award arising out of commercial transaction.

Brief facts:

a. The Petitioner was awarded a contract for the rehabilitation of the Afghanistan Embassy in New Delhi by the Respondent. Thereafter, disputes arose during the course of execution of the work that led the Petitioner to invoke the arbitration clause in the contract between the parties.

b. Subsequently, the Supreme Court appointed an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**') to adjudicate the disputes. The Respondent appeared before the Sole Arbitrator appointed until July 2017 and made no appearance thereafter.

c. The Sole Arbitrator passed an *ex-parte* award in favour of the Petitioner. The Respondent did not challenge the award and it attained finality. However, no payment was made to the Petitioner in terms of the award. The present proceedings have been initiated seeking enforcement of the arbitral award.

Submissions:

a. The Petitioners submitted that an arbitral award passed in an International Commercial Arbitration (ICA) held in India, as in this case, should be interpreted as a 'Domestic Award' under the Arbitration Act and would be enforceable under Section 36 of the said Act.

b. The Petitioners also claimed that an arbitral award deriving from a commercial transaction does not allow for sovereign immunity of a foreign state, and that entering into an arbitration agreement constitutes a waiver of such sovereign immunity.

c. The Petitioners also contended that since India is a signatory to the United Nations Convention on Jurisdictional Immunities of States and their Property, 2004, Article 10 of the Convention forbids a Foreign State from claiming sovereign immunity, and under Article 19 of the Convention, there is an express prohibition for a Foreign State from claiming sovereign immunity in the face of post-judgment measures of constraint, such as attachment, arrest, or execution, against the State's property in cases arising, from an ICA.

Decision:

a. The High Court held that a Foreign State could not claim sovereign immunity against the enforcement of an arbitral award, arising out of a commercial transaction. In addition to this, the Court stated that the purpose and nature of the transaction would determine whether it was purely commercial in nature or in the domain of exercise of sovereign authority.

b. Additionally, the Court held, that a foreign State could not be permitted to contend that its consent must be sought again at the stage of enforcement, since the award itself is the result of arbitration, which the foreign state had consented to.

c. Lastly, it held that an arbitral award was to be treated as a decree only for the limited purpose of enforcement under the Code of Civil Procedure, 1908 (CPC), and not in a manner that would render useless the rationale of the Arbitration Act.

[*KLA Const. Technologies Pvt. Ltd.* v. *Embassy of Islamic Republic of Afghanistan* – Judgment dated 18 June 2021 in OMP (ENF) (COMM) 82/2019 & I.A. No. 7023/2019, Delhi High Court]

Limitation Act applicable to arbitration proceedings under Section 18 of MSMED Act

The Supreme Court of India has held that provisions of Indian Limitation Act, 1963 ('**Limitation Act**') are applicable to arbitration proceedings initiated under Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 ('**MSMED Act**'). The Court in this regard relied upon Section 43 of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**') according to which the Limitation Act shall apply to the arbitrations, as it applies to proceedings in court.

Brief facts:

a. The Respondent had given a tender to the Appellant with a clause that 90 per cent of the total purchase price was payable on supply of materials and the remaining 10 per cent would be paid subject to performance of materials.

b. Upon failure of the Respondent to pay the 10 per cent balance amount, the Appellant approached the Industrial Facilitation Council ('**Council**') under Section 17 of the MSMED Act, whereafter conciliation proceedings failed, which resulted in the dispute being referred to arbitration in accordance with Section 18(3) of the MSMED Act.

c. The arbitration award was passed in favour of the Appellant, which was sought to be set aside by the Respondent u/s. 34 of the Arbitration Act. Upon dismissal of the Section 34 application, the Respondent approached the High Court of Kerala in appeal under Section 37 of the Arbitration Act. The High Court held that the Limitation Act applies to arbitrations under the Arbitration Act arising out of the MSMED Act and remanded the matter back for fresh consideration. The present appeal has been filed against the said order by the Appellants.

Submissions:

a. The Appellants, being the seller, raised objection to the maintainability of a buyer's claims and submitted that the MSMED Act only envisages to protect the interests of sellers, and if counter claims of buyers were allowed it would amount to expanding the scope of the enactment beyond the statutory mandate.

b. The Appellants further argued that the fact that Act benefits the 'unpaid seller' could not be made inapplicable, and that the benefits of a statutory body established to hear the seller's claims could not be rejected only because of the buyer's counter arguments.

c. It was submitted by the Respondents that when the conciliation has failed, for further proceedings being arbitration proceedings, provisions of the Arbitration and Conciliation Act, 1996 are made applicable as if there is an agreement between the parties under sub-section (1) of Section 7 of the Arbitration Act. In light of the same, as such there is no reason for not allowing counter claim by the buyer. A specific reference was made to Section 23(2A) of the Arbitration Act.

