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CASE IN POINT

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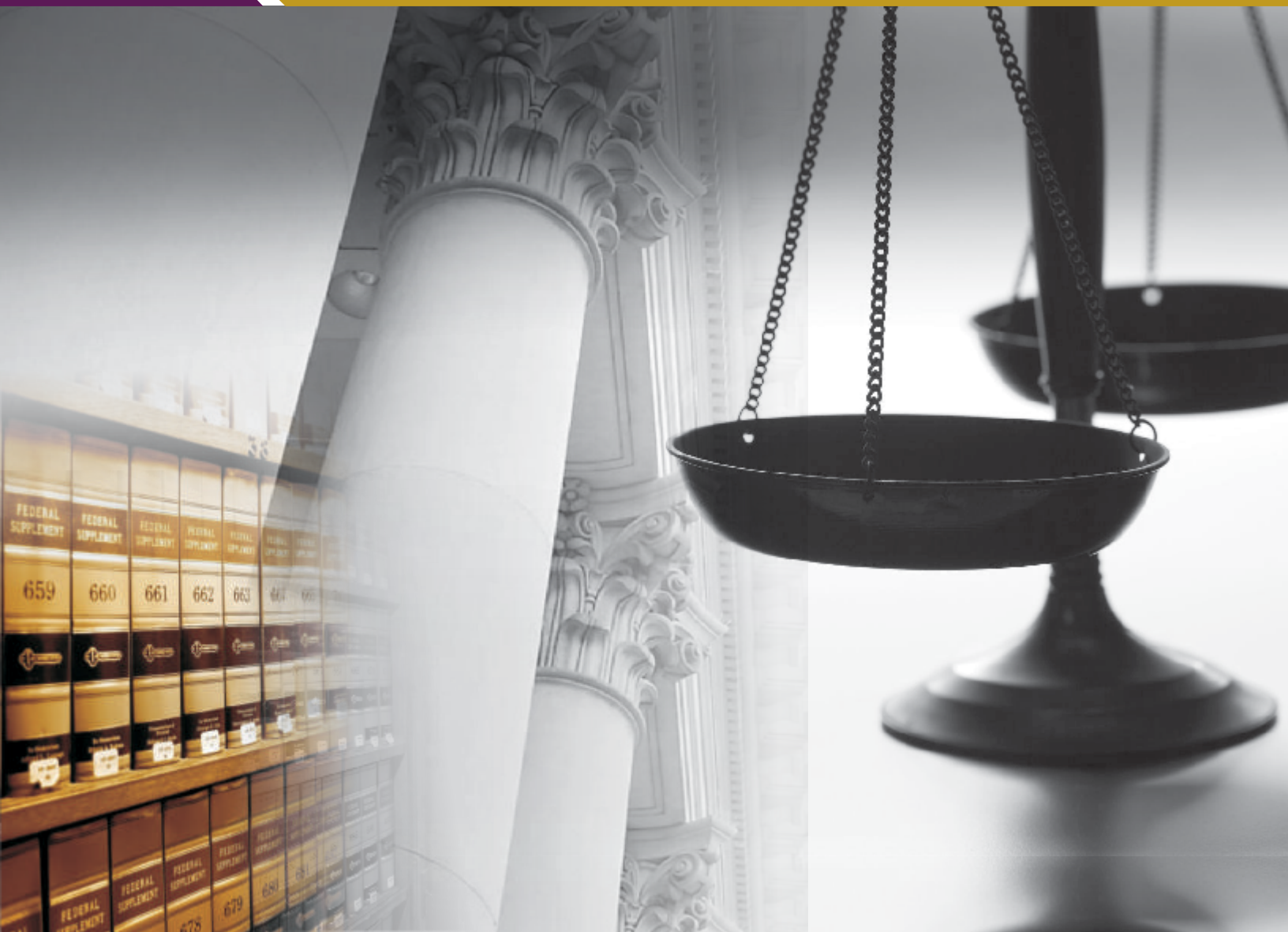

Foreword

It gives me immense pleasure to present to you the fifteenth issue of *Case in Point*, a quarterly update on the recent legal developments in the field of Dispute Resolution.

In the present issue we have examined the corporate insolvency mechanism under the Insolvency and Bankruptcy Code, 2016, which recently received Presidential assent on May 28, 2016. Among the recent case laws, in this issue we have examined the decisions of the Supreme Court in the case of (i) *Eitzen Bulk A/S v. Ashapurna Minechem Ltd. & Anr* wherein the court held that Part I of the Arbitration and Conciliation Act, 1996 will be excluded if the parties choose a foreign seat and a foreign law governing the arbitration; (ii) *Velugubanti Hari Babu* v. *Parvathini Narasimha Rao & Anr.* wherein the Supreme Court reiterated the principle that the validity and genuineness of an arbitration agreement should be determined by the Chief Justice or his designate under Section 11 of the Arbitration & Conciliation Act, 1996 and should not be left to the decision of the Arbitral Tribunal; (iii) *Sasan Power Limited v. North American Coal Corporation India Private Limited* wherein the Supreme Court held that arbitration in question was an international commercial arbitration, with a foreign element, i.e. an american company with continuing obligations. On the basis of this finding, the Court held that a foreign seat was permissible in the facts of the case.

We have also examined the decisions of the Bombay High Court in the case of (iv) *Eros International Media Limited v. Telemax Links India Pvt. Ltd. and Ors.* wherein the Bombay High Court held that issues arising under a contract for licensing of intellectual property are arbitrable in nature, if the contract provides for the same and if the arbitrator is capable of granting the reliefs sought by the parties; (v) *Sridhar Sundararajan v. Ultramarine & Pigments Limited*, wherein the Bombay High Court has held that the disqualifications introduced under Section 196(3)(a) of the Companies Act, 2013 whether incurred before or after the amendment of the section, would operate automatically/immediately.

The issue is concluded by a section on other legal updates in the field of dispute resolution.

Feedback and suggestions from our readers would be appreciated.

Please feel free to send your comments to caseinpoint@cyrilshroff.com.

Regards,
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Corporate Insolvency Mechanism under the Insolvency and Bankruptcy Code, 2016 : a double-edged sword?

I. Overview

The Insolvency and Bankruptcy Code, 2016 ("**Code**")received Presidential assent on May 28, 2016, however, most of the provisions of this Code are yet to be notified. This Code seeks to overhaul India's Insolvency laws, by providing a time bound procedure for resolving insolvency. It aims to consolidate and streamline India's scattered insolvency laws[1] and bring the rights and obligations of all stakeholders within one legislative framework[2]. The existing framework of laws is highly inadequate, ineffective. The multitude of laws provide for different forums such as Board of Industrial and Financial Reconstruction ("**BIFR**"), Debt Recovery Tribunal ("**DRT**"), National Company Law Tribunal ("**NCLT**") and High Court, which have overlapping jurisdiction, which in turn gives rise to systemic delays and complexities in the process. The World Bank ranks India 136 out of the 189 economies for resolving insolvencies. The average time taken to resolve insolvency in India it is 4.30 years[3] as compared to 0.80 years in Singapore and 1 year in United Kingdom. The Banking Law Committee has reported that incase of default, lenders seem to recover merely 20% of the value of debt, on an NPV basis[4]. Under these conditions, the recovery rates obtained in India are among the lowest in the world.

