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Articles

Prepaid Instruments – An analysis of master directions issued by RBI

By **Manan Chhabra**

Banks regulator, the Reserve Bank of India (RBI), on 27 August 2021, issued the Master Directions on Prepaid Payment Instruments ('**MD PPI**') to introduce significant changes to the existing legal regime pertaining to the prepaid instruments (PPI) *viz.*, under the Master Directions on Issuance and Operation of Prepaid Payment Instruments ('**2017 MD**').

With the outbreak of the Covid-19 pandemic, there has been a drastic increase in the number of people using digital payment systems, thus, bringing significant profitability to the digital payment and fintech industry in India.

PPIs mean instruments that facilitate purchase of goods and services, financial services, remittance facilities, etc., against the value stored therein. For example, Sodexo cards with pre-loaded value. The MD PPI has now classified PPIs into two new categories, with an aim to simplify the regulatory procedure, as compared to the three categories provided under the 2017 MD i.e., Closed Systems PPI, Semi-Closed Systems PPI, and Open Systems PPI.

The MD PPI mandates that no entity can set up and operate payment systems for PPIs without prior approval / authorisation of RBI, and banks and non-bank entities are allowed to issue PPIs only after obtaining necessary approval / authorisation from RBI under the Payment and Settlement Systems Act, 2007. The salient features of the MD PPI are brought out as below:

A. Classification of PPIs:

The two newly introduced categories of PPIs which can be issued by banks and non-banks under the MD PPI are:

i. ***Small PPIs:***

- Issued after obtaining minimum details of the PPI holder for purchase of goods and services only.
- Minimum details include One Time Password (OTP) verified mobile number and a self-declaration of name and unique identity / identification number of any 'mandatory document' or 'Officially Valid Document (OVD)' or any such document with any name listed for this purpose in the Master Directions on Know Your Customer (KYC) norms.
- Small PPIs can hold cash up to INR 10,000 loaded per month, and not exceeding INR 1.2 lakh in a year.
- Maximum amount outstanding and maximum debit amount (PPI with cash loading facility) in a given month shall not exceed INR 10,000.

ii. ***Full-KYC PPIs:***

- Issued after completing Know Your Customer (KYC) of the PPI holder for the purchase of goods and services, funds transfer or cash withdrawal.
- Video-based Customer Identification Process (V-CIP)

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can be used to open full-KYC PPIs as well as to convert Small PPIs into full-KYC PPIs.

- Maximum amount outstanding at any point of time shall not exceed INR 2,00,000.
- Limit of INR 2,00,000 per month fund transfer in case of pre-registered beneficiaries and maximum limit for fund transfer in all other cases is INR 10,000 per month.
- RBI had used the term in earlier notifications, but this is the first time, the same is defined.

B. Interoperability:

- RBI under the MD PPI has mandated interoperability for all full-KYC PPIs, interoperability on the acceptance, and QR Codes in all modes shall be interoperable by 31 March 2022.
- Interoperability will enable a payment system to be used in conjunction with other payment systems, such as interoperability pertaining to wallets through Unified Payment Interface (UPI) and interoperability in form of cards through National Payments Corporation of India (NPCI).
- PPIs issued in mass transit systems are exempted from the requirement of interoperability, and gift PPI issuers (banks and non-banks) have an option to offer interoperability. The interoperability guidelines issued vide notification dated 19 May 2021 are now made part of the MD PPI.

C. Security measures:

- Vide the MD PPI, RBI has also introduced significant security measures to ensure safety of PPI holders. PPI issuers must disclose all the important terms and conditions to the PPI holders including details pertaining to charges and fees associated along with expiry period.
- An Issuer needs to have Two Factor Authentication for all wallet and cash withdrawal transactions.
- The PPI issuer shall put in place a formal, publicly disclosed customer grievance redressal framework, including designating a nodal officer to handle customer complaints or grievances, the escalation matrix, and turn-around-times for complaint resolution.
- In addition to the alerts to the PPI holder concerning debit/credit transactions, balance available /remaining in the PPI, MD PPI now stipulates PPI issuers to send alerts to the PPI holder in case of offline transactions also.

D. Other additions:

- For the purpose of pooling money, Non-bank PPI issuers are required to maintain the outstanding balance in an escrow account with any scheduled commercial bank, and non-bank PPI issuers that are members of the Centralised Payment Systems operated by RBI must maintain a Current Account with RBI.

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- PPI issuers are now required to submit a due diligence report, in addition to the satisfactory system audit report, and a net worth certificate, for the purpose of obtaining the Certificate of Authorisation under the MD PPI.
- With the consent of the PPI holder, funds can be transferred back to source account in case of gift PPIs.

