The Corporate Brief

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NCLAT: Dispute under Section 8(2)(a) of IBC must be in respect to the amount so claimed and not to any other kind of dispute.

- Sohair Wani

In the matter of Mr. Aroon K. Aggarwal v. ABC Consultants at NCLAT, principle bench Delhi has held that that for a debtor to take the plea of pre-existing dispute under Section 8(2) of the Insolvency and Bankruptcy Code, 2016 (IBC), the dispute must relate to the claim made by the operational creditor; mere existence of a dispute is not blanket protection under Section 8(2)(a) of the IBC.

Brief Facts:

1. The Appellant is an ex-employee of the Respondent's Company and was appointed in the year 2003. But his services were terminated in the year 2016 as the Respondent levelled allegations of fraud and breach of trust against the Appellant and FIR was lodged under S.420 and 406 of IPC.
2. The Respondent did not respond to the Appellant's notice under Section 8 of the IBC, which sought a sum of Rs. 33,42,002/- as an operational creditor. The Appellant subsequently submitted an application according to Section 9 of the Code, which the Adjudicating Authority (NCLT, Kolkata Bench) denied due to pre-existing dispute.

Arguments by Appellant:

- Appellant submitted that the claim of the Appellant has nothing to do with the registration of FIR because the Appellant has claimed his salary, flexible pay basket, gratuity, performance bonus and business development bonus which is not the subject matter of pre-existing dispute.
- The Appellant cited Thothappa Nainar Mohamed Sirajdheen v. Intex Technologies (India) Ltd., in which it was held that a criminal liability is a pending consideration before a court of competent jurisdiction but since there was no suggestion that the Corporate Debtor had raised any dispute about the supply or quality of goods prior to issuance of demand notice, the Adjudicating Authority had rightly held that there was no pre-existing dispute and admitted the application.
- In Sudhi Sachdev v. APPL Industries Ltd. an application under Section 9 was admitted. The Appellant therein, in order to challenge the admission order raised the existence of dispute on the ground that the Respondent had instituted a case under Section 138/441 of Negotiable Instruments Act, 1881, pending in the court. The said contention was not accepted by this Tribunal holding that it is not the dispute about the payable debt to the Operational Creditor and default on the part of the Corporate Debtor. The pendency of the case under Section 138/441 of NI Act, 1881 even if accepted as recovery proceedings, cannot be held to be a dispute pending before a court of law. Further, it was held that the pendency of the case amounts to admission and not an existence of dispute.

Judgement:

- The tribunal held that pre-existing dispute has to co-relate with the amount claimed by the Operational Creditor or if a suit or arbitration proceedings is pending then the same should also be related to such dispute.
- In the present case, however, no dispute has been raised by the Respondent that the Appellant is not entitled to the salary of a sum of Rs. 33,42,002/-
- The appeal was allowed

Conclusion:

As a result of the aforementioned case study, we can infer that a claim of a pre-existing dispute must be related to the amount sought by the operational creditor. In the current instance, the Respondent has not raised any objections to the Appellant's salary, flexible pay basket, gratuity, performance bonus, or business development bonus up until the point at which he terminated his employment. Therefore, for a debtor to take the plea of pre-existing dispute under Section 8(2) the dispute must relate to the claim made by the operational creditor, mere existence of a dispute is not blanket protection under Section 8(2)(a) of the IBC.

Read more at:

- https://www.latestlaws.com/case-analysis/a-preexisting-dispute-must-co-relate-with-the-amount-claimed-by-the-operational-creditor-opines-nclat-193112/
- https://www.scconline.com/blog/post/2022/12/22/plea-of-pre-existing-dispute-must-co-relate-with-amount-claimed-by-operational-creditor-nclat/

Limitation Period u/s 11B of Central Excise Act, 1944 is Not Applicable To Refund Claims For Service Tax Paid Under Mistake Of Law

- Sanyam Gupta

In the case of M/s. Raheja Regency Cooperative Housing Society ltd. Versus Commissioner of GST & Central Excise, a Single Judge Bench (comprising of Mr. Ajay Sharma, judicial Member) of the Customs, Excise Service Tax Appellate Tribunal, Mumbai on 8th December, 2022, held that the limitation prescribed under Section 11B of the Central Excise Act, 1944, is not applicable to refund claims for service tax paid under a mistake of law.

The appellant in the present case was providing the services under the category of Club or Association Services and is a Society Registered under the provisions of Maharashtra Cooperative Housing Society Act, 1960. They had filed two refund claims on the ground that they had paid service tax under protest as they were Co-operative Society not engaged in any activity of profit and as per the principle of mutuality, services provided by them to their members would not be liable to Service tax under the Club or Association Service. These claims were rejected by the CIT (Appeals) on the basis that the refund claimed was barred due to the limitation period u/s 11B of the Central Excise Act, 1944.

The Bench noted that it was a well-established fact and settled legal position that a club incorporated and formed on the principle of mutuality, is not liable to pay service tax on services provided to its members inasmuch as it is not a service by one legal entity to another and though the club had distinct legal entity, it was acting only as an agent for its members. Further, it noted that the Hon'ble Supreme Court in the matter of State of West Bengal & Ors. vs. Calcutta Club Ltd. & Ors. while following its decision in the matter of The Joint Commercial Tax Officer vs. The Young Mens' Indian Association has laid down that from 2005 onwards, the Finance Act, 1994 does not purport to levy service tax on members' club in incorporated form, and held that show cause notices, demand notices and other action taken to levy and collect service tax from incorporated members' club are void and of no effect.

It further observed that since the amount paid by the Appellant in the present case would not take the character of tax, it is thus simply an amount paid under a mistake of law. Hence, the provisions of Section 11B would not be applicable to an application seeking refund thereof. Moreover, since the retention of the amount in issue by the department was without authority of law, the question of applying the limitation prescribed under Section 11B would not arise. Even in case where any amount is paid by way of self-assessment, if it has been paid by mistake or through ignorance, it is always open to the assessee to bring it to the notice of the authority concerned and claim refund of the amount wrongly paid. For a service to be taxable, it is necessary that the service has to be rendered by one person to another, and without a perceived service, money contribution cannot be held to be a consideration which is liable to tax.

The CESTAT held that the authority concerned is duty bound to refund such amount as retention of such amount would be hit by Article 265 of the Constitution of India which mandates that no tax shall be levied or collected except by authority of law. Since Service Tax received by the concerned authority was not backed by any authority of law, in view of the provisions of Article 265 of the Constitution, the authority concerned has no right to retain the same. Regarding the same the Hon'ble Bench relied on a plethora of judgements including the case of Parijat Construction v. Commissioner Excise, Nashik decided by the Hon'ble High Court of Judicature at Bombay as well as 3E Infotech V. CESTAT, Chennai decided by Hon'ble High Court of Judicature at Madras.