The enactment of this Code, especially at the time when the banking industry is plagued with bad loans and burgeoning NPAs, would help to significantly improve debt recovery rates and revitalise the ailing Indian corporate bond markets. The successful implementation of this Code would improve India's poor ranking in the Doing Business Index and facilitate more investments leading to higher economic growth and development.

II. Key highlights of the Code: *Corporate Insolvency mechanism*

The Code is an umbrella legislation providing *inter alia*, for rehabilitation and liquidation under the same roof. The Code provides for two different Adjudicating Authorities ("**AA**"), which will exercise judicial control over insolvency process and liquidation process. In case of individuals and partnerships the concerned AA is the DRT. In case of companies, LLPs and other limited liability entities, the concerned AA is the NCLT.

Part II of the Code lays down corporate insolvency mechanism in relation to companies governed by the Companies Act, 2013, limited liability partnerships, and other limited liability entities as may be notified from time to time. Corporate Insolvency includes two processes (i) Insolvency resolution Process and (ii) Liquidation. To initiate a process for insolvency or liquidation under the Code for corporate debtors, the default should be of at least INR 1,00,000 (which limit may be increased up to INR 1,00,00,000 by the Central Government).

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1 Prior to enactment of the Code, corporate insolvency was governed by Sick Industrial Companies (Special Provisions) Act, 1985 ("**SICA Act**"), the Recovery of Debt Due to Banks and Financial Institutions Act, 1993 ("**Recovery of Debts Act**"), the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**") and the Companies Act, 2013 ("**CA 2013**"), whereas personal insolvency was governed by the Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920.

2 The Insolvency and Bankruptcy Code, 2016 repeals the archaic Presidency Towns Insolvency Act, 1990, Provincial Insolvency Act, 1920 and SICA and amends 11 existing laws.

3 Doing Business 2016, (13th edn.), World Bank Group Flagship Report, Measuring Regulatory Quality and Efficiency, Economy Profile 2016, India, page 126.

4 The Report of Banking Law Reform Committee Vol I : Rational and Design (November 2015), '*Executive Summary*', at page 10

Insolvency Resolution ("IR") and Liquidation:

A financial default of at least INR 1,00,000 can trigger the corporate insolvency resolution process, upon the relevant creditor (financial or operational creditor) or the corporate debtor itself, filing an application before the NCLT. The NCLT is required to admit or reject the application within 14 days and if the application is accepted by the NCLT an interim professional shall be appointed to oversee the resolution process. The powers of the board of directors (of the corporate debtor) stand suspended and shall be exercised by the resolution professional who shall be required to manage affairs of the corporate debtor. In the interim, NCLT shall order a moratorium to be placed on the debtor's operations and in terms of section 14 of the Code, during the period of moratorium no judicial proceedings for recovery, enforcement of any security interest, sale or transfer of assets can be initiated or continued against the debtor, including execution of any judgment decree or order. Thereafter, NCLT is required to make a public announcement, as per Section 15 of the Code, providing details of the corporate debtor, last date for submission of claims, penalties for false claims, etc. Further, during the statutory moratorium period, the interim resolution professional is required to identify the financial creditors and constitute the Creditors Committee (comprising financial creditors, secured or unsecured) which shall decide upon the revival plan of the corporate debtor. The Creditors Committee may resolve to appoint the interim Resolution Professional or someone else as the final Resolution Professional. The Resolution Professional, so appointed, is required to manage the affairs of the corporate debtor and to operate its business as a going concern under the broad directions of the Creditors Committee. The Creditors Committee is responsible for approving plans (with at least 75% majority) for the revival of the corporate debtor, or to decide whether to allow the corporate debtor to liquidate. The Resolution Professional is thereafter, required to submit the approved resolution plan to the NCLT for its sanction. Once approved by the NCLT, the plan is binding on all stakeholders; the corporate debtor its employees, shareholders, members, guarantors and creditors. NCLT is vested with the discretion to approve or reject the resolution plan in terms of Section 31 of the Code.

Section 12 of the Code stipulates that the entire process of insolvency resolution is required to be completed within a period of 180 days from the date of admission of application, which may be extended by a further period of 90 days, if more than 75% of the creditors agree.[5] The Code also provides an option to fast track method of resolution process for certain categories of corporate debtors or creditors, which shall have to be completed within a period of 90 days (extendable by a further period of 45 days).

Section 11 of the new Code also contains sufficient safeguards to prevent corporate debtors from misusing the system, and precludes corporate debtors who have violated the terms of a restructuring plan in the past or have undergone a restructuring process in the last 12 months from making an application for initiating such restructuring process.

If no resolution plan has been approved within 180 days (or a further period of 90 days, if extended) or when 75% majority of Creditor's Committee resolve to liquidate the corporate debtor, the NCLT shall order for liquidation of the corporate debtor. Section 33 of the Code provides other instances when corporate debtor will be liquidated by the NCLT. Upon an order of liquidation being passed, NCLT is required to appoint a liquidator which may or may not be the Resolution Professional, who shall exercise all powers of the board of the corporate debtor. Once the process of liquidation is complete, the proceeds from the sale of liquidation assets shall be distributed in the following order of priority:[6] (i) fees of insolvency professional and costs related to the resolution process, (ii) workmen's dues and secured creditors, (iii) employee wages, (iv) unsecured creditors, (v) government dues and remaining secured creditors (any remaining debt if they enforce their collateral), (vi) any remaining debt, (vii) preference shareholders, and (viii) equity shareholders.

[5] Section 12 of the Insolvency and Bankruptcy Code, 2016 *: (Time limit for Completion of Insolvency Resolution Process)*
[6] Section 53 of the Insolvency and Bankruptcy Code, 2016 : (Distribution of assets)

Change proposed to the existing regime

Under the existing legislative framework, a petition for revival can be filed under the Companies Act, 2013, only when there is a failure to pay 50% or more of the secured creditors. Further, under SICA, proceedings for revival and reconstruction of the Company can be commenced only when there is 100% net worth erosion. However, under the new Code, a financial default of INR 1,00,000 can trigger the corporate insolvency resolution process. Further, under the Companies Act, 2013 a winding up petition can be filed by, *inter alia*, company and the secured creditors. However, under the new Code, even operational creditors and unsecured creditors can trigger the corporate insolvency resolution process.