Conclusion:

Digital payment methods were already an extremely prominent way of making payments on day-to-day basis, until the pandemic hit the world and increased our dependence on these modes of payments. RBI identified PPIs as one of the major modes of payment and cash withdrawal and issued the first set of guidelines on PPIs in 2017. *Vide* the latest Master Directions of 2021, RBI has introduced changes to said guidelines with an aim to harmonise the process of issuance and usage of PPIs and ensure interoperability of wallet and card-based PPIs with identified payment systems.

Although the new Master Directions have further liberalised the framework pertaining to issuance and operation of PPIs by banks and non-banks, but at the same time, RBI has also ensured that usage of PPI is safe and secure by introducing security measures involving a Two Factor Authentication and message alerts to the holder of PPIs pertaining to any transaction, along with introducing provisions relating to customer protection and grievance redressal framework, to ensure transparency and awareness amongst the users of PPIs.

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Notifications and Circulars

SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021 notified: SEBI has issued the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021 ('**NCS Regulations**'). Highlights of the NCS regulations are:

(a) Mandatory appointment of Debenture Trustee for both public issue and private placement of debt securities.

(b) Provisions relating to call and put options shall equally apply in case of public issuances as well as private placement.

(c) Regulation 44(2) of the NCS regulations clarifies the ambiguity regarding issuance of debt securities on private placement basis, by a company in existence for less than 3 years, and provides that issuers who are in existence for less than 3 years may provide Annual Reports pertaining to the years of existence.

(d) Restrictions of using proceeds from the issue of non-convertible securities for providing loans to or acquisition of shares of entities under their promoter group or

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group companies have been relaxed for Non-Banking Financial Companies (NBFCs), Housing Finance Companies (HFCs) and public financial institutions.

(e) Validity of shelf-prospectus.

(f) For public issuance, removal of the requirement that not more than four issuances can be made under a single shelf prospectus.

(g) For private placement, time validity of shelf prospectus increased from 180 days to 1 year.

(h) Eligibility requirements specified for the issuance of listed debt securities.

(i) Minimum subscription in case of public issue of Debt Securities set to 75% of the base issue size. However, the same is not applicable in the case of issuance of tax-free bonds.

In case of secured debentures, the assets offered as collateral are required to be unencumbered only to the extent of 100% security cover. Thus, assets over and above the 100% security cover may be encumbered and the same may be provided as security without obtaining relevant permissions from the existing charge holders.

Independent Directors – SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 notified: The amendment majorly deals with the provisions relating to Independent Directors ('**IDs**') which are summarized as follows:

(a) Enhanced criteria for determining independence of IDs

(b) Regularization of additional directors (both independent or otherwise)

(c) Changes in the composition of Nomination and Remuneration Committee (NRC)

(d) Change in manner of approval of Related Party Transactions

(e) Procedure for Appointment/ Removal of IDs

(f) Changes in time limit for filing casual vacancy

(g) Directors and Officers (D&O) Liability Insurance for IDs

(h) Cooling-off period before transition post resignation as IDs

(i) Disclosures at the time of appointment and resignation of IDs

(j) Role of NRC in appointment of IDs

These amendments are applicable from 1 January 2022.

SEBI (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2021 notified: SEBI has amended the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ('**SAST Regulations**') The following changes have been brought:

(a) In Regulation 29(1) & (2), which deals with disclosure of acquisition and disposal of shares by acquires and persons acting in concert, the Convoluted language has been straightened to make it reader friendly. No change in interpretation.

(b) For Regulation 30 dealing with continual disclosures has been done away with. The relaxation has been provided on account of implementation of System Driven Disclosures ('**SDD**').

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(c) For Regulation 31 dealing with disclosure of encumbered shares, where creation/ invocation/ release of encumbrance on the shares of the target company is through a depository, promoters have been exempted from giving disclosures of the same, since it is covered under SDD.

SEBI (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2021 notified: The SEBI has amended SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 **('ICDR Regulations')** and provided the following relaxations:

(a) ***Change in definition of promoter group***: In Regulation 2(1)(pp)(iii), omission of clause (C) - Any body corporate in which a group of individuals or companies or combinations thereof acting in concert, which holds 20% or more of the equity share capital in that body corporate, and such group of individuals or companies or combinations thereof also holds 20% or more of the equity share capital of the issuer, are omitted from the definition of promoter group.

(b) ***Reduction in lock-in of promoter holdings under Regulations 16 and 115:***

- Lock-in requirements of minimum promoters' contribution and other institutional investors has been reduced to 18 months from the date of allotment under IPO/ FPO (earlier 3 years from the date of commencement of production or IPO/ FPO, whichever is later). However, if majority of the issue proceeds excluding offer for sale is to be utilized for capital expenditure, then the lock-in period shall be 3 years from the date of allotment in IPO/FPO.
- Lock-in requirement of excess promoters' contribution has been reduced to 6 months (earlier 1 year). However, if the majority of the issue proceeds excluding offer for sale is to be utilized for capital expenditure, then the lock-in period shall be 1 year from the date of allotment in IPO/ FPO.
- Capital expenditure has been explained to include civil work, miscellaneous fixed assets, purchase of land, building and plant and machinery, etc.