Read more at:

- https://www.livelaw.in/news-updates/limitation-period-not-refund-claims-service-tax-paid-mistake-law-cestat-216679
- https://taxguru.in/service-tax/period-limitation-doesnt-apply-amount-tax-mistakenly-paid.html

Meta Platforms Inc. to settle Cambridge Analytica scandal case for $725 million

- Amitabh Abhijit

Introduction:
Meta Platforms Inc. (“Meta”), Facebook’s parent company, has agreed to pay $725 million to settle a class-action lawsuit alleging the social media giant of granting third companies, including Cambridge Analytica, access to users' personal information. The proposed settlement was disclosed in a court filing before the United States District Court of Northern California (San Francisco Division).

If the settlement follows through, it would lead to the resolution of a four-years long legal battle, prompted by revelations in 2018 that Facebook had allowed the British political consulting firm ‘Cambridge Analytica’ to access data of as many as 87 million users.

According to the Keller Rohrback L.L.P, the law firm representing the plaintiffs, this deal is the "biggest recovery ever reached in a data privacy class action and the most Facebook has ever paid to resolve a private class action."

Unravelling the Dispute:
The lawsuit began in 2018, when Facebook was accused of sharing users’ information with Cambridge Analytica, the company that assisted President Donald Trump’s first campaign in 2016. It was alleged that the purpose of this ‘data-leak’ was voter profiling and targeting, that led to several users receiving advertisements aimed at influencing their decision for the 2016 U.S. Presidential Election. Meanwhile, in May 2018, Cambridge Analytica filed for insolvency proceedings in the United Kingdom and became defunct shortly thereafter.

In response, several Facebook users filed a class-action lawsuit against the tech-giant for misleading them with respect to control over their personal data. This initiated a series of investigations, inquiries and hearings led by the U.S. Congress in which Mark Zuckerberg, Meta’s CEO, was vehemently questioned.

In 2019, Facebook agreed to pay $5 billion to settle the Federal Trade Commission's probe and $100 million to the U.S. Securities and Exchange Commission to settle the charge that it misled investors about misusing user data.

The dispute dragged on for three more years with several mediation efforts and a lengthy and thorough discovery process by both the parties. Finally, on 22nd December 2022, the court finally put an end to the same by virtue of the instant settlement. The settlement covers an estimated 250 to 280 million Facebook users. How much an individual user receives is unclear at the time as the same will depend on how many people submitted valid claims for a share of the settlement.

Meta’s Stand:
In 2019, Facebook had argued that its users have no legitimate privacy interest in information they shared with friends on social media. However, U.S. District Judge Vince Chhabria referred to this contention as "so wrong" and in 2019 largely allowed the case to move forward.

Since then, Meta has denied any allegations of a wrongdoing on their part but concluded that settling was "in the best interest of our community and shareholders." Meta also issued a public statement saying that they have worked to revamp their approach to the privacy of their users and have also implemented a comprehensive privacy program in that regard.

Conclusion:

Since the case was filed, Facebook has stopped allowing third parties to access data about users through their friends, plaintiffs said in the court filing detailing the settlement. The company has also strengthened its ability to restrict and monitor how third parties acquire and use Facebook users' information, and improved its methods for telling users what information Facebook collects and shares about them, according to the filing.

At the time, several investigations by the State Attorney General's Office are still ongoing and the approval for this settlement is yet to be received by the U.S District Court of Norther California. Nevertheless, it does seem like Meta is putting its efforts towards damage-control and until the allegations reach finality, consequences for the company as well as its customers are difficult to predict, though Meta's users are better off with an improved privacy policy.

Read more at:

- https://www.reuters.com/legal/facebook-parent-meta-pay-725-mln-settle-lawsuit-relating-cambridge-analytica-2022-12-23/
- https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html
- https://fortune.com/2022/12/23/facebook-parent-meta-pays-record-725-million-to-settle-cambridge-analytica-scandal/
- https://www.npr.org/2022/12/23/1145303268/facebook-meta-cambridge-analytica-privacy-settlement

SEBI amends ICDR regulations to provide an 18-month window for pre-filed IPOs

- Bakhshind Singh

Introduction:

The Securities and Exchange Board of India ("SEBI"), through its amendment dated November 21, 2022 ("Amendment") to the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("SEBI ICDR Regulations") has, inter-alia, introduced the provision of confidential pre-filing of draft offer document ("Pre-Filing Option") for Initial Public Offerings ("IPOs"), norms pertaining to Key Performance Indicators ("KPI") disclosures and monitoring procedure for proceeds from Qualified Institutional Placements ("QIPs") and preferential allotments.

Stages of confidential filing:

The process of Pre-Filing Option is extensive when compared to the traditional route and comprises the following stages:

- Confidential filing of the draft offer document (the "Pre-Filed DRHP"), including any re-filings, if required;
- Public announcement of pre-filing;
- Issuance of SEBI observations on the Pre-Filed DRHP;
- Filing an updated draft offer document with SEBI incorporating observations from SEBI ("UDRHP-I"), including any re-filings, if required;
- Inviting public comments on UDRHP-I;
- Confidential filing of UDRHP-II with SEBI;
- Filing of the offer document with the Registrar of Companies followed by filing copies with SEBI and the Stock Exchanges
- Opening of the issue

The benefits of this process include keeping commercially sensitive information confidential up to the time that the issuers are very sure they want to go ahead with the transaction. It also now allows issuers and regulators to resolve disclosure-related concerns or any other complex matters relating to the issuer or its industry before the disclosure becomes public and ensures that the document that is made available for public review incorporates the regulator's inputs and observations.

Key features of pre-filing option:

The Amendment has brought about several positive changes which include allowing the company with an 18-month period from the date of final observations to launch their IPOs under Pre-Filing Option, as against the 12-month window, which is available under the regular route.

Companies opting for Pre-Filing Option can also market their issuances to QIBs from the time of pre-filing till the initial observations are received from SEBI.

Further, the one-year holding period for selling shareholders, which is counted from the date of filing of the draft offer document under the regular route, shall be counted from the date of filing of UDRHP-1 under the Pre-Filing Option.