The new Code ushers a sea of reforms and provides for early identification of financial distress and revival of entities if the underlying business is found to be viable. The Code proposes a monumental shift in the balance of power from equity to debt in the insolvency resolution process. Under the new Code (during the moratorium period), the Creditors Committee, acting through a Resolution Professional can, *inter alia*, (i) take possession of assets of the corporate debtor (ii) manage its affairs and (iii) approve or reject the revival plan of their choice (by bringing fresh finance, selling assets, changing the management/ capital of corporate debtor etc). The Creditors Committee also has the power to approve the liquidation of the corporate debtor. This is a significant departure from the existing regime of *'debtor in possession'* concept, which has failed us thus far. Further, the new Code, does not make any distinction between the rights of (i) international and the domestic creditors and (ii) unsecured and secured creditors as secured and unsecured financial creditors (in Creditors Committee) are placed at par and can exercise their right to vote on resolution plan of the corporate debtor, to the extent of their voting share.

The time bound resolution of insolvency proceedings works as a double edged sword as, in the event of the Creditors Committee, failing to approve a resolution plan within 180 days (or a further period of 90 days, if extended), the corporate debtor will be liquidated. Further, the new Code puts the Creditors Committee and the insolvency professionals in primacy of the entire insolvency resolution process. The Resolution professional, so appointed to run the business of the corporate debtors, during the moratorium period, must necessarily have the requisite expertise, otherwise it would result in serious destruction of value and would defeat the entire object of this Code.

The other significant change to the existing liquidation regime, is the change in the priority waterfall for distribution of liquidation proceeds. Under the existing framework, government dues would take preference over dues of unsecured financial creditors. However, under this new Code, government dues rank lower than unsecured creditors. Similarly, in the new regime, workmen's dues of the 2 years preceding the liquidation commencement date are given preference over the unpaid dues owed to other employees, government and unsecured creditors.

Four pillars of institutional infrastructure

Part IV of the Code introduces certain new intermediaries and institutions to aid the process of insolvency such as; (i) Insolvency Professionals, (ii) Insolvency Agencies (to register and regulate the performance of Insolvency Professionals), (iii) Information Utilities and Insolvency and (iv) the Bankruptcy Board of India ("**Board**"). Section 195 of the Code provides that until such a Board is established, the Central Government can designate any financial sector regulator to exercise the powers and functions of the Board. The Code does not provide for eligibility criteria of Insolvency Professionals, the same is left for the Board to prescribe by appropriate rules/ regulations. The Board as the insolvency regulator is entrusted with task of overseeing the functioning of insolvency intermediaries.

Further, Information Utilities, proposed to be constituted under the Code, would be required to collect, collate and disseminate financial information related to a debtor (record of debt and liabilities of the

debtor) to prevent serious defaulters from misusing the system. Thus, debtors will now be obligated to register all financial contracts with such Information Utilities. It is pertinent to note that the Code does not contain provisions protecting confidentiality of such information, that may be collected by such Information Utilities.

III. The way ahead

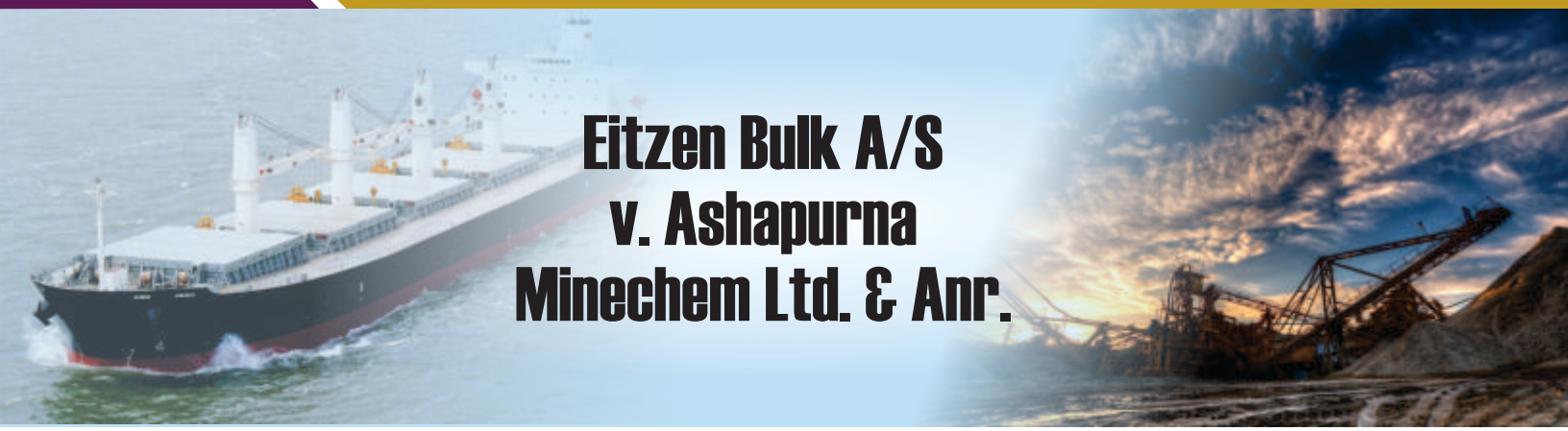
This Code is a much awaited legislation in the country to bring the insolvency laws of India at par with global standards. The streamlining of procedures, simplification of insolvency process and fast tracking of recovery brings a ray of new hope for the financial sector in India, which is currently plagued with stressed assets.

Enactment of the Code is merely the start but not the end of the process. Implementing the processes contemplated will be the key in ensuring that the objectives of the Code are achieved. Considering, it may take a while before the infrastructural requirements under the Code are established, the provisions of the Code may be notified in a staged manner, to ensure smooth transition from the existing insolvency regime. The Ministry of Corporate Affairs vide its notifications dated August 5, 2016 and August 19, 2016, has recently notified Sections 188 to 194 of the Code and other 12 Sections of the Code. These sections deal with establishment and incorporation of the Board, the powers of the chairman, meetings of the board, powers of the Central Government under the Code and Board's fund etc. The said Sections have been notified to enable the selection of chairman and members to the Board.

However, this Code, alone, cannot achieve better bankruptcy resolution outcomes and is required to be supported with related laws and regulations. Accordingly, the Parliament has passed the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016[7] ("**Amendment Act**"), which seeks to amend, *inter alia*, the SARFAESI Act, 2002 in order '*to suit the changing credit landscape and augument ease of doing business in India*'.[8] The underlying object of this is to ensure that along with this Code an amended SARAESI Act, 2002, will help to expedite the debt recovery process in India. The Amendment Act, inter alia, provides for (i) registration of creation, modification and satisfaction of security interest by all secured creditors and provision for integration of registration systems under different laws relating to property rights with the Central Registry so as to create a Central database of security interest on property rights; (ii) conferment of powers upon the Reserve Bank of India to regulate asset reconstruction companies in a changing business environment; (iii) exemption from stamp duty on assignment of loans by banks and financial institutions in favour of asset reconstruction companies; (iv) specific timeline for taking possession of secured assets; and (v) priority to secured creditors in repayment of debts.

Despite various uncertainties, the Code if implemented efficiently, will go a long way in improving India's ease of doing business ranking, financial markets and the economy as a whole.