(c) ***Lock-in of holding of persons other than promoters under Regulation 17:*** The lock-in requirement of pre-issue capital of persons other promoters has been reduced to 6 months (earlier 1 year).

(d) ***Lock-in of partly paid shares:*** The lock-in requirement of partly paid shares has been reduced to 18 months (earlier 3 years).

SEBI (Infrastructure Investment Trusts) (Amendment) Regulations, 2021 notified: SEBI has amended SEBI (Infrastructure Investment Trusts) Regulations, 2014 and SEBI (Real Estate Investment Trusts) Regulations, 2014. Provisions related to minimum application value and trading lots have been amended. The minimum application value will now be in the range of INR 10,000-15,000 and a trading lot will be of one unit for Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (InvITs).

SEBI (Alternative Investment Funds) (Third Amendment) Regulations, 2021 notified: The latest amendment introduces the following:

(a) Framework for Accredited Investors of Alternate Investment Funds (AIFs) basis financial parameters;

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(b) AIFs with only Accredited Investors are exempt from minimum investment criteria; diversification requirements relaxed; allowed to extend the tenure of the fund beyond 2 years; and

(c) Issue of partly paid-up units by AIFs; relaxing investment restrictions on venture capital funds and filing of Private Placement Memorandum (PPM) through merchant bankers.

SEBI (Foreign Portfolio Investors) (Amendment) Regulations, 2021 notified: The latest amendment provides that the non-resident Indians or overseas citizens of India, or resident Indian individuals, may be constituents of an applicant for Foreign Portfolio Investment (FPI) registration provided they meet the conditions specified by SEBI from time to time. It is further provided that resident Indians, other than individuals, may also be the constituents of the applicant, subject to the following conditions, namely –

(a) Such resident Indian, other than individuals, is an eligible fund manager of the applicant, as provided under sub-section (4) of Section 9A of the Income Tax Act, 1961; and

(b) The applicant is an eligible investment fund as provided under sub-section (3) of Section 9A of the Income Tax Act, 1961 which has been granted approval under the Income Tax Rules, 1962.

Securities Contracts (Regulation) (Second Amendment) Rules, 2021 notified: The latest amendment is brought under Rule 19A of Securities Contracts (Regulation) Rules, 1957, which provides for maintenance of minimum public shareholding and its attainment within a specified period. These amended rules can be summarized as under:

(a) Every listed company (other than public sector Company) shall maintain public shareholding of at least 25%.

(b) Any listed company which has public shareholding below 25%, shall increase its public shareholding to at least 25%, within a period of three years from the date of such commencement, in the manner specified by SEBI.

(c) A company whose securities have been listed pursuant to an offer and allotment made to public, shall maintain minimum 25% of public shareholding.

(d) Where the public shareholding in a listed company falls below 25% at any time, such company shall bring the public shareholding to 25% within a maximum period of twelve months from the date of such fall in the manner specified by SEBI.

(e) Where the public shareholding in a listed company falls below 25% in consequence to the Securities Contracts (Regulation) (Amendment) Rules, 2015, such company shall increase its public shareholding to at least 25% in the manner specified by SEBI within a period of three years

Through this amendment, the Central Government, in the public interest, shall exempt any listed public sector company from any or all of the above provisions of this rule.

Foreign companies or those incorporated outside India – Specified companies exempted from compliance with Sections 387 to 392: The Ministry of Corporate Affairs (MCA) has exempted following class of companies from

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compliance with section 387 to 392 of the Companies Act, 2013 (which deals with provisions for issue of securities in India by companies incorporated outside India):

(a) foreign companies; and

(b) companies incorporated or to be incorporated outside India, whether the company has or has not established, or when formed may or may not establish, a place of business in India, if they are offering for subscription in the securities, requirements related to the prospectus, and all other related matters to the International Financial Services Company (IFSC).

Electronic mode – Companies (Registration of Foreign Companies) Amendment Rules, 2021 and Companies (Specification of definitions details) Third Amendment Rules, 2021 notified: MCA has amended the Companies (Registration of Foreign Companies) Rules, 2014. An explanation has been inserted in Rule 2(1)(c), which defines the term 'electronic mode' for the purpose of Section 2(42) of the Companies Act, stating that electronic based offering of securities, its subscription or listing of securities in the IFSC shall not be construed as 'electronic mode' for the purpose of Section 2(42) of the Act. Changes have in this regard also been made in the Companies (Specification of definitions details) Third Amendment Rules, 2021.

Companies (Appointment and Qualification of Directors) Amendment Rules, 2021 notified: The MCA has amended Rule 6(4) of Companies (Appointment and Qualification of Directors) Rules, 2014 dealing with 'Compliances required by a person eligible and willing to be appointed as an independent director'. The amendments have the effect of extending coverage of persons who can be appointed as an independent director without passing online proficiency self-assessment test.