Additionally, the restraint on receiving equity shares of the company apart from employee stock options and convertible securities has been relaxed. Under the Pre-Filing Option, the right to receive equity shares is permitted to subsist until the issuance of observations by SEBI.

Another feature, the intention behind which still remains hazy, is the obligation upon the company to make a public announcement of the Pre-Filing Option while only filing the offer documents with the SEBI and stock exchanges.

Conclusion and the way forward:

The Amendment has introduced the much-awaited Pre-Filing Option to the Indian capital markets regime, displaying a pragmatic step taken by SEBI. The Pre-Filing Option benefits the company by allowing for discussions with SEBI on a confidential basis, and by allowing the prospective selling shareholders to meet the one-year holding period requirements in the interim, while not restraining their right to receive equity shares of the company. At the same time, the Pre-Filing Option likely adds an audit cycle and prolongs the overall IPO process, while restricting the investor interaction permitted during the Pre-Filing process.

Read more at:

- https://www.business-standard.com/article/markets/confidential-ipo-filing-how-it-will-work-and-why-it-is-being-introduced-122111501381_1.html
- https://mintgenie.livemint.com/news/markets/6-key-new-ipo-rules-that-you-must-know-about-151669002626480
- https://www.financialexpress.com/market/sebi-provides-18-month-window-for-pre-filed-ipos/2890448/lite/

SEBI brings regulatory framework for Online Bond Platform Providers

- Pushpendra Dixit

In a recent move to streamline the operations of Online Bond Platform Providers (OBPPs) the Securities and Exchange Board of India has come out with a regulatory framework that majorly mandates the OBPPs to be companies incorporated in India and should register themselves as stockbrokers in the debt segment of the stock exchange.

What are OBPPs?

The term “bond market” typically refers to a market where investors may purchase debt instruments that are offered by either firms or governments. National governments often utilize bond earnings to finance infrastructure upgrades and debt repayment. Companies sell bonds to generate the funds necessary to fund operations, expand their product lines, or establish new branches. Either new debt is issued on the primary market for bonds, or existing debt can be purchased by investors on the secondary market through brokers or other intermediaries. As per SEBI, an Online Bond Platform is an electronic system other than a recognized stock exchange or an electronic book-providing platform, on which debt securities are listed or proposed to be listed are offered and transacted. The online bond platform provider means any person operating or providing such a platform.

What do the new rules say?

1. After obtaining registration as a stockbroker in the debt segment of a stock exchange, an entity would have to apply to the bourse to act as an OBPP.
2. The new rules mandate a registration certificate as a stockbroker from SEBI to act as an online bond platform provider.
3. Those acting as an online bond platform provider without a registration certificate provider prior to 9th November 2022 continue to do so for a period of three months.
4. People will have to comply with the conditions of registrations as specified by the SEBI from time to time.
5. The entity would have to ensure compliance with the minimum disclosure requirements. It would also have to disclose on its platform all instances of conflict of interest, if any, arising from its transactions or dealings with related parties.

Read more at:

- https://www.livemint.com/news/india/sebi-puts-in-place-regulatory-framework-for-online-bond-platform-providers-11668436286910.html
- https://www.business-standard.com/article/markets/sebi-introduces-regulatory-framework-for-online-bond-platform-providers-122111101037_1.html
- https://www.sebi.gov.in/legal/circulars/nov-2022/registration-and-regulatory-framework-for-online-bond-platform-providers_65014.html

MCA Revises the Definition of Small Companies to Facilitate Ease of Doing Business

- Pushpendra Dixit

In a recent move to help business entities and make India a preferred destination for businesses, the Ministry of Corporate Affairs has revised the threshold for paid-up capital of ‘small companies’ which aims at facilitating the ‘Ease of Doing Business’ and reduce the burden on ‘small companies’ needed for compliance.

What is a small company?

Small businesses are corporations, partnerships, or sole proprietorships that are smaller in scale than larger firms or corporations in terms of both the number of employees and/or yearly revenue. The regulations and provisions pertaining to a ‘Small Company’ are defined by the Companies Act, 2021. In terms of compliance needs, small businesses have several benefits over larger businesses. For instance, a small business is only required to hold two board meetings within a fiscal year, as opposed to bigger businesses, which must hold four such meetings over the same time frame. A company secretary or a single director can sign an organization's yearly returns, and small businesses are not required to keep their cash flow statement on file.

What has changed now?

On April 1, 2021, the Companies (Specification of Definitions Details) Rules, 2014, were amended as announced by the Ministry of Corporate Affairs. It states that the Companies Act of 2013's definition of "Small Companies" was changed by raising the criteria for paid-up capital from “not surpassing Rs 50 lakh” to “not exceeding Rs 2 crore” and turnover from “not exceeding Rs 2 crore” to “not exceeding Rs 20 crore.” The increased criteria for paid-up Capital resulting from the recent amendment changed the definition of “Small Companies.” Additionally, the turnover was changed from “not exceeding Rs 20 crore” to “not exceeding Rs 40 crore.”

How will it benefit companies?

The revised definition for small companies includes the following advantages in terms of compliance –

- No need to prepare cash flow statement as part of the financial statement.
- Advantage of preparing and filing an Abridged Annual Return.
- Mandatory rotation of auditor not required.
- An Auditor of a small company is not required to report on the adequacy of the internal financial controls and its operating effectiveness in the auditor’s report.
- Holding of only two board meetings in a year.
- Annual Return of the company can be signed by the company secretary, or where there is no company secretary, by a director of the company.
- Lesser penalties for small companies.

Read more at:

- https://www.livelaw.in/know-the-law/ministry-of-corporate-affairs-mca-companies-act-small-company-one-person-company-opc-216603
- https://www.pib.gov.in/PressReleaseIframePage.aspx?PRID=1859699

Invoking CIRP Would Not Make The Dispute Non-Arbitrable: Delhi High Court

- Udhav Mittal

Case Reference: Brilltech Engineers Pvt. Ltd. v. Shapoorji Pallonji and Co. Pvt Ltd.

Facts:
The parties entered into a contract on 19.12.2011 requiring the petitioner to do specified electrical work. Clause 13 of the agreement said that disagreements would be resolved by arbitration. A dispute emerged between the parties over the non-payment or retention of a particular amount on a running account's bills and the respondent's retention of the security deposit. Accordingly, a demand notice dated 19.04.2019 was filed onto the respondent, who disputed any obligation to make any payments to the petitioner in its response to the notice. Subsequently, the petitioner referred the matter to MSME Samadhan. However, no action was taken based on this application, and the proceedings were declared null and void from the outset for lack of statutory limits. Consequently, the petitioner filed an application under Section 9 of Insolvency and Bankruptcy Code, 2016 (“IBC”), initiating corporate insolvency against the respondent. Subsequently, the petitioner filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 (“Act”), whereafter the respondent first agreed to resolve the matter through arbitration, but subsequently reneged. Consequently, the petitioner filed a petition under Sections 11 and 9 of the Act seeking the appointment of an arbitrator and temporary relief.