[7] The Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 received Presidential assent on August 12, 2016.
[8] The Statement of Objects and Reasons to the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016



Eitzen Bulk A/S v. Ashapurna Minechem Ltd. & Anr.

The Supreme Court in the case of ***Eitzen Bulk A/S v. Ashapurna Minechem Ltd. & Anr.,***[1] has held that where parties choose a juridical seat of arbitration outside India and provide that the law which governs arbitration will be a law other than Indian law, Part I of the Arbitration and Conciliation Act, 1996 (the "**Act**") would not have any application and that a debtor would not be entitled to challenge the award by raising objections under Section 34 of the Act. The Court further observed that the mere choosing of a juridical seat of arbitration, would automatically attract the law applicable to such location to the arbitration proceedings.

Facts

Eitzen Bulk A/S ("**Appellant**") had entered into the contract of affreightment with Ashapurna Minechem Ltd. ("**Respondent**") as charterers for shipment of bauxite from India to China, by way of a charter party agreement ("**Agreement**"). The said Charter Party Agreement contained an arbitration clause with London as the seat of arbitration and English law as the applicable law. Subsequently, certain disputes arose between the parties and the matter was referred to arbitration. The arbitration was held in London according to English Law and the sole arbitrator vide an award dated May 26, 2009 held the Respondent guilty of repudiatory breach and directed it to pay to the Appellant an amount of 36,306,104.00 USD plus interest ("**Award**").

Aggrieved by the said award, the Respondent, filed an application under Section 34 of the Act, before the District Judge, Jamnagar, for setting aside the foreign award passed in London. A miscellaneous Application for injunction restraining the Appellant from enforcing the Award in foreign jurisdictions outside India was also moved. The District Judge, vide an order dated August 24, 2009, dismissed the application for injunction seeking restraint on enforcement of the Award. Simultaneously, the Appellant also applied for enforcement of the Award in USA, Netherlands, Belgium , UK and India.

Thereafter, the Respondent filed a writ petition before the Gujarat High Court for quashing and setting aside of the Order dated August 24, 2009. After a series of proceedings, the Division Bench of the Gujarat High Court held that the Respondent is entitled to challenge the foreign award under Section 34 of the Act because Part I of the Act is not excluded from operation in respect of a foreign award.

Simultaneously, the Appellant proceeded before the Bombay High Court for enforcement of the foreign award. The Single Judge of the Bombay High Court allowed the petition for enforcing the foreign award and held that since the parties had agreed that juridical seat would be London and English law would apply, there was an express and in any case implied exclusion of Part I of the 1996 Act. The Respondent challenged the decision of the Bombay High Court before the Supreme Court.

Issue

Whether Part I of the Arbitration Act is excluded from its operation in case of a foreign award where the arbitration is not held in India and is governed by foreign law.

[1] Civil Appeal nos. 5131-5133 of 2016 decided on May 13, 2016

Decision

The Appellant contended that the arbitration clause in the contract, which stipulated that disputes be "settled and referred to Arbitration in London" under English Law, clearly intended Part I of the Act to be excluded.

The Court stated that it was settled law that if the parties had picked the juridical seat of arbitration outside India and provided that the law which governs arbitration would be a law other than Indian law, Part I of the Act would not have any application. Thus the Respondent was not entitled to challenge the award under Section 34 of the Act. Finally, the Court concluded that the proceedings under Section 34 of the Act instituted before the Gujarat High Court were untenable in law**.** The judgment of the Bombay High Court enforcing the Foreign Award under Part II of Act was upheld.

The Supreme court referred to its judgment in *Reliance Industries Limited and Anr.*v. *Union of India.* Which had laid down that seat of arbitration is an important factor in determining proper law of arbitration agreement. The interesting portion of the judgment flows from its observation that *'the mere choosing of the juridical seat of arbitration attracts the law applicable to such location'*. The Supreme Court by relying on a passage from Redfern and Hunter, observed that there was no necessity to specify which law would apply to an arbitration proceeding since the law of that country would apply automatically.

Analysis

The Supreme Court had previously in its decision in *Bhatia International v. Bulk Trading SA,* held that unless the parties expressly or impliedly exclude the applicability of all or any of the provisions of Part I of the Act, the provisions of Part I of the Act would be applicable to all arbitrations (including those held outside India). This judgment was subsequently overruled by a constitution bench judgment in *Bharat Aluminum and Co. vs. Kaiser Aluminium* ("**Balco Case**") wherein it was held that Part I would not be applicable to arbitrations where the seat of arbitration is outside India. But the judgment only applies to disputes arising out of agreements entered into after September 6, 2012.

This is a landmark judgment since the Supreme Court for the first time has applied the principle set out in the Balco Case to an arbitration which is prior to the judgment. This would effectively bring a positive change since the application of the law of the seat of the arbitration to the arbitration is a well accepted principle in international arbitration practice. However, it must also be considered that the observation made by the Supreme Court in this order was merely an *obiter dicta* and thus it will have to be seen whether in the future the courts shall construe the mere choice of a juridical seat to amount to the non application of Part I of the Act in pre-Balco cases.

[2] 2014 (4) CTC 75
[3] (2002) 4 SCC 105
[4] (2012) 9 SCC 552

Eros International Media Limited v. Telemax Links India Pvt. Ltd. and Ors.

In the case of ***Eros International Media Limited v. Telemax Links India Pvt. Ltd. and Ors.,***[1] the Bombay High Court held that issues arising under a contract for licensing of intellectual property are arbitrable in nature, if the contract provides for the same and if the arbitrator is capable of granting the reliefs sought by the parties.

Facts

Eros International Media Limited ("**Eros**"), being the owner of several feature films entered into a Term Sheet dated June 13, 2012 with first Defendant ("**Telemax**"), for granting content marketing and distribution rights in respect of the films. Although, the Term Sheet contemplated the execution of a Long Form Agreement within ten days of the execution of the Term Sheet, however, no such Long Form Agreement was executed between the parties.

The parties had agreed that till the time the Long Form Agreement was not executed, Telemax would not exploit or deal with the copyright-protected content of Eros. Eros filed a suit for infringement of copyright against Telemax and prayed for an injunction against it. The Term Sheet contained an arbitration clause providing for a Sole Arbitrator to be appointed in case of disputes arising in connection with the Term Sheet, and accordingly, Telemax, along with the concurrence of the other Defendants, filed a Notice of Motion before the Bombay High Court praying for the dispute to be referred to arbitration under Section 8 of the Arbitration and Conciliation Act, 1996 ("**Act**").

Eros opposed this application and urged that the present dispute could not be referred to arbitration as the Suit in question was a composite action (including an action for infringement), and not merely a contractual dispute. Eros contended that the action against Telemax was not for a breach of contract (as the Term Sheet had expired), but was a statutory action under the Copyright Act, 1957 which is inherently non- arbitrable.

Issue

The question which arose for the Court to decide was, whether disputes which arose in respect of infringement of copyrights and trademarks could be referred to an arbitral tribunal, or approaching a civil court was the appropriate remedy for the parties?