Foreign Exchange Management (Non-debt Instruments) (Second Amendment) Rules, 2021 notified: As per the Foreign Exchange Management (Non-debt Instruments) (Second Amendment) Rules, 2021, applications for FDI in private banks having a joint venture or subsidiary in the insurance sector may be addressed to the RBI for consideration in consultation with the Insurance Regulatory Development Authority of India (IRDAI) to ensure that the limit of foreign investment of 74% for the insurance sector is not breached.

Position Limits for Currency Derivatives Contracts clarified: SEBI has revised client level position limits for trading in cross-currency futures and options contracts as follows:

(a) For USD-INR, gross open position across all contracts will not exceed 6% of the total open interest or USD 20 million, whichever is higher. Earlier, the limit was USD 10 million.

(b) In EUR-INR case, the gross open position across all contracts will not exceed 6 % of the total open interest or 10 million euros, whichever is higher. The limit was earlier fixed at 5 million euros.

(c) For GBP-INR, gross open position across all contracts will not exceed 6% of the total open interest or 10 million pounds, whichever is higher. Earlier, limit was set at 5 million pounds.

(d) For JPY-INR, gross open position across all contracts will not exceed 6 % of the total open interest or JPY 400 million Japanese yen, whichever is higher. Previously, the limit was 200 million Japanese yen.

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The revised position limits shall also apply to Non-Resident Indians (NRIs) and Category-II Foreign Portfolio Investors (FPIs) that are individuals, family offices, and corporates.

Accredited Investors – Modalities for implementation of the framework issued: SEBI has issued guidelines on eligibility criteria for accredited investors (AIs), and procedure as well as validation for accreditation, procedure to avail benefits linked to accreditation and flexibility to investors to withdraw "consent". Under the aforesaid framework, AIs may avail flexibility in minimum investment amount or concessions from specific regulatory requirements applicable to investment products, subject to conditions applicable for specific products/ services under the aforesaid Regulations. The modalities of accreditation are provided in Annexure A of the circular dated 26 August 2021 as issued by SEBI.

Alignment of interest of Asset Management Companies (AMCs) with the Unit holders of the Mutual Fund Schemes: Based on the risk value assigned to the scheme(s), AMCs are required to invest minimum amount as a percentage of assets under management ('AUM') in their scheme(s). Key points:

(a) Risk value of the scheme as per the risk-o-meter of the immediate preceding month shall be considered.

(b) Investment shall be maintained at all points of time till the completion of tenure of the scheme or till the scheme is wound up.

(c) AMCs shall, except in case of close ended scheme(s), conduct a quarterly review to ensure compliance with the requirement of investment of minimum amount in the scheme(s), which may change either due to change in value of the AUM or in the risk value assigned to the scheme. Further, based on review of quarterly average AUM, shortfall in value of the investment in scheme(s), if any, shall be made good within 7 days of such review. AMC shall have the option to withdraw any excess investment than what is required pursuant to such review.

(d) AMCs may invest from their net worth, or the sponsor may fund the AMC to fulfil the aforesaid obligations, if required. However, the AMCs shall be required to make good the shortfall in the minimum net-worth to comply with the requirement of the SEBI (Mutual Fund) Regulations, 1996 ('MF **Regulations'**), in case of sustenance of temporary Mark to Market loss for two consecutive quarters. AMC shall ensure that such temporariness of the Mark to Market loss is certified by the statutory auditor.

(e) AMCs shall not be required to invest in Exchange Traded Funds (ETFs), Index Funds, Overnight Funds, Funds of Funds scheme(s) and in case of close ended funds wherein the subscription period has closed as on date of coming into force of MF Amendment Regulations.

(f) Mandatory contribution already made by the AMCs in compliance with the applicable MF Regulations shall not be withdrawn. However, such contribution can be adjusted against the investment required by the AMC as per this latest circular.

RBI issues Master Direction on Financial Statements - Presentation and disclosures: These latest Directions shall be applicable to all banking companies, corresponding new banks, Regional Rural Banks ('RRBs') and State Bank of India & primary co-operative banks. The Directions deals with-

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(a) Format of Balance Sheet & Profit & Loss account are prescribed in Annexure 1.

(b) The general instructions for the compilation of Balance Sheet and Profit and Loss Account for Commercial Banks are specified in Part-A of Annexure II. Part-B of Annexure II specifies guidance with respect to relevant issues in the application of certain Accounting Standards for Commercial Banks.

(c) Banks shall disclose information as specified in Annexure III in the notes to accounts of the financial statements. These disclosures are intended only to supplement and not to replace disclosure requirements.

(d) A standalone financial statement shall be prepared as per the formats prescribed in Annexure IV whether listed or unlisted, shall prepare and disclose Consolidated Financial Statements (CFS) in their Annual Reports.