Objections raised by the respondent:

- There is no arbitrable dispute as the petitioner has filed an insolvency application which can be filed only for admitted debt, therefore, there survives no arbitrable dispute that requires adjudication by the arbitral tribunal.
- The petitioner has not complied with the pre-arbitral step that provides for an attempt at amicable settlement and then a reference to internal dispute resolution board, however, the petitioner has directly invoked the arbitration clause.
- The petition is not maintainable as the petitioner has indulged in forum shopping and claimed different amounts before various forums.
- The petition is liable to be dismissed for non-compliance with Section 21 of the A&C Act as no notice of arbitration was ever given to respondent.

Analysis:
The Court ruled that the dispute would not become non-arbitrable solely because the petitioner filed a corporate insolvency application under Section 9 of the IBC prior to submitting the application for appointment of an arbitrator. Since the petitioner has filed an insolvency application, which may only be filed for accepted debts, the court rejected the contention that admitted debts cannot be arbitrated. The court ruled that it is a settled position of law that NCLT's jurisdiction can only be invoked in the case of fixed debts; however, the fact that a petition has been filed by the petitioner asserting that the respondent owes a specific amount does not mean that the claimed amount has been admitted. The court ruled that when the respondent persistently denies its duty to pay, the claimed sum does not become an accepted debt and the petitioner may seek resolution through arbitration. The Court rejected the argument that by filing claims before several forums the petitioner has engaged in forum shopping and that there was difference in the amount claimed before the forums.

The Court held that since the scope of inquiry before the NCLT and arbitral tribunal is absolutely distinct, therefore, filing of petition before the two forums cannot be called as forum shopping. Moreover, the claims before both the forums were filed at different dates, thereby, the difference in the amount claimed was a natural thing. The court also ruled that the arbitration clause only permitted a negotiated settlement and a referral to the Regional Read of the respondent when the dispute pertained to interpretation of clauses, technical specifications, etc. However, the dispute between the parties is not related to these issues, but rather to non-payment of fees. In addition, the petitioner sought the MSME Samadhan for conflict resolution, which satisfies the criteria for an effort at a negotiated settlement. In addition, the court ruled that the petition under Section 9 of the Act and the respondent's readiness to resolve issues through arbitration satisfies Section 21 of the Act.

Noting that the respondent in its statement in the application filed under Section 9 of the A&C Act had agreed to maintain a sum until the adjudication of disputes, the court ordered the respondent to maintain the same sum until the conclusion of arbitration proceedings, subject to modification by the arbitral tribunal, if any.

Therefore, the Court granted the petition and appointed the arbitrator.

Read more at:
https://www.livelaw.in/news-updates/invoking-cirp-would-not-make-the-dispute-non-arbitrable-delhi-high-court-217031#:~:text=The%20High%20Court%20of%20Delhi,Section%209%20of%20the%20IBC

Claim Based on an Uninvoked Bank Guarantee Liable to be Rejected by RP: NCLT Mumbai

- Udhav Mittal

Case Reference: Mrs. Bhanu Navin Nisar v Vijay Group Realty LLP.

The National Company Law Tribunal ("NCLT"), Mumbai Bench, comprising of Shri H.V. Subba Rao (Judicial Member) and Smt. Anuradha Sanjay Bhatia (Technical Member), while adjudicating an application filed in *Mrs. Bhanu Navin Nisar v. Vijay Group Realty LLP*, has ruled that a Resolution Professional ("RP") is legally obligated to reject a creditor's claim arising out of an uninvoked Bank Guarantee.

Facts:

Mrs. Bhanu Navin Nisar ("Financial Creditor") has filed a petition under Section 7 of the Insolvency and Bankruptcy Act, 2016 ("IBC"), requesting the commencement of the Corporate Insolvency Resolution Process ("CIRP") against Vijay Group Realty LLP ("Corporate Debtor"). The CIRP was started by the Adjudicating Authority against the Corporate Debtor. As a financial creditor of the Corporate Debtor, Yes Bank Limited had filed a claim with the Resolution Professional for Rs. 420,16,00,000/- due and payable on 07.10.2021. The Resolution Professional had denied the Bank's application and excluded Yes Bank Ltd. from the Committee of Creditors ("CoC"). Yes Bank filed a petition with the Adjudicating Authority contesting the Resolution Professional's action. The Bank maintained that the maturity of a claim, the default of a claim, or the invocation of a guarantee for claiming the amount have no relationship with the filing of a claim pursuant to a public notice issued pursuant to Section 13(1)(b) of IBC read with Section 15(1)(c) of IBC.

The Resolution Professional submitted a response in opposition to the application, arguing that Yes Bank's claim was based on an uninvoked Bank Guarantee and that the Principal Borrower's account was a standard account. The Resolution Professional relied on the NCLAT's ruling in *Edelweiss Assets Reconstruction Company v. Orrisa Manganese and Mineral Limited*, which concluded that an uninvoked corporate guarantee cannot be deemed a claim under the IBC. Not to be included in the RP's maintained and updated list of claims.

Issue:

Whether the action of Resolution Professional in rejection of the claim of Yes Bank Ltd., based on an uninvoked bank guarantee in respect of a standard account of a borrower, is legally correct and sustainable?

NCLT's decision:

The Bench noted that NCLAT's ruling in *Edelweiss Assets Reconstruction Company v. Orrisa Manganese and Mineral Ltd.* was appealed to the Supreme Court, whereupon the Supreme Court issued a common judgment titled *Ghanshyam Mishra and Sons Private Limited v. Edelweiss Assets Reconstruction Company Limited*. The Supreme Court held that:

"From the record placed before NCLT, it was clear that EARC had not invoked the corporate guarantee. NCLT, therefore posed a question to itself, as to whether an uninvoked corporate guarantee could be considered as matured claim of the appellant. NCLT found that once the moratorium was applied under Section 14 of the I&B Code, EARC was prevented from invoking the corporate guarantee. NCLT further found that the OMML's guarantee had not been invoked by EARC till the date of completion of CIRP process and once the moratorium was imposed, it could not invoke the corporate guarantee. NCLT therefore found that there is no illegality or irregularity in not admitting the claim of EARC."