Arguments

Telemax contended that the present dispute did not involve a mere allegation of copyright infringement on Telemax. There also existed questions as to breach of contractual obligations between the parties. Telemax argued that by way of the present Suit, Eros sought to enforce a right *in personam* as opposed to a right *in rem*. It was further argued that the remaining Defendants to whom Telemax had sub-licensed the copyrights, who were not parties to teh Term Sheet, were in the nature of persons claiming through Telemax under the amended Section 8 of the Act and had agreed to submit the entire dispute to arbitration.

Telemax relied upon the decision of the Supreme Court in *Booz Allen & Hamilton Inc v. SBI Home Finance Limited & Ors.*[2] ("**Booz Allen**"), to argue that all civil disputes are, by definition, arbitrable except those that are specifically excluded and that there was no specific bar on arbitrability of the present dispute.

On the other hand, Eros contended that disputes of the present kind were inherently non-arbitrable, as it involved copyrights, which were rights *in rem*. It was further argued that the right did not arise purely out of a contract, and that to establish such a right, a finding of infringement of copyright was required. Further there was an absolute bar on an arbitral tribunal rendering a finding of infringement of copyright.

[1] Notice of Motion No. 886 of 2013 in Suit No. 331 of 2013, decided on 12.04.2016
[2] AIR 2011 SC 2507

Decision

In light of the arguments made and case laws referred to by the parties, the Court arrived at the following conclusions:

1. Section 62 of the Copyright Act as well as Section 134 of the Trade Marks Act, 1999 which state that actions against infringement and passing off cannot be brought in a court lower than a District Court, cannot be interpreted as ousting the jurisdiction of an arbitral panel. Though "Intellectual Property" is a special right granted by a statue, however, at its heart it is a species of property rights and shares much with its more tangible cousins to whom acts such as the Sale of Goods Act, 1930 or the Transfer of Property Act, 1882 apply. In this sense, there existed no material distinction between the owner of a land and the proprietor of a mark. And sections such as these, which are common to many statutes dealing with properties, cannot be inferred to mean the ouster of an entire statute relating to arbitration.
2. The dispute could not be said to be in relation to rights *in rem*. An action for infringement or passing off between two claimants to a copyright or a trade mark can only be an action *in personam*. Even though upon registration of a trademark, the registrant receives a right against the world at large, and that an opposition to such an application for registration could be considered to be an action *in rem*, however, an infringement or passing off action would only bind the parties to it such that while a proprietor of a trademark may succeed against one person in an action for infringement, it is not necessary that he will succeed in a similar action against another person with respect to the same trademark. This can be distinguished from the list of non-arbitrable matters provided in the Supreme Court's decision in *Booz Allen*. For instance, in testamentary matters, a will when proved, is proved once and for all, till it is revoked, against the world at large. Further, where a probate petitioner obtains a probate against certain caveators, that probate can be set up against every other person whether or not that person was a caveator before the Court. Such a power to enforce a right against the world at large can only be exercised by a Court and not an arbitrator. Thus, Eros's action is *in personam* and not *in rem,* as it seeking a particular relief against a particular defined party and the dispute between the parties was arbitrable.
3. Unless specifically barred, an arbitrator can allow most remedies which a Civil Court is entitled to grant, including damages and injunction, and as such, attempts should not be made to short-circuit the Act. Further, an arbitrator would be well within his powers to arrive at a finding of copyright infringement, as part of a finding of fact and the same would not exclusively fall within the domain of Civil Courts.
4. The Court further laid down a general observation that in matters of commercial disputes where parties have consciously decided to refer these disputes arising from a contract to a private forum, no question shall arise of those disputes being non-arbitrable. Such actions shall be considered to be actions *in personam*, i.e. one party seeking a specific particularized relief against a particular defined party, and not against the world at large.

Adopting a pro – arbitration stance, the Bombay High Court disposed of the matter by referring the disputes to arbitration under Section 8 of the Act.

Analysis

This judgment forms part of a series of recent rulings by Indian courts which attempt to widen the scope of arbitration. In essence, if a contract relating to intellectual property provides for arbitration, and the arbitrator is capable of granting the reliefs sought by the party, the dispute can be termed arbitrable. This reasoning goes one step further than the test laid down in *Booz Allen*. By opening an entire class of disputes, relating to copyright/trademark infringement or passing off, to arbitration the Bombay High Court has given effect to the commercial intent of parties while licensing intellectual property. This shall help in upholding arbitration clauses contained in a whole range of matters relating to mergers, acquisitions, joint ventures, technology transfer and sharing agreements, technical tie-ups, licensing and so on, which also have a bearing on intellectual property rights of the parties.

However, this cannot be treated as a general rule, and in cases where a licensee undertakes unauthorised distribution of copies, an arbitrator, unlike a court, will not be in a position to grant a relief restraining third parties (to whom such distribution has been made) from using the said copies.

Sridhar Sundararajan v. Ultramarine & Pigments Limited

The Bombay High Court in the case of ***Sridhar Sundararajan v. Ultramarine & Pigments Limited***[1] has held that the disqualifications introduced under Section 196(3)(a)[2] of the Companies Act, 2013 ("**Act**") whether incurred before or after the amendment of the Section, would operate automatically/immediately. The Court clarified that if appointment to the post of Managing Director is made after coming into force of the Amendment Act, 2013 on April 1, 2014, a person who is above the age of 70 years cannot be appointed on account of disqualification, subject to fulfillment of the proviso. On the other hand, if the person was already appointed prior to April 1, 2014 when he was below the age of 70 years, on account of operation of statute, disqualification, whenever incurred after the Amendment Act, would operate automatically, subject to proviso i.e. special resolution being passed by the Company.

Facts

Mr. Rangaswamy Sampath ("**Respondent No.2**") was the Managing Director ("**MD**") of Ultramarine & Pigments Limited ("**Respondent No.1**"). Thereafter, he was re-appointed as Chairman and MD of Respondent No.1, for a period of further five years till 2017 on August 1, 2012. The Appellant was also appointed as Joint MD of Respondent No.1. The Appellant filed a Notice of Motion before the Bombay High Court, inter alia, sought an injunction to restrain the Respondent No.2 from functioning or continuing to exercise his powers as the Chairman and MD as he had crossed the age of 70 years. The single judge of the Bombay High Court, while dismissing the Motion, held that there was no 'discontinuance' of Managing Directorship at the age of 70, the Section applied only to his appointment and reappointment. The Court stated that the Respondent No.2 was already a Chairman and Managing Director of Company when he turned 70, the Act could not operate as an immediate termination of his appointment, as that would give a retrospective application to the Act. The said order passed by the Single Judge was challenged before Division bench of Bombay High Court.