Disclosure of shareholding pattern of promoters and promoter group entities clarified: Regulation 31(4) of the SEBI (LODR) Regulations, 2015 mandates that all entities falling under promoter and promoter group be disclosed separately in the shareholding pattern on the website of stock exchanges, in accordance with the format(s) specified by SEBI *vide* Circular dated 30 November 2015 and Circular dated 7 December 2018. Currently, shareholdings of promoters and promoter group entities are collectively disclosed under 'Table II-Statement showing shareholding pattern of the Promoter and Promoter Group' of the circular dated November 30, 2015. In the interest of transparency to the investors, all listed entities are now required to provide such shareholding, segregated into promoters and promoter group.

Non-convertible debt instruments along with warrants – SEBI issues guidelines: Chapter VI of SEBI ICDR Regulations governs issuance of Non-Convertible Debt Instruments along with warrants ('**NCDs with Warrants'**) through Qualified Institutions Placement ('**QIP'**). The NCS regulations governing issue and listing of non-convertible securities provide for Electronic Book Provider platform (EBP platform) for private placements of debentures amounting to INR 200 crore and above in a financial year. In order to streamline the procedure of issuance and applicability of EBP platform mechanism on the 'NCDs portion', SEBI has made applicable the following for issues wherein the size of NCDs portion is above threshold prescribed under the NCS regulations, and circulars issued there under:

(a) EBP platform mechanism shall be mandatory for 'NCDs portion' of the issue (for both stapled and segregated offer) and issuer shall be required to comply with the NCS regulations and Circulars issued there under.

(b) 'Warrants portion' of the issue shall be in terms of Chapter VI on QIPs under ICDR regulations.

(c) Of the 'total issue size' of the issue, at least 40% size shall consist of 'Warrants portion'.

The segregated offer of NCDs (issue where NCDs can be offered separately for subscription and stapled offer) (the issue where NCDs and warrants offering can be attached to each other), both shall be exempted from the requirements as prescribed under the Regulations 175(3), 179(2)(a), 180(1), and 180(2) of the ICDR Regulations.

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Ratio Decidendi

Payment due on fulfilment of certain condition is not financial debt if condition not fulfilled

The Mumbai bench of the National Company Law Tribunal ('**NCLT**') has held that payment due after the restaurant business 'breaks even', does not qualify for a 'financial debt' in case none of the restaurants, after the arrangement, 'broke even'.

Brief facts:

a. The relevant parties in the said dispute entered into a Restaurant Operation and Service Agreement ('**Agreement**') for operation of a restaurant for a period of five years as per which the Financial Creditor would finance the restaurant and the Corporate Debtor would provide technical and managerial assistance and operate the restaurant under the mark, 'Busaba' or 'Busago'. The Financial Creditor was responsible for paying for the security deposit and capital expenditure, while the Corporate Debtor was responsible for payment of working capital for the restaurant.

b. There was an arrangement in the agreement where the Financial Debtor could provide additional working capital on behalf of the Corporate Debtor in the manner mutually agreed between the parties. The Financial Creditor provided some amount to the Corporate Debtor under this.

c. The Financial Creditor sent various reminders to the Corporate Debtor regarding the outstanding amount which he owed. Since the Corporate Debtor was unable to make these payments, the Financial Creditor approached the NCLT for initiating corporate insolvency resolution process under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('**IBC**').

Submissions:

a. The Financial Creditor argued that the additional sum was invested by the Financial Creditor in good faith as capital expenditure on behalf of the Corporate Debtor. It was agreed between the parties that the Financial Creditor will provide any additional working capital if required, which the Corporate Debtor agreed to return on priority before any other payment as per the agreement.

b. On behalf of the Corporate Debtor, it was argued that the three outlets were rented by the Financial Creditor in his name and that the Corporate Debtor was not a party to the lease agreement. It was the duty of the Financial Creditor to arrange for the working capital for the management and operation of the restaurants until the restaurant would reach a break-even point and that every amount invested was towards the restaurant and was not given to the Corporate Debtor. The Financial Creditor's interpretation of 'working capital' was incorrect as it only considered a few expenses and not all. No relationship of Creditor-Debtor existed between the parties since there were no disbursement to the Corporate Debtor directly and all the payment were related to third parties.

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Decision:

a. The NCLT dismissed the petition noting that all the three lease agreements for the outlets were in the name of the Financial Creditor alone. The claim was a claim of rent maintenance and commission which in the opinion of the NCLT would not amount to financial debt.

b. Further, the Tribunal observed that the provision for working capital contribution by the Financial Creditor under the agreement did not mention that the contribution would be considered as a loan. It only mentioned that in a situation where the operating partner required working capital, the investor will provide the same till the restaurant reaches a break-even point. The Tribunal observed that since the restaurants had not reached the breakeven point, the Respondent rightly did not return the so called working capital. The working capital provided by the Financial Creditor was therefore not considered as a 'financial debt'.