The court determined that the Resolution Professional did not violate the law by rejecting the claim of Yes Bank Ltd. (Financial Creditor) based on an uninvoked guarantee for a standard account of primary borrower. The Resolution Professional's conclusion was consistent with the law established by the Supreme Court in the Ghanshyam Mishra case. The application was dismissed.

Read more at:

- https://www.livelaw.in/news-updates/claim-based-on-an-uninvoked-bank-guarantee-liable-to-be-rejected-by-rp-nclt-mumbai-217250

PhonePe splits from Flipkart before IPO

- Amar Prem Prakash

PhonePe was established by ex-Flipkart executives, Sameer Nigam, Rahul Chari and Burzin Engineer and had initially been acquired by Flipkart, the e-commerce giant in 2016.

Being one of the largest digital payment platforms, PhonePe has a huge consumer base of more than 400 million users. It commands more than 40% of the market share of the mobile payments market in India. This comes at a time when the Indian Government announced that it will not enforce a check on the market share for companies operating on the homegrown payments network until 2024, which gives a significant boost to PhonePe.

The idea behind separating these companies is to allow them to grow and develop in an independent manner and cater to the Indian market, which is also the reason why PhonePe has relocated its domicile from Singapore to India. It aims to invest in new and upcoming businesses such as insurance, wealth management and lending along with promoting UPI payments in India.

Ahead of its Initial Public Offering ("IPO"), Flipkart Singapore and PhonePe Singapore led by Walmart purchased shares directly as they operate under the US-based retail giant which is the majority shareholder of both companies. Additionally, employees holding Flipkart Employee Stock Ownership Programmes ("ESOP") are being offered a one-time cash payout at $43.67 per option as compared to $165.83 which is the new share price of Flipkart. The total cash payout is estimated at $700 million.

A report by Bloomberg stated that PhonePe is close to making a deal with General Atlantic, Tiger Global Management, Qatar Investment Authority and Microsoft Corporation for an investment of $1 billion at a valuation close to $13 billion. Furthermore, PhonePe believes that they will turn profitable this year and hence have decided to go public.

Read more at:

- https://www.livemint.com/companies/start-ups/phonepe-completes-separation-from-flipkart-ahead-of-ipo-11671774529459.html
- https://www.financialexpress.com/industry/phonepe-separates-from-flipkart-ahead-of-ipo/2924296/
- https://www.bqprime.com/business/phonepe-officially-separates-from-flipkart-in-road-to-ipo

Ease of Business Bill In Parliament

- Nikhil Bhargava

The Jan Vishwas (Amendment of Provisions) Bill, 2022 is a proposed legislation that is aimed at making changes to the Jan Vishwas Act. The act in of itself is aimed to provide relief to taxpayers by providing a one-time opportunity to settle outstanding tax disputes. The Bill is introduced in the Lok Sabha by Union Minister of Commerce and Industry, Mr. Piyush Goyal, in December.

The main purpose of the bill is to decriminalize 183 offences spread across 42 legislations administered by 19 Ministries and thereby enhancing and promoting the ease of doing business in India.

The various changes to the existing laws include:

- Decriminalizing various offences
- Revision of fines and penalties
- Appointment of Adjudicating officers
- Establishment of Appellate Authority
- Increasing 10% of minimum amount of fine and penalty levied after expiry of three years

The various acts covered by the Bill include Trade Marks Act 1999, Railways Act 1989, Prevention of Money Laundering, 2002; Patents Act, 1970; Drugs and Cosmetics Act, 1940 etc.

The major reasons why this bill has been introduced in the Parliament are:

- The fear of imprisonment was the major reason for sluggish growth in the 'ease of doing business' environment.
- Criminalisation for minor offences gives enormous power in the hands of the authority to misuse these laws for personal benefit.
- Such laws also result in overcrowding of the prison and thus lead to the violation of human rights.
- Many complicated laws have increased the burden on the courts and thereby contributed to the pendency of the cases.
- The analysis of the provisions of the Bill indicates that there has been an increased focus on the replacement of imprisonment clauses with fines and experts believe that this alone cannot be termed as "decriminalisation" instead they term it as "quasi-decriminalisation".
- According to Andrew Ashworth's seminal piece titled "Is the Criminal Law a Lost Cause?", the objective of a "tax" is mainly regulatory in nature whereas a "fine" carries an element of censure and stigma with it.
- This functional difference is being increasingly diluted under the legislative frameworks which use these elements of censure and stigma in regulatory domains.
- According to the report of the Observer Research Foundation titled "Jailed for Doing Business", there were over 26,134 imprisonment provisions in about 843 economic laws, rules and regulations which regulated economic activities in India.
- Considering the above numbers, the number of offences deregulated by the new Bill seems to be very few.

Read more at:

- https://economictimes.indiatimes.com/opinion/et-commentary/why-goi-should-reconsider-provisions-of-jan-vishwas-bill-that-decriminalise-criminals/articleshow/96745551.cms?from=mdr
- https://economictimes.indiatimes.com/opinion/et-commentary/how-jan-vishwas-bill-will-bury-statutes-that-are-not-only-archaic-but-lead-to-harassment/articleshow/96837195.cms
- https://www.ijlmh.com/wp-content/uploads/What-is-%E2%80%98Overcriminalisation-and-How-does-the-Jan-Vishwas-Amendment-of-Provisions-Bill-2022-deal-with-it.pdf

IRDAI Proposes Management Expense Limit for Insurers

- Nikhil Bhargava

With the release of three new drafts the Insurance Regulatory and Development Authority of India proposes to change the 'Expenses of Management' ("EoM") for both life insurers and non-life insurers. These changes were laid down in the Exposure drafts after requests from stakeholders were made to review the regulations.

As for the EoM of insurers transacting life insurance business the proposed changes include:

- Additional allowable expenses of up to 15% incremental premium over previous year towards rural sector business or any other government schemes as may be specified.
- Additional allowable expensed up to 15% of premium for Pradhan Mantri Jeevan Jyoti Bima Yojna (PMJJBY)
- Expense allowances for annuity policies and paid-up policies increased.
- Additional allowances for Insurance awareness and Insuretech stipulated at 5% of total allowable expenses for the FY.
- The Board approved policy on EoM must include measures to bring cost effectiveness and manner of transfer of benefits arising out of cost reduction, to the individual policyholders.
- Policy to also include the manner in which compliance with computation of additional allowance shall be ensured.
- The Board approved policy on EoM to include stipulations regarding payment of commission to agents/ intermediaries.
- New provision introduced regarding board approved business plan and expenditure projections for a financial year.
- The compliance checks to be done on an overall basis for Participating as well as Non-Participating (including Linked) portfolios, instead of segmental basis as at present.
- Authority may grant forbearance to insurers in case of excess expenditure up to 5 years of 'duration of business' instead of 10 years at present.
- Glide path of three years up to FY 2025-26 for insurers which are not compliant with the expense limits laid down in the Regulations.
- No variable pay for MD/ CEO/ WTD/ KMPs in case actual expenses exceed the business plan by 10% or more.