Issue

The question which had arisen for consideration of the Court is whether, after the amendment of the Companies Act, 2013 which was brought into force w.e.f. April 1, 2014, any Managing Director who was appointed prior to the Amendment Act i.e. before April 1, 2014 would have a right to continue to act as Managing Director after his attaining the age of 70 years without special general resolution being passed by the Company in its general meeting as mandated in Section 196(3)(a) of the Act. Section 196(3)(a) of the Act provides as under:

"No company shall appoint or continue the employment of any person as managing director, whole-time director or manager who -

(a) is below the age of twenty-one years or has attained the age of seventy years:

Provided that appointment of a person who has attained the age of seventy years may be made by passing a special resolution in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person."

[1] Appeal (L) No. 632 of 2015 dated February 8, 2016.
[2] Made effective from April 1, 2014

Arguments

The primary contention of the Respondents was that the amendment could not apply to Respondent No. 1 since it would retrospectively affect its vested right. Since Respondent No.2 was appointed on August 12, 2012, before the amendment was enacted, it could not be retrospectively applied to remove him from his position. In support of this contention, the Respondents relied on numerous cases concerning retrospective application and placed heavy reliance on the judgment of *P. Suseela and Ors. v. University Grants Commision*[3] and *J.S. Yadav v. the State of Uttar Pradesh and another*[4] in which the Supreme Court had found a new eligibility criteria to be prospective and one that would only be applied at the stage of appointment.

The Appellant contended that the in view of incorporation of the said sub – clause (c) in Section 196(3) which contains a mandatory prohibition / bar against any Company from continuing the MD in employment once he attains 70 years, the Respondent No.2 could not continue as an MD, subject to proviso i.e. special resolution being passed by the Respondent No.1. It was further argued that there is a distinction between disqualification which is added after the appointment and the eligibility criteria which is added after the appointment. In the former case, disqualification would operate even after the appointment but in the latter case, it would operate prospectively.

Decision

The Division Bench of the Bombay High Court set aside the order of the single judge holding that in the case of a person who has already been appointed as MD and later on attained the age of 70 years would be disqualified from the position of the MD, unless a special resolution was passed by the company. The new clause is a further disqualification for appointment or continuation as MD, and operates not only at the stage of appointment but also during the employment. The amended Section contains a mandatory prohibition/bar against any company from continuing as MD in employment since he has attained the age of 70 years.

The Court stated states that the judgments in *P. Suseela and Ors. Vs. University Grants Commision* and *J.S. Yadav vs. the State of Uttar Pradesh and another* were not applicable since these pertained to an eligibility criteria as opposed to a disqualification. The bench stated that the single judge bench deciding the previous order had erroneously failed to see the distinction between an eligibility criteria added after appointment and a disqualification added after appointment, and concluded that while an eligibility criteria would only apply to appointments prospectively, a disqualification would apply even after appointment.

Analysis

By relying on the 'simple and unambiguous' language of the provision, the Bombay High Court has correctly interpreted Section 196(3)(a) to be a disqualification which would apply to all managing directors equally making no distinction between the managing directors appointed before and after the date the amendment came into force.

[3] 2015(3) SCALE 726
[4] (2011) 6 SCC 570

Velugubanti Hari Babu v. Parvathini Narasimha Rao & Anr.

The Supreme Court in the case of ***Velugubanti Hari Babu* v. *Parvathini Narasimha Rao & Anr***,[1] has reiterated the principle that the validity and genuineness of an arbitration agreement should be determined by the Chief Justice or his designate under Section 11 of the Arbitration & Conciliation Act, 1996 ("**Act**") and should not be left to the decision of the Arbitral Tribunal.

Facts

Velugubanti Hari Babu ("**Appellant**"), had entered into a MOU dated May 27, 2013 ("**said MoU**") with the Respondents. Subsequently, certain disputes arose between the parties and the Respondents issued a notice for appointment of an arbitrator. As no communication was forthcoming from the Appellant, in response to the Respondents' notice, the latter filed an application before the Hyderabad High Court under section 11(5) and 11(6) of the Act for appointment of an arbitrator. The Appellant contested the Section 11 Application and alleged that the said MoU was forged and fabricated document and that the Appellant had never signed and such MoU. The High Court, vide its order dated February 13, 2015, allowed the Section 11 Application by holding that the legality and the validity of the MoU including the arbitration agreement can be examined by the arbitrator on taking evidence, particularly under Section 16 of the Act. Accordingly, the High Court appointed a retired judge of the High Court as a sole arbitrator to adjudicate all disputes raised by the parties, including to decide the question regarding legality and genuineness of the MoU ("**impugned Order**"). The High Court further observed that the question of legality and validity of MoU and also the arbitration agreement cannot be adjudicated conclusively by the High Court in the Section 11 Application and that it would be proper for an Arbitrator to do so. Aggrieved by the impugned Order, the Appellant filed an appeal before the Supreme Court.

Issue

The issue before the Supreme Court was whether the High Court was justified in (i) not determining the validity and genuineness of the MoU and (ii) in directing the arbitrator to undertake such determination.

Arguments

The Appellant contended that the impugned Order is legally unsustainable and that the High Court erred in directly proceeding to appoint the arbitrator without first determining question of validity and genuineness of the MoU and the arbitration clause contained therein. The Appellant relied on Supreme Court's decision in the case of *SBP & Co. vs. Patel Engg. Ltd*,[2] *National Insurance Co. Ltd. Vs. Boghara Polyfab (P) Ltd.*[3] and *Bharat Rasiklal Ashra vs. Gautam Rasiklal Ashra & Anr,*[4] wherein the Court has held that *"the question whether there is an arbitration agreement has to be decided only by the Chief Justice or his designate and should not be left to the decision of the Arbitral Tribunal… The question whether there is an arbitration agreement is a jurisdictional issue and unless there is a valid arbitration agreement, the application under Section 11 of the Act will not be maintainable and the Chief Justice or his designate will have no jurisdiction to appoint an arbitrator under Section 11 of the Act."*

Decision

The Supreme Court observed that the High Court ought to have decided the question of legality, validity and genuineness of the agreement/ MoU itself and recorded a finding as to whether the MoU is valid and genuine document or is a forged and fabricated document. The Supreme Court, while allowing the appeal, held that the directions issued by the High Court are plainly against the law laid down in the aforesaid three cases and remanded the matter to the designate Judge of the High Court, to decide the question of legality, validity and genuineness of the agreement/ MoU.

[1] Civil appeal No.6198 of 2016 decided on July 13, 2016
[2] (2005) 8 SCC 618,
[3] (2009) 1 SCC 267
[4] (2012) 2 SCC 144

Sasan Power Limited v. North American Coal Corporation India Private Limited

The Supreme Court's decision in ***Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd.***[1] was a long awaited decision. The Supreme Court was hearing a challenge against an order of the Madhya Pradesh High Court which upheld the agreement of two Indian companies to arbitrate outside India, and ruled that in such a situation, a suit would not be maintainable in India and the court would refer the parties to arbitration under Section 45 of the Arbitration and Conciliation Act, 1996 ("**Act**"). The key issue on which the legal community awaited the Supreme Court's verdict was whether in fact, two Indian parties could agree to arbitrate in a foreign seat. The issue gained importance since the Bombay High Court ruled, contrary to the Madhya Pradesh High Court, that this was not permissible.