[*Plutusone Hospitality Private Limited* v. *Busabong & Co. Private Limited* – Order in Petition No. 4395/IBC/MB/2019, National Company Law Tribunal, Mumbai]

Foreign Arbitral Award when enforceable against non-signatories to the Arbitral Agreement

In an interesting dispute regarding the enforcement of an arbitral award passed by a foreign seated arbitral tribunal, against a non-signatory to the arbitral agreement, the Supreme Court has held that an arbitration award can be enforced against such non-signatory persons.

Brief facts:

a. The Respondents, Integrated Sales Services Ltd. (ISS) and DMC Management Consultants Ltd. (DMC), entered into an agreement of representation by which ISS agreed to assist DMC to sell its products and services in exchange for commission. This agreement also had an arbitration clause for disputes. The Appellant, Gemini Bay Transcription Private Limited, is an Indian Company owned by the chairman of DMC.

b. A dispute arose between the parties about payment of commission as it was alleged that DMC terminated various contracts brought by ISS and entered into contracts with the same companies through the Appellant company with an intention of not paying the commission. The arbitrator awarded an amount to ISS which was payable by several parties including DMC and the Appellant (Gemini).

c. ISS filed a suit before the Bombay High Court for enforcement of the foreign arbitral award. The single bench held that the arbitral award could be enforced only against DMC and not the Appellant. The said order was challenged before a Division Bench of the High Court. The Division Bench reversed the judgment of the Single Bench and held that the award could be enforced against the Appellant as well. Aggrieved by this, the Appellant appealed before the Supreme Court of India.

Submissions:

a. The Appellants argued that the burden of proof was on the Respondent to prove that the arbitral award can be enforced against

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the Appellant and that this can only be done where the Respondent proved that a non-signatory of the Arbitration Agreement can be covered by such a foreign award and this burden was not discharged by the Respondent. It was submitted that the Respondent failed to give any valid reasons as to why the arbitral award could be enforced against the Appellant, which violated the principle of 'natural justice'. Further, it was argued that arbitration in relation to a tort claim would fall outside the purview of a contractual dispute and therefore an award that arose out of tort will be vitiated on this ground.

b. On behalf of the Respondent (ISS), it was argued that DMC and the Appellant were all located in the very same address, to show that they were all related parties. Further, the Arbitrator applied his mind and ascertained all the facts before giving the award. In counter, the Appellant submitted that Section 48(1) of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**') did not deal with a non-signatory of an arbitration agreement. Additionally, the Appellants did not argue that the award was against public policy before the lower courts, so it could not be raised at a later stage.

Decision:

a. The Supreme Court while dismissing the appeal observed that foreign awards which have been passed in countries which have signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards have a pro-enforcement bias. The Court noted that India having adopted this Convention needed to enforce the award as fast as possible, therefore it was held that unless a party clearly shows that their case falls within the purview of Section 48(1) or Section 48(2) of the Arbitration Act, which deals with conditions under which enforcement of foreign awards may be refused, being construed expansively, a foreign award must be enforced.

b. It held that non-party to the agreement, alleging that it cannot be bound by an award made under such agreement, is outside the literal construction of Section 48(1)(a). The Supreme Court was of the view that the grounds in Section 48(1)(a) are in themselves specific, and only speak of incapacity of parties and the agreement being invalid under the law to which the parties have subjected it, and hence to attempt to bring non-parties within this ground was to try and fit a square peg in a round hole.

[G*emini Bay Transcription Pvt. Ltd.* v. *Integrated Sales Service Ltd.* – Judgment dated 10 August 2021 in Civil Appeal No. 8345-8346 of 2018, Supreme Court of India]

No party can unilaterally appoint an Arbitrator as it defeats the purpose of unbiased adjudication

In a dispute regarding a license agreement, the Delhi High Court has reiterated that no person can appoint an Arbitrator unilaterally as it would defeat the principles of natural justice and the whole purpose of adjudication.

Brief facts:

a. In 1982, the Petitioners (Proprietorship firm and others) entered into a license agreement along with a supplementary agreement with the Respondent for some

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shops located in the shopping arcade of Hotel Hyatt Regency, New Delhi owned by the Respondent. This agreement was renewable at the option of the Petitioner every 5 years.

b. In the year 2020, the Respondent revoked the license agreements and supplementary agreements with effect from 1st June stating that the shops were in urgent need of repair and it was no longer profitable for the Respondent to continue with the shopping arcade. This revocation was challenged before the City Civil Court which was disposed of in view of the arbitration clause of the license agreement. The Petitioners invoked the arbitration clause and called upon the Respondent to confirm on the appointment of a sole arbitrator. The Respondent failed to agree with this appointment, and thereafter, the Petitioner approached the Delhi High Court for appointment of arbitrator.