Further, changes were also made to the Expenses of Management of General or Health Insurance Business. The proposed regulation changes include:

- Revision of limits on expenses to 30 percent in case General Insurers, 35 percent in case of Standalone Health Insurers, of gross premium written in India in that financial year.
- Insertion of additional allowances towards Rural Sector & Govt. Welfare oriented schemes.
- Insertion of additional allowances for expenses towards 'Insurtech' and 'Insurance Awareness'.
- Manner of transfer of benefits, arising from reduction of expenses to the policyholders by way of reduction in the premium.
- Submission of Board approved business plan on the projected capital requirements, projected solvency requirements and projected expenses of management in terms of allowable limits.
- Authority may grant forbearance to new insurers in case of excess expenditure up to first 5 years of 'duration of business'.
- Glide path of three years up to FY 2025-26 for insurers which are not compliant with the expense limits laid down in the Regulation.
- No variable pay to Managing Director (MD) / Chief Executive Officer (CEO) / Whole-Time Directors (WTD) and Key Management Persons (KMPs) for the said financial year in which the actual expenses exceeds the projected expenses by more than 10 percent.

Read more at:

- https://www.financialexpress.com/money/insurance/irdai-proposes-management-expense-limit-for-insurers/2889304/
- https://economictimes.indiatimes.com/industry/banking/finance/insure/general-health-insurers-face-a-single-management-expense-limit/articleshow/95723899.cms?from=mdr
- https://www.business-standard.com/article/finance/several-insurance-companies-exceed-limit-on-expenses-in-fy22-irdai-report-122122300884_1.html

Standing Committee Report: An analysis in the backdrop of Competition (Amendment) Bill 2020

- Puhumi Verma

The Competition (Amendment) Bill, 2022 (hereinafter "Amendment Bill"), seeks to amend the Competition Act, 2002. After being introduced in the Lok Sabha on 05 August 2022, it was referred to the standing committee on 17 August 2022. The 52nd standing committee report (hereinafter "Report") came on 13 December 2022. This article highlights the suggestions of the standing committee on the Amendment Bill.

The report highlights nine issues which are as following:

1. Deal Value Threshold
2. Definition of control
3. Procedural timelines
4. Ability of the DG to depose legal advisors
5. Settlements and Commitments
6. Hub and Spoke Cartels
7. Requirements of a Judicial Member
8. IPR as a defence of abuse of dominant position
9. Effects based test

Analysis of Key Issues:

Evaluating deal value for regulation of combinations

Under the Act, combinations are defined as the acquisition, merger, or amalgamation of one or more enterprises if they meet certain thresholds based on their assets or turnover. Combinations meeting these thresholds have to seek CCI's approval. The Bill seeks to add an additional threshold of deal value of transactions for the notification and scrutiny of combinations. According to the provision, transactions with a value of more than Rs 2,000 crore will have to be notified for CCI's approval. Value of transaction is proposed to include every valuable consideration, whether direct, indirect, or deferred for any acquisition, merger, or amalgamation.

The Report directs that the bill should provide more understanding or direction on how this transaction value will be calculated.

Definition of Control

CCI has been using the material influence standard in actual practice over the last few years. Since, material influence is now a settled standard and therefore suggests an explicit definition of control which is as following:

"Control" means the ability to exercise material influence, as may be specified by regulations, in any manner whatsoever, over the management or affairs or strategic commercial decisions.

Ability of the DG to depose legal advisors

According to the Bill, the director general (hereinafter "DG") possess the power to examine any agent under oath who are being investigated. The definition of agents includes legal advisors. Such a power may give rise to a scenario where the attorney-client privilege may be broken. It must be noted that the DG or any investigative authority such as the CCI cannot be authorized to depose legal professionals or other similarly placed privileged advisers. Hence, the Report recommends that the bill should include a clause that specifies with clarity that nothing in the section which gives power to the DG to depose legal advisors shall be in contravention of the Indian Evidence Act 1872 or any other Act that protects attorney-client privilege.

Settlements and Commitments

Commitment and settlement provisions are used by antitrust regulators for speedier enforcement and subsequent termination of the investigation. The regulators assess if the voluntary commitments offered by the parties address the concerns being investigated.

Under the Bill, settlements can be offered only after the DG's investigation report is issued but prior to CCI's final decision. Whereas commitments can be offered at any time after an investigation has been initiated but before the DG's investigation report is issued.

The Standing Committee observed that the Bill is silent on whether an application for settlements and commitments requires an admission of guilt. Prima facie, admission of guilt should not be mandated. The Committee, accordingly, recommends that there should be an enabling provision to allow the applicant to apply to the CCI to revisit the settlement/commitment after the order of the final settlement by the CCI as one last opportunity. From the consumer's perspective provision may be made by way of regulation under this clause (apart from the enabling section in the parent Act) to provide compensation to the affected consumers in an appropriate manner.

Hub and Spoke Cartels

Hub and Spoke arrangements are horizontal restrictions on the supplier or retailer level (the “spokes”), which are implemented through vertically related players that serve as a common “hub” (e.g., a common manufacturer, retailer or service provider).

The Bill has expanded the scope of cartels to include Hub and Spoke arrangements implemented by entities involved at different levels of the value chain. The Committee, however, note that there is no clarity on the meaning of active participation in the agreement, which could potentially cover the following:

- .Entities merely providing intermediation services in digital markets, for instance online platforms and
- Consortiums, industry association and trade unions that merely organise meetings without an agenda to share sensitive information.

Therefore, the Report suggests a clause to clarify that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall be presumed to be part of the agreement under this sub-section if it is proved that such person intended to actively participate in the furtherance of such agreement.

The report has taken up many CLRC Report (2019) suggestions that were missed by the Bill. Therefore, the Report has extensively covered many concerns of the stakeholders.