Decision:

a. The Supreme Court held that in case a dispute arose under Section 17 of the MSMED Act, a reference must be made to the Council. The Council was then to refer the parties to conciliation, and if conciliation proceedings failed, the Council was to refer the dispute to arbitration under Section 18 of the MSMED Act. In these proceedings, the provisions of the Arbitration Act would apply.

b. The Court held that Section 23 of the Arbitration Act, which deals with statement of claim and defense, will apply. Additionally, the Court observed that a buyer can make its counter-claim and/or plead set-off in the arbitral proceedings under the MSMED Act.

c. The Court further held that, accordingly, Section 43 of the Limitations Act shall apply to arbitrations, and that the provisions of the Arbitration Act will apply in the same manner to arbitrations initiated under the MSMED Act as if there exists an agreement

between the parties under Section 7(1) of the Arbitration Act. The Court unequivocally held that the provisions of the Limitation Act apply to arbitrations initiated under Section 18 of the MSMED Act.

[*Silpi Industries Etc.* v. *Kerala State Road Transport Corporation & Anr. etc.* – Judgment dated 29 June 2021 in Civil Appeal Nos.1570-1578 Of 2021, Supreme Court]

News Nuggets

Consumer protection – Article in newspaper, providing inaccurate health advice, is not 'defective product'

The Court of Justice of the European Union (CJEU) has held that an article in a printed newspaper, that provides inaccurate health advice relating to the use of a plant, which when followed, proved injurious to the health of a reader, does not constitute a 'defective product' within the meaning of the EU's Directive on liability for defective products, Product Liability Directive 85/374/EEC ('**Directive**'). According to the Court, inaccurate health advice published in a printed newspaper, concerning the use of another physical item, falls outside the scope of the Directive, and hence will not render the newspaper defective and the 'producer' (publisher, printer or author) strictly liable.

It observed that the inaccurate advice, in the case, was not related to the printed newspaper which constituted its medium and that the service did not concern either the presentation or the use of the newspaper. It held that the service was not part of the inherent characteristics of the printed newspaper which alone permit an assessment as to whether the product is defective. The published article had inaccurately mentioned the duration of the treatment by using 'hours' instead of 'minutes'. The CJEU, in this case *VI* v. *KRONE – Verlag Gesellschaft mbH & Co KG* [Judgment dated 10 June 2021], also noted that services did not come within the scope of the EU's Directive.

Reflective loss – Australian Supreme Court summarises principles

In a case involving a shareholder's claim for reflective loss, the Supreme Court of Western Australia has recently laid down the principles covering the reflective loss principle. Quoting various authorities, the Court summarised that where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss and no action would lay at the suit of a shareholder, to make good a diminution of the value of the shareholder's shareholding, where that loss merely reflects the loss suffered by the company. It observed that this will be so even if the company has declined or failed to take action to recover the loss, and that the principle will apply even where both the company and the shareholder have a claim for breach of duty or breach of contract which caused the loss.

It however noted that if the company suffers loss but has no cause of action to sue to recover that loss, a shareholder, with a cause of action, who suffers loss to the value of his shares may sue in respect of it. The Court, in the case *Mineralogy Pty Ltd*. v. *Sino Iron Pty Ltd*. [Judgement dated 25 June 2021], also observed that the reflective loss principle does not prevent a shareholder suing for a loss suffered from a breach of duty owed to him, where the loss is separate and distinct from the loss suffered by the company.

Prior consent of Central Government not required for enforcement of arbitral award against foreign State

The Delhi High Court has held that prior consent of the [Indian] Central Government is not necessary under Section 86(3) of the Code of Civil Procedure, 1908 (CPC) to enforce an arbitral award against a Foreign State. The Court was of the view that a prior consent from the Central Government, in relation to an arbitral award, would lead to unnecessary delays and defeat the main purpose of arbitration, which is having a speedy, inexpensive, and fair trial by an impartial tribunal. Section 86(3) of the CPC provides that no decree shall be executed against the property of any Foreign State without the consent of the Central Government. The High Cour,t in the case *KLA Const Technologies Pvt. Ltd.* v. *Embassy of Islamic Republic of Afghanistan* [Judgement dated 18 June 2021], was of the view that Section 36 of the Arbitration and Conciliation Act, 1996 considers an arbitral award as a decree only, in the form of a legal fiction, for the purpose of enforcement and providing it legitimacy and validity and that it does not intend to make an arbitral award a decree under CPC.