The Supreme Court however did not decide the issue. Instead based on a finding of fact that the arbitration in question was an international commercial arbitration, with a foreign element, i.e. an American company with continuing obligations, a foreign seat was permissible in the facts of the present case.

Prior facts and proceedings

Sasan Power Ltd. (the Appellant before the Supreme Court), ("**Sasan Power**"), an Indian Company, entered into an agreement dated January 1, 2009 for mine and development operations with North American Coal Corporation an American Company (the "**American Company"**), ("**Agreement - I**"). Under Agreement-I, the American Company agreed to provide certain consultancy and other onsite services for a mine to be operated by Sasan Power in India. The Agreement-I provided for resolution of disputes by way of arbitration under Article XII of the Agreement-I which, *inter alia,* provided for the following:

a. Governing law of the agreement shall be law of United Kingdom

b. Conflict of laws principles of England will have no application while interpreting Agreement-I.

c. The arbitration is to be administered by International Chamber of Commerce ("**ICC**").

d. The place of arbitration shall be London

By an agreement dated April 1, 2011, the American Company assigned all its rights and obligations under Agreement-I to its Indian subsidiary, viz. North American Coal Corporation India Pvt. Ltd. (the Respondent before the Supreme Court – the **"Indian Company**"), with the consent of Sasan Power, through a tripartite agreement ("**Agreement-II**"). It was agreed that the American Company was not relieved of its obligations and liabilities.

Disputes arose between Sasan Power and the Indian Company and vide its letter dated July 23, 2014, the Indian Company sought to terminate Agreement-I and also invoked arbitration on August 8, 2014.

Sasan Power filed a suit before District Judge, Singrauli, Madhya Pradesh, in relation to Agreement-I, inter alia praying that the arbitration clause seeking various reliefs, including for a declaration that the arbitration clause in Agreement-I was null and void and for an anti-arbitration injunction restraining the Indian Company from proceeding with the arbitration. The District Court granted an ex parte injunction restraining the ICC from proceeding with the arbitration.

In retort, the Indian Company filed an application in the suit seeking rejection of the suit and a referral to arbitration under Section 45 of the Act (which

[1] Civil appeal No. 8299 of 2016.

empowers the court to refer parties to arbitration on the request of a party unless the court finds the agreement to be null and void, inoperative or incapable of being performed). The District Judge dismissed Sasan Power's suit and referred the parties to arbitration on the basis that having agreed to arbitration, the suit was not maintainable.

Sasan Power preferred an appeal before the Madhya Pradesh High Court. Its primary contention was that it was not permissible for two Indian Companies to agree to refer their commercial disputes to a binding arbitration, with a place of arbitration outside India, and governing law being English Law. The reasoning was that Agreement-II having assigned all of the American Company's rights and obligations under Agreement-I to its subsidiary, the Indian Company, the American Company was fully discharged and the agreement became one between two Indian parties, who were then barred from arbitrating before a foreign seat.

The High Court dismissed the appeal, thus upholding the judgment of the District Court, holding that once it is found that parties by mutual agreement have decided to resolve their disputes through arbitration, there were bound thereby, including in relation to their choice of seat. In respect of a foreign seat (chosen by two Indian parties), the High Court referred to the judgment in *Atlas Exports Industries v. Kotak & Company,*[2] where it was held that if two Indian parties contract to arbitration by foreign arbitrators thereby impliedly excluding the remedy available to them under the ordinary law of India, the same is not opposed to public policy. On this basis, the High Court found nothing wrong with the arbitration clause in Agreement-I providing for a foreign seat. The Court held that in the circumstances, Part I of the Act would not apply; Part II would apply and the parties would be referred to arbitration, unless the agreement is found to be null or void or inoperative. In the present case, the High Court ruled that the arbitration agreement was valid and so was the parties agreement on the choice of a foreign seat, i.e. London.

Accordingly, the Division Bench of the Madhya Pradesh High Court found no error in the judgment passed by the District Judge and dismissed the appeal.

Appeal before the Supreme Court

Sasan Power appealed to the Supreme Court, where it dropped the issue as to whether two Indian companies are prevented from entering into an agreement for arbitration of their dispute to be seated outside India. Sasan Power's argument was confined only to the question whether two Indian companies can enter into an agreement with a stipulation that their agreement "be governed by, construed and interpreted in accordance with the laws of the United Kingdom".

The Apex Court skirted the issue. It held that in the facts of the present case, it was apparent that there was no discharge of the original contractee, i.e. the American company's obligations and that there were mutual obligations (arising out of Agreement-I) still to be enforced. Instead it appeared that under Agreement-II, Sasan Power retained its rights to enforce obligations arising thereunder, against the American company and that it perhaps only created an agency where the American Company was the principal and the Indian Company, its agent.

On this basis, the Supreme Court held that the dispute was between three parties with a foreign element, i.e. rights and obligations of the American company. Hence, the stipulation regarding the governing law could not be considered to be an agreement between only two Indian companies.

Conclusion

On the reasoning of the Supreme Court, the dispute in relation to Agreement-I read with Agreement-II, is an international commercial arbitration and being so, the parties would be entitled to chose a foreign governing law and also a seat of arbitration outside India.

The question as to whether two Indian parties may choose a seat outside India however remains to be decided by the apex court. While the Madhya Pradesh High Court has ruled that this is permissible, the Bombay High Court (in *Addhar Mercantile P. Ltd. v. Shree Jagdamba Agrico Exports P. Ltd.*[3] has ruled that two Indian parties cannot arbitrate outside India. The Act itself is silent in this regard, and it will be interesting to see how the Supreme Court ultimately interprets the provisions of the Act.

[2] (1997) 7 SCC 61
[3] MANU/MH/1978/2015

Legal Updates

1. **<u>The Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 ("Amendment Act")</u>**

   The Amendment Act received Presidential assent on August 12, 2016. The Amendment Act seeks to amend the following Acts (i) Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), (ii) Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI), (iii) Indian Stamp Act, 1899 and (iv) Depositories Act, 1996.

   - <u>Amendments to SARFAESI Act-</u>

     The Act, *inter alia*, postulates the process by which the secured creditors can take possession over a collateral, against which a loan had been provided, upon default in repayment. The Act provides that this process will have to be completed within 30 days by the District Magistrate. The Act also allows banks to take over the management of the company which is unable to repay loans in case the banks decide to convert their debt into equity and consequently hold 51% or more in the company. This can be done by taking assistance of the District Magistrate. The Act requires the secured creditors to register their collateral security with the central registry failing which they will be unable to take possession of the collateral security. Further, such creditors, after registration of security interest, will have priority over others in repayment of dues. Further, the Act empowers the RBI to carry out audit and inspection of the Asset Reconstruction Companies in addition to examining their financial statements. The Act provides that no stamp duty will be charged in case of transfer of financial assets in favour of asset reconstruction companies.