Read more at:

- https://www.mondaq.com/india/cartels-monopolies/1264798/standing-committee-report-recommends-sweeping-changes-to-the-indian-competition-amendment-bill-2022
- https://www.livemint.com/opinion/columns/were-a-step-closer-to-an-overhaul-of-our-competition-law-11671124360630.html
- https://prsindia.org/files/bills_acts/bills_parliament/2022/SC%20Report_Competition%20(A)%20Bill,%202022.pdf

SEBI tweaks norms to strengthen structure & governance of exchanges

– Puhumi Verma

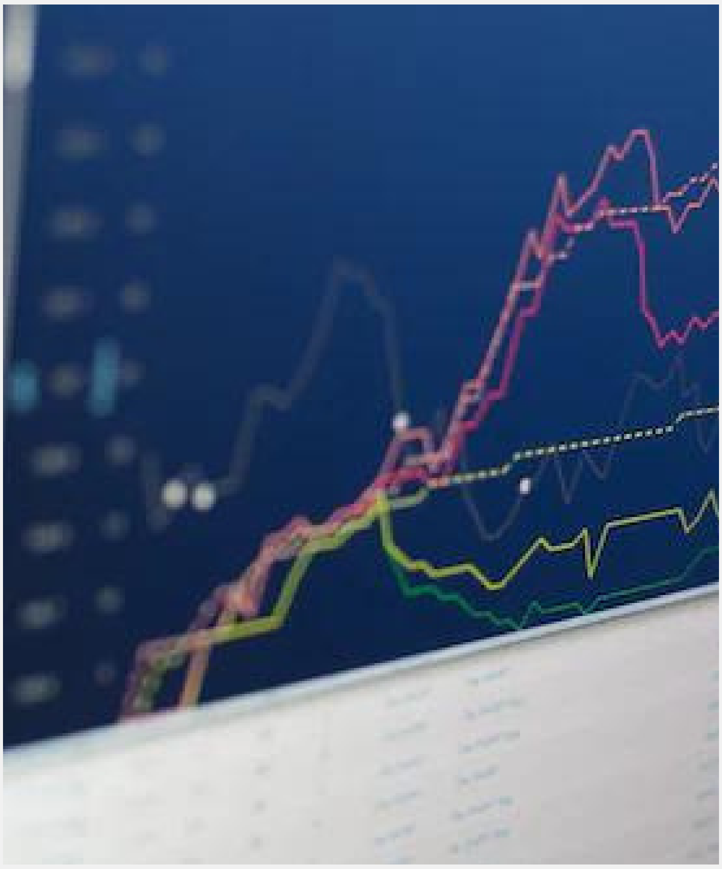
To strengthen the governance mechanism of stock exchanges, clearing corporations, and depositories, the Securities and Exchange Board of India (SEBI) made major amendments to the structure, governance and accountability processes of these institutions. According to SEBI, these regulatory changes are expected to bring greater transparency and accountability in the functioning of these institutions. The amendments will come into effect 180 days from the date of notification in the Official Gazette, SEBI said.

Key takeaways:

1. The functions of Market Infrastructure Institutions (MIIs) have been categorised into three critical operations - regulatory, compliance & risk management and other functions, including business development. Furthermore, as part of the board governance regulations, MIIs will mandatorily appoint public interest directors with expertise in the areas of technology, law and regulatory, finance and accounts and capital markets. Moreover, the appointment and removal of key managerial personnel will be done by the nomination and remuneration committee.
2. SEBI has introduced a framework to facilitate execution-only platforms for direct plans of mutual fund schemes.
3. Introduction of a platform for risk reduction access to investors in case of a disruption in trading services at the broker's end.
4. SEBI introduced governance norms for REITs and InvITs that are similar to the corporate governance norms for listed companies.
5. SEBI permitted Alternate Investment Funds to participate in Credit Default Swaps (CDS), not only as protection buyers but also as protection sellers, subject to conditions for risk mitigation.
6. SEBI has also strengthened the framework for stock brokers designated as qualified stock brokers who would need to comply with enhanced risk management practices to safeguard investors from any widespread negative impact.

Read more at:

- https://economictimes.indiatimes.com/markets/stocks/news/sebi-tweaks-norms-to-strengthen-structure-governance-of-exchanges-clearing-corp/articleshow/96377086.cms?from=mdr



An Analysis of the Consultation Paper on Review of Disclosure Requirements for Material Events or Information under SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

- Divyank Dewan

The Securities and Exchange Board of India (SEBI) intends to strengthen disclosure rules in order to promote greater information symmetry among listed companies. Companies must disclose any event that will have an influence on the firm, such as an acquisition, merger, demerger, reorganisation, or sale of any unit, under existing requirements. SEBI, in a consultation paper released on November 12, recommended higher limits for material disclosures and even set quantitative criteria for determination of materiality of an event. The criteria is based on a combination of turnover, net worth and profit/ loss after tax and is proposed to be such event/ information whose threshold value or the expected impact in terms of value, exceeds two percent of the turnover or net worth and five year average of the net profit.

The notable proposed regulations from the consultation paper are as follows:-

1. *Reduction in timelines for disclosure of material events or information*: It is proposed to reduce the timelines for disclosure of certain material events or information to twelve hours instead of the existing twenty-four hours in order to avoid rumours and speculation by the media. In case of those events or information which emanate from a decision taken in a meeting of board of directors, the disclosure shall be made within 30 minutes from the closure of such meeting.
2. *Mandatory verification of market rumours:* Regulation 30(11) of the Listing Regulations provides a general provision for verification of market rumours by the listed entity. However, to ensure that the listed entities do give heed of such information being disseminated in the market through media or other public sources, it is proposed to mandate verification of such information by the top 250 listed entities presently.
3. *Unavailability of the MD/ CEO for fulfilment of roles in the listed entity:* This essentially means that in instances where the MD/ CEO is not available to look after the affairs of the listed entity as a result of prolonged illness, serious ailments, etc., it must be disclosed to the investors as the role of an MD/CEO is essential in an organisation.
4. *Any announcements made to any form of mass communication media in relation to the listed entity:* This insertion proposes the disclosure of all information in relation to the listed entity which is put out to the public through any form of mass communication by the directors, KMPs, senior management, promoters etc. of the listed entity.
5. *Disclosure of cyber security incidents or breaches and loss of data / documents:* With the increasing significance of data and cyber security, cyber security incidents or breaches and loss of data / documents have become a major concern. However, in view of the vulnerability of the said information, it may not be feasible to make prompt disclosure of the same. Therefore, the quarterly corporate governance report in terms of Regulation 27 of the Listing Regulations is proposed to be amended to provide adequate disclosures with respect to the same.