Interim compensation under Section 143A of Negotiable Instruments Act is not discretionary

Pursuing the aim and object of the amended Section 143A of the Negotiable Instruments Act, 1881, the Chhattisgarh High Court has held that the word 'may' used in the said section is to be treated as 'shall'. Observing that it is in the interest of the complainant as well the accused if the 20% of the cheque amount is paid by the accused, the Court held that the provision is not discretionary but directory in nature.

The High Court noted that the intent behind Section 143A was to provide aid to the complainant during the pendency of proceedings under Section 138, where he is already suffering the double-edged sword of loss of receivables by dishonour of the cheque and the subsequent legal costs in pursuing claim and offence. It observed that the amendments in 2018 would reduce pendency in courts because of the deterrent effect on the masses while also ensuring certainty of process. Upholding the Order passed by the First Class Judicial Magistrate, the High Court in *Rajesh Soni* v. *Mukesh Verma* [Order dated 30 June 2021], relied upon the Supreme Court decision in the case of *Bachahan Devi* v. *Nagar Nigam, Gorakhpur* [(2008) 12 SCC 372] to pass the Order.

Corporate criminal liability – UK's Law Commission publishes discussion paper

The United Kingdom Law Commission has last month published a discussion paper with respect to corporate criminal liability ('**Paper**'). Acknowledging that there is no simple answer to questions like whose acts should count as the acts of the company, and how elements such as intent, recklessness, knowledge and dishonesty be applied to non-natural persons,

the Paper notes that the identification principle (mental state of only a senior management person) does not adequately deal with misconduct carried out by and on behalf of companies. It also elaborately discusses the general law on criminal liability of corporations, specific legislation on criminal liability, procedural rules for corporate prosecutions, corporate liability under civil law in England and Wales, and the approaches taken in USA, Australia, Canada, Germany, Italy and France. Addressing many questions, the Paper also talks about sentencing of corporations and criminal liability of directors and other individuals for corporate misconduct. One of the important questions dealt with is - What principles should govern the individual criminal liability of directors for the actions of corporate bodies? Are statutory 'consent or connivance' or 'consent, connivance or neglect' provisions necessary or is the general law of accessory liability sufficient to enable prosecutions to be brought against directors, where they bear some responsibility for a corporate body's criminal conduct?

New claims at belated stage when Resolution Applicants are already before CoC jeopardizes CIRP

The NCLAT, in a recent Order, has upheld the decision passed by NCLT Ahmedabad Bench and has held that, '*if at a belated stage when the Resolution Applicants are already before the Committee of Creditors with their Resolution Plan(s), if new claims keep popping up and are entertained, the CIRP would be jeopardized and Resolution Process may become more difficult'.* NCLAT observed that, as per Regulation 12 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ('**CIRP Regulations**'), the last day for submission of claim in the present matter was the 90th day i.e., 17 March 2020 as the CIRP started on 19 December 2019. The NCLAT in this case *Harish Polymer Product* v. *George Samuel* [Order dated 18 June 2021] was of the view that, in light of Regulation 40C of the CIRP Regulations, which was added in the wake of the pandemic,the period of lockdown imposed is not to be counted for the purposes of the timeline for any activity that could not be completed due to such lockdown, in relation to a CIRP. However, since the nationwide lockdown was imposed on 25 March 2020, and the 90 days completed much prior to the same, the option was also not available to the appellant in the case.

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

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

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

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

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

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

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

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

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

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

GURUGRAM
OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,
Sector 25-A,
Gurgaon-122001
Phone : +91-124-477 1300
E-mail : lsgurgaon@lakshmisri.com

PRAYAGRAJ (ALLAHABAD)
3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.P.)
Phone : +91-532-2421037, 2420359
E-mail : lsallahabad@lakshmisri.com

KOCHI
First floor, PDR Bhavan,
Palliyil Lane, Foreshore Road,
Ernakulam Kochi-682016
Phone : +91-484 4869018; 4867852
E-mail : lskochi@laskhmisri.com

JAIPUR
2nd Floor (Front side),
Unique Destination, Tonk Road,
Near Laxmi Mandir Cinema Crossing,
Jaipur - 302 015
Phone : +91-141-456 1200
E-mail : lsjaipur@lakshmisri.com

NAGPUR
First Floor, HRM Design Space,
90-A, Next to Ram Mandir, Ramnagar,
Nagpur - 440033
Phone: +91-712-2959038/2959048
E-mail : lsnagpur@lakshmisri.com