Submissions:

a. The Petitioner's contention was that the Respondent cancelled the license because the shopping arcade was more than 40 years old and was in an urgent need to be repaired making it unprofitable to continue the business for the Respondent. However, the Petitioners were in the exclusive possession of these shops for a long time and that there were no violation of the terms and conditions of the agreements between the Parties. The Petitioners had a right to carry on their business and the Respondent could not revoke the license simply at his will and that the eviction was illegal. The only recourse left to the Petitioner was to let the Petitioner appoint an arbitrator according to the agreements.

b. On behalf of the Respondent, it was argued that the Respondent does not deny the arbitration clause or arbitration proceedings. The Respondent is only opposing the appointment of the Arbitrator unilaterally.

Decision:

a. The Delhi High Court allowed the petition since the Respondent did not dispute the need to appoint an arbitrator. While placing reliance on the case of *Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd.,* [2019 SCC Online SC 1517]*,* the Court highlighted that the Petitioners' request to nominate an arbitrator of their sole choice shall not be entertained as no party can be permitted to unilaterally appoint an arbitrator. If such appointment is permitted, it would negate the objective of fair determination of a dispute between the parties.

b. Subsequently, the Delhi High Court appointed a Sole Arbitrator and also directed that the Arbitrator must comply with the provisions of Section 12 of the Arbitration & Conciliation Act, 1996 to ensure that his judgment will be impartial and independent of any bias.

[*Sital Dass Jewellers & Anr.* v. *Asian Hotels (North) Ltd.* – Judgment dated 6 August 2021 in Arbitration Petition No. 661, 665, 667 and 668 of 2021, Delhi High Court]

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News Nuggets

Withdrawals / modifications by successful Resolution Applicants not permissible during period after acceptance by CoC and before approval by NCLT

The Supreme Court has held that withdrawals or modifications of the Resolution Plan by the successful Resolution Applicant are not permissible under the Insolvency and Bankruptcy Code, 2016 (IBC) after acceptance of said Plan by the Committee of Creditors (CoC). The Court, in this case, was concerned about the binding nature of the Resolution Plan during the interim period between after the Resolution Plan's approval by the CoC and before its confirmation by the Adjudicating Authority. Noting that the IBC and the United Nations Commission on International Trade Law (UNCITRAL) are silent on whether a successful Resolution Applicant can withdraw its Resolution Plan after such approval, it observed that while Regulation 40-A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 described a model-timeline for the Corporate Insolvency Resolution Process (CIRP) that accounts for every eventuality, the absence of any exit routes being stipulated under the statute for a successful Resolution Applicant was indicative of the IBC's proscription of any attempts at withdrawal. It was also of the view that vesting the Resolution Applicant with such a relief, through a process of judicial interpretation, would be impermissible. The Supreme Court in its decision dated 13 September 2021 in *Ebix Singapore Private Limited* v. *Committee of Creditors of Educomp Solutions Limited & Anr.* however observed that the Resolution Plan is not a contract or a statutory contract.

Arbitration not restricted to a one-time measure – Res judicata when not applicable

The Delhi High Court has observed that recourse to arbitration under an agreement is not restricted to a one-time measure. It held that recourse to arbitration is neither precluded nor exhausted because parties had referred certain disputes arising from a contractual relationship, to arbitration previously. \ The petitioner in the case *Steel Authority of India Ltd.* v. *Tata Projects Ltd.* had pleaded that respondents-claimants were barred by the principles of constructive *res judicata* as they had referred certain disputes arising from the agreement to arbitration on a previous occasion and hence were barred from invoking the arbitration clause in respect of the disputes that had arisen prior to the settlement of the Terms of Reference of the first arbitration. The Court was of the view that the arbitration is merely an alternate dispute resolution mechanism and thus, if otherwise an action is maintainable, recourse to arbitration would also be available. It observed that disputes that arise subsequently or at a later point of time are also required to be referred to arbitration, provided, the same fall within the scope of the arbitration agreement.

Limited Liability Partnership (Amendment) Bill, 2021 receives Presidential assent

The President of India has on 13 September 2021 given his assent to the Limited Liability Partnership (Amendment) Bill, 2021 which seeks

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to amend the LLP Act, 2008. Key highlights/ advantages of the amendments are:

(a) De-criminalization of procedural and technical defaults under LLP Act, 2008 to incentivize compliance and reduce burden on NCLT and special courts.

(b) Enhancing the confidence of LLPs on the Government's resolve to reduce the burden on the criminal Justice system

(c) Providing greater Ease of Doing Business and according highest respect to honest wealth creators in the country.

(d) Introducing the concept of 'Small LLP' and 'Start up LLP' in the LLP Act, 2008.

(e) Rationalising provisions levying additional fees in case of late filings by LLPs.

Deposit Insurance and Credit Corporation (Amendment) Act, 2021 receives Presidential assent

The President of India has on 13 August 2021 given his assent to the Deposit Insurance and Credit Corporation (Amendment) Act, 2021. The key features of said Act are as follows:

(a) Interim payment to be made by Deposit Insurance and Credit Guarantee Corporation (DICGC) to depositors in those banks for whom any restrictions/ moratorium has been imposed by RBI under the Banking Regulations Act, 1949.