   - <u>Amendments to RDDBFI Act-</u>

     The Act has increased the retirement age of the Presiding Officers of the Debt recovery tribunal from 62 years to 65 years. Further, the retirement age of Chairpersons of Appellate Tribunals has been increased to 70 years. With regards to jurisdiction, the Act allows banks to file cases in tribunals having jurisdiction over the area of the bank branch where the debt is pending. The Act set out the procedure which tribunals will have to follow to recover debt alongwith the prescribed time limit to complete the same.

   - <u>Amendments to Indian Stamp Act, 1899 and Depositories Act, 1996</u>

     The Act provides that stamp duty will not be

charged on transactions undertaken for transfer of financial assets in favour of asset reconstruction companies. However, this exemption will not be available, if the asset has been transferred for purposes other than securitisation or reconstruction.

With regards to the Depositories Act, 1996, the Amendment Act seeks to insert Section (1A) and (1B) to section 7 of the Depositories Act, 1996,which, inter alia, provides that every depository on receipt of intimation from a participant, shall register any transfer of security in favour of an asset reconstruction company along with or consequent upon transfer or assignment of financial asset of any bank or financial institution under sub-section (1) of section 5 of the SARFAESI Act.

The Ministry of Finance, vide its notification dated 1st September 2016, has recently notified the following sections of the Amendment Act :-

a. Sections 2 to 4 (except clause xiii) and Sections 5 to 6;

b. Section 8 to 16 deals with, inter alia, the power of the Reserve Bank to carry out audit and inspection;

c. Sections 22 to 31 which deals with, inter alia, amendments to the Recovery of Debts Due to Banks and Financial Institutions including the term of office of Presiding Officer and term of office of Chairperson of the Appellate Tribunal;

d. Sections 33 to 44 which deals with, inter alia, uniform procedure for conduct of proceedings, deposit of amount of debt due for filing appeal against orders of the Recovery Officer, priority to secured creditors etc.

2. <u>The Insolvency and Bankruptcy Code, 2016</u> (“**Code**”)

The Code consolidates several legislations which deal with insolvency of individuals, partnerships and limited liability partnerships into one single legislation thereby making the process of resolving insolvency transparent and efficient. The Code repeals the archaic Presidency Towns Insolvency Act, 1990, Provincial Insolvency Act, 1920, and SICA and amends 11 existing laws including Companies Act, 2013, RDDBFI Act, 1993 and SARFAESI Act, 2002. The Code specifies a framework for time bound insolvency resolution, with two similar processes for (i) companies and limited liability partnerships (liability of partners restricted to their investment), and (ii) individuals and partnership firms.

The Code was passed by the Lok Sabha on May 5, 2016, by the Rajya Sabha on May 11, 2016. The Code received the President's assent on May 28, 2016. Vide notification dated August 5, 2016 the Central Government notified sections 188 to 194 (both inclusive) of the Code and vide notification dated August 19, 2016 further 12 sections of the code were notified by the Central Government. The said sections deal with establishment and incorporation of the Insolvency and Bankruptcy Board of India, the powers of the chairman, meetings of the board, power of Central Government to made rules, etc.

3. <u>The Constitution (One Hundred and First Amendment) Act, 2016</u>

The Constitution (One Hundred and First Amendment) Act, 2016 received Presidential assent on September 8, 2016. The Constitution Amendment Act does away with a host of Central and State taxes and ushers one tax regime for the country, thereby making India a single unified market. According to the provisions of the Constitution Amendment Act, the GST Council will have to be set up within 60 days of its notification. Accordingly, the Ministry of Finance, vide its notification dated September 10, 2016, has also notified Section 12 of the said Constitution Amendment Act which deals with establishment of the Goods and Services Tax Council (“**GST Council**”). The GST Council will decide taxes to be subsumed and exempted from GST, the rate of taxation and model Central, State and integrated GST laws.

4. **The Benami Transactions (Prohibition) Amendment Act, 2016**

The Amendment Act received Presidential assent on August 10, 1996. The Amendment Act further amends the Benami Transactions (Prohibition) Act, 1988. The Act seeks to: (i) amend the definition of benami transactions, (ii) establish adjudicating authorities and an Appellate Tribunal to deal with benami transactions, and (iii) specify the penalty for entering into benami transactions. The Act has expanded the definition of a Benami Transaction to mean property transactions where: (i) the transaction is made in a fictitious name, (ii) the owner is not aware of any denies knowledge of the ownership of the property, or (iii) the person providing the consideration for the property is not traceable. The Act also lists certain transactions which will be exempt from the definition of a Benami Transaction. These include cases when a property is held by: (i) a member of a Hindu undivided family, and is being held for his or another family member's benefit, and has been provided for or paid off from sources of income of that family; (ii) a person in a fiduciary capacity; (iii) a person in the name of his spouse or child, and the property has been paid for from the person's income. The Act has established four authorities to enquire into Benami Transactions namely (i) the Initiating Officer; (ii) the Approving Authority; (iii) the Administrator; and (iv)the Adjudicating Authority.

The punishment for entering into a Benami Transaction is rigorous imprisonment for a term of not less than 1 year but which may extend to 7 years and shall also be liable to fine which may extend to twenty five percent of fair market value of property.

5. **The Indian Trusts (Amendment) Act, 2016**

The Amendment Act received the assent of the President on July 26, 2016. The Amendment Act seeks to amend the Indian Trusts Act, 1882 (Principal Act). The Amendment act has substituted section 20 of the Principal Act, 1882. According to the substituted section, "*Where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee shall, subject to any direction contained in the instrument of trust, invest the money in any of the securities or class of securities expressly authorised by the instrument of trust or as specified by the Central Government, by notification in the Official Gazette".*

6. **Companies (Mediation and Conciliation) Rules, 2016**

Vide notification dated September 9, 2016, the Ministry of Corporate Affairs notified and released the Companies (Mediation and Conciliation) Rules, 2016. With the publication of the said Rules, Central Government has paved the way for setting up of a panel of mediators or conciliators, in pursuance of Section 442 of the Companies Act, 2013. The role of mediator / conciliator shall be to facilitate voluntary resolution of the dispute by the parties and communicate the view of each parties to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute.The said Rules provide the eligibility criteria for persons to be appointed as mediators. The said Rules also provide that the mediation / conciliation process shall be completed within three months from the date of appointment of expert/experts from the Panel and that on the expiry of three months from the date of appointment of experts from the Panel, the mediation/conciliation process shall stand terminated. Rule 30 of the said Rules also provides for matters which cannot be referred to mediation or conciliation.

7. **Judges Appointment and Transfer**

Justice Shiavax Jal Vazifdar has been appointed as the Chief Justice of the Punjab & Haryana High Court on August 6, 2016.

Justice Manjulla Chellur has been appointed as the Chief Justice of the Bombay High Court on August 24, 2016.

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The views expressed in this newsletter do not necessarily constitute the final opinion of Cyril Amarchand Mangaldas and should you have any queries in relation to any of the issues set out herein or on other areas of law, please feel free to contact us on **caseinpoint@cyrilshroff.com** or write to following coordinates:

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