Read more at:

- https://www.sebi.gov.in/reports-and-statistics/reports/nov-2022/review-of-disclosure-requirements-for-material-events-or-information-under-sebi-listing-obligations-and-disclosure-requirements-regulations-2015_64962.html
- https://corporate.cyrilamarchandblogs.com/2022/11/sebis-recent-proposal-on-tweaking-the-lodr-disclosure-regime-more-spill-and-tell/
- https://www.mondaq.com/india/securities/1262470/sebi-proposes-to-overhaul-the-continuing-disclosure-framework

Fourth Iteration of India's Draft Data Protection Law, The Digital Personal Data Protection Bill, 2022

- Vikram Jain

The Digital Personal Data Protection Bill, 2022, the fourth version of India's data protection law, was announced by the Ministry of Electronics and Information Technology on November 18, 2022. ("Bill"). The proposed Data Protection Bill, 2021 was approved by the expert committee and had 90+ sections, while the new bill only contains 30 sections as a result of streamlining. Although the Bill's pro-business stance has been praised, the industry has voiced concerns regarding its excessive simplification.

The Bill also disregards the individual's fundamental right to privacy, in contrast to the earlier iterations of the Bill (as established in the case of K.S. Puttaswamy v. Union of India). This is ironic, given that a campaign was launched to protect people's right to privacy, which led to the creation of the Bill. Additionally, the Bill limits the law's application from data protection to the protection of digital personal data (thereby, excluding non-personal data and offline data processing from its purview). The central government may also decide on a variety of Bill provisions "as may be mandated" or in accordance with an equivalent clause. This might give the central government the unrestrained and arbitrary ability to draft regulations for the Bill.

A summary of the Bill's key elements is provided as follows:
The Bill addresses the processing of digital personal data on Indian soil, whether (a) it is obtained online from Data Principals, or (b) it is obtained offline and then converted to digital form. If any profiling or offering of products or services to Data Principals inside the territory of India occurs in connection with the processing of digital personal data outside the territory of India, the Bill also applies to that processing. However, it does not apply when a company in India processes data of foreign citizens there (where such processing is done pursuant to a contract between such Indian entity and the person resident outside India). Additionally, the Bill does not apply to non-automated processing of personal data or processing of personal data for domestic or individual use.

Additionally, the Bill relates to the processing of "personal data," which is any information about a person who can be identified from or in connection with such information.

Tiered rules for particular types of personal information, such as sensitive information, vital information, etc., have been eliminated.

Moreover, the Data Fiduciary is expected to notify the Data Principal of the personal information it intends to obtain from the Data Principal and the reason for which it will be processed. If Data Principals have granted their agreement to the collecting of personal data before the start of the Bill, the Bill also mandates that notice be sent by the Data Fiduciary as soon as reasonably practical. The notification has to be given in a manner "as may be prescribed." Additionally, the Data Principal must have access to the notice in English or any of the 22 languages listed in the Eighth Schedule of the Indian Constitution.

The Bill is simple to read, and the federal government may have succeeded in creating a straightforward data protection law, but it is far from complete; it hits some points while missing others. Although there is no requirement for data localization presently, the central government will choose which nations are prohibited from receiving personal data. Although notice and consent are required, making them available in English in addition to the other scheduled languages greatly increases the burden of compliance. Smaller organisations would be burdened by this, even though it might be acceptable to large organisations.

Read more at:

- https://induslaw.com/publications/pdf/alerts-2022/Infolex_Draft_digital_personal_data_protection_bill_2022.pdf
- https://www.lexology.com/library/detail.aspx?g=b9c85265-3c25-4c19-9b74-61d60dda14d8&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2022-12-21&utm_term=
- https://www.thehindu.com/podcast/fourth-draft-decoding-the-digital-personal-data-protection-bill-2022-part-1-in-focus-podcast/article66182928.ece

Government unveils framework to nullify fake reviews on e-commerce sites

- Vikram Jain

In order to prevent fake reviews on e-commerce platforms and to preserve and protect the interests of the customers, the Department of Consumer Affairs and the Department and Bureau of Indian Standards (BIS) recently announced a framework known as the Indian Standard (IS) 19000:2022 titled 'Online Consumer Reviews — Principles and Requirements for their Collection, Moderation and Publication'.

The regulations, which took effect on November 25, 2022, apply to all online platforms that publish or disseminate user reviews. The establishment of the standard on false and misleading reviews was the subject of discussion and deliberation among the various industry participants and stakeholders, including e-commerce companies, industry associations, consumer organisations, and law chairs.

The following are the framework's main characteristics:

- Outlining the specific obligations that a review author must fulfil, such as confirming that they have read and agreed to the terms and conditions, and providing their contact information.
- Outlining specific obligations for a review administrator, such as protecting personal data and informing the team.
- Establishing a code of conduct and the necessary requirements for terms and conditions, such as criteria for accessibility and confirming that the content is free of financial information, etc.
- Offering methods for review author authentication via email address, identification via phone call or SMS, confirmation of registration by clicking a link, availability of captcha system, etc. to identify and check the review author's credibility.
- Providing checks for reviewing the review content as well as automated and manual moderation.
- The publication process defines the accuracy of the review, default display, and weighting of the ratings.

It is important to remember that although adoption of the standard is currently voluntary, if fake reviews keep appearing, they may eventually become obligatory.

Once required, a company's violation of standards may be regarded as an unfair business practise, and customers may file complaints about this with the National Consumer Helpline, consumer commissions, or the Central Consumer Protection Authority.

Without a doubt, the e-commerce sector has experienced steady growth over the past few years. Online reviews are crucial in influencing the consumers' purchasing choices. Therefore, it is crucial that these reviews are unbiased, trustworthy, and truthful.

Therefore, this move on the part of the Union government is a wise step towards promoting accurate information and increasing transparency for brands and consumers. This action would go a long way towards shielding customers from fake and misleading reviews and assisting them in making informed decisions.

Read more at:

- https://www.mondaq.com/india/dodd-frank-consumer-protection-act/1263914/framework-launched-by-the-government-of-india-to-restrict-fake-reviews-on-e-commerce-sites#:~:text=Recently%2C%20the%20Department%20of%20Consumer,reviews%20on%20e%2Dcommerce%20platforms
- https://pib.gov.in/PressReleasePage.aspx?PRID=1877733
- https://indianexpress.com/article/india/govt-unveils-framework-to-curb-fake-reviews-on-e-commerce-sites-8281807/