(b) The depositors will be able to access their own money (ordinarily payable on demand) without waiting for years till liquidation, etc.

(c) The clear-cut timeline of maximum of 90 days has been provided for interim payment to depositors.

(d) The provision of covering existing cases where banks are already under restrictions has been included.

(e) It also enables timely repayment of DICGC and expedites recoveries.

(f) It further enables ceiling on premium to be notified by DICGC, with the prior approval of RBI.

General Insurance Business (Nationalisation) Amendment Act, 2021 receives Presidential assent

The General Insurance business (Nationalisation) Amendment Act, 2021, which seeks to amend the General Insurance Business (Nationalisation) Act, 1972, has on 18 August 2021 received the Presidential assent. Said Amendment Act removes the requirement that the Union Government should hold not less than 51% of the equity capital in a specified insurer. A new Section 31A has been inserted which provides for liability of a Director of the specified insurer, who is not a whole-time director, for any acts of omission or commission committed with his knowledge and consent.

RBI proposes to launch the pilot of its digital currency

The Governor of the Reserve Bank of India has, in an interview on 28 August 2021, stated that the RBI is working on a phased implementation strategy for the bank to launch thepilot of its digital currency possibly by December this year.

According to the Governor, the RBI is studying various aspects of a digital currency, called the Central Bank Digital Currency ('**CBDC**'), including its security, its impact on India's financial sector as well as how it would affect monetary policy and currency in circulation. He added that the RBI is 'extremely careful' about the CBDC, which is a new product globally. However, the RBI is yet to finalise whether to launch the currency using distributed ledger technology or a centralised ledger.

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The RBI defines CBDC as a legal tender issued by a central bank in a digital form. It is the same as a fiat currency and is exchangeable one-to-one with the fiat currency, only its form is different. Around the world, the main purpose for the increase in the use of CBDC is justified by the increase in the use of digital currency. It is pertinent to note that digital currencies and cryptocurrencies are not the same.

National Vehicle Scrappage Policy launched to phase out old vehicles and reduce pollution

The National Vehicle Scrappage Policy ('**Policy**') has been launched on 13 August 2021 to help phase out unfit and polluting vehicles. The Policy is estimated to bring in investments of around INR 10,000 crore to the country. The PM, while launching the Policy, mentioned that the vehicles will not just be scrapped based on their age, but also if they are found to be unfit in automated testing. According to the new Policy, a certificate will be issued on the scrappage of old cars, which will ensure the former owners get a discount on the purchase of new cars and benefit fees. The aim is to develop a sustainable and environment-friendly economy.

The voluntary Vehicle Scrapping Policy announced in the Union Budget for 2021-22 provides for fitness tests after 20 years for personal vehicles, while commercial vehicles would require it after the completion of 15 years. These automated fitness tests will be set up under public-private partnership (PPP) mode while the Government will assist private partners and state governments for scrapping centres. Driving such vehicles that fail to pass automated tests will attract huge penalties and result in impounding.

Vegan food – FSSAI issues draft regulations

As per the latest draft Food Safety and Standards (Vegan Food) Regulations, 2021 ('**Draft Regulations'),** the food products or ingredients to be called 'Vegan', shall not have involved animal testing for evaluating the safety of the final product/ingredient; and, shall not contain any animal-derived Genetically Modified Organisms (GMOs) or products prepared using animal derived gene for manufacturing the ingredients or products. The Food Business Operator will have to submit an application with all necessary details related to plant/machinery/premises to the concerned Authority under the Regulations. Inspection and verification of the premises shall be done by concerned Food Safety Officer or Designated Officer. The Food Authority may specify guidelines for endorsement of vegan logo and annual market surveillance for such products. Seller of vegan food either exclusively or as part of retail merchandise will have to store and display such food in a manner distinguishable from non-vegan food.

Yahoo India shuts down news sites following changes to FDI policy

As of 26 August 2021, Yahoo India is no longer publishing news content through its Yahoo News venture in India, due to regulatory changes in the Foreign Direct Investment ('**FDI**') policy of India. These changes were brought about in the Department for Promotion of Industry and Internal Trade (DPIIT)'s Press Note No. 4 of 2019 dated 18 September 2019 ('**Press Note'**). As per the press note, digital news media outlets are prohibited from receiving foreign funding of more than 26 per cent. Further, this foreign investment of up to 26 percent is subject to approval from the Central Government. A further explanation to such limits

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had also been provided vide the clarification dated 16 October 2020 by the DPIIT as to which entities would be covered under said Press Note.

In a press statement, Yahoo India stated that the new FDI regulations, brought about by the Press Note for digital media, limit foreign ownership of media companies that operate and publish digital content in India in the 'News and Current Affairs' space, which will impact many of their products such as Yahoo Cricket, Finance, News, Entertainment, and MAKERS India.

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