The Corporate Brief

October 2023

Centre for
Business &
Commercial Laws
NATIONAL LAW INSTITUTE UNIVERSITY, BHOPAL

The Corporate Word

Mudra Loans	Pradhan Mantri Mudra Yojna(PMMY) was launched by the government in 2015 for providing loans upto Rs. 10 Lakh to the non-corporate,non-farm small/micro enterprises.It provides funding through various channles like NBFC,MFI(Micro Finance Institutions) and does not directly lend to enteerprises and indivduals.
Secular Stagnation	A prolonged period of low economic growth, low inflation, and low interest rates, often characterized by a lack of investment and demand
EBITDA	It stands for Earnings before Interests, Taxes, Depreciation and Amortization.A financial metric used to asses a comapny 'soperating performance by excluding certain non-operating expenses and is often used to analyze profitibility before accounting for financial and tax factors.
Greenfield Investments	A green-field investment is a type of foreign direct investment (FDI) in which a parent company creates a subsidiary in a different country, building its operations from the ground up. In addition to the construction of new production facilities, these projects can also include the building of new distribution hubs, offices, and living quarters.
Quantative Tightening	The process of reducing the money supply or decreasing the size of a central bank's balance sheet by selling financial assets, typically used to combat inflation.
Demurrage	Is the cost associated with owning or holding currency over a given period. It is sometimes referred to as a carrying cost of money.
Veblen Good	A type of luxury good for which demand increases as its price rises, often driven by conspicuous consumption and the desire for status symbols
Tragedy of the Commons	A situation in which individuals, acting in their self-interest, deplete shared resources, leading to the detriment of the common good.
Phillips Curve	A concept that shows an inverse relationship between inflation and unemployment rates. It suggests that policymakers face a trade-off between these two variables.

Recommendations of 52nd GST Council – A Step In The Right Direction?

- Ishita Warghat

Brief Background

On 7th October, 2023 the 52nd GST Council convened another meeting under the chairmanship of Smt. Nirmala Sitharaman, Minister of Finance and Minister of Corporate Affairs; in New Delhi. The meeting also saw in attendance Mr. Pankaj Chaudhary, Minister of State, Finance; Chief Ministers of Goa and Meghalaya in addition to other senior officials from the ministry. Most of the changes recommended ought to bring relief to the taxpayers. The convening of such periodic Council sessions is important as they serve a higher function, which is to provide the states with a forum for voicing their opinions. Maintaining the smooth operation of cooperative federalism also requires regular meetings. The council made the following recommendations inter alia others: -

Corporate Guarantees

The problem of director-extended corporate guarantees, which has been the focus of multiple departmental notices, was clarified; the corporates will welcome the suggestion that there not be a charge in the event that there is no consideration. Nonetheless, the council has suggested that the value in cases where a corporate guarantee is given between related parties be equal to 1% of the guarantee granted or the real consideration, whichever is larger. It has also been suggested that the rules be changed to reflect this.

Exporters should benefit from the proposals that have been made. The first is to allow export remittances to be regarded as exports of services when they are received in a specific INR Vostro account as payment for the provision of services. And the second is allowing suppliers to enter special economic zones provided they pay integrated tax and request a return of the taxes they have already paid. This will facilitate the use of credit.

Tribunals

The recommendation for the selection of the GST Appellate Tribunals' president and members is another step in the right direction. Notably, the Council has also suggested that an advocate with ten years of litigation experience be qualified to serve as a judicial member. This should hopefully allay concerns within the legal community. It has been determined that the President and Members will serve terms of up to 70 and 67 years old, respectively. The GST Tribunal's establishment has been much delayed; perhaps, these suggestions will quicken the procedure.

Services

Recommendations as to rates for various services, including waste management, public health, water supply, and sanitation services provided to government authorities were made. Job work services related to the processing of barley, another ingredient used to make alcohol for human consumption, will be subject to a rate of five percent instead of eighteen percent.

The council has suggested that bus transport services provided by electronic commerce operators be allowed to use the Input Tax Credit (ITC) to pay their GST, as opposed to the former rule that prohibited them from doing so because of Section 9(5) of the CGST Act.

Amnesty Scheme

The Council has recommended creating an amnesty scheme through a special procedure under section 148 of the CGST Act, 2017 for taxable persons whose appeal against the said order was rejected solely on the grounds that it was not filed within the time period specified in sub-section (1) of section 107, or who were unable to file an appeal under section 107 of the said Act against the demand order under sections 73 or 74 of the CGST Act, 2017 passed on or before the 31st day of March, 2023. In all of these situations, taxpayers may file an appeal against these orders until January 31, 2024, provided they pay a pre-deposit of 12.5% of the tax in question, at least 20% of which—or 2.5% of the tax in question—must be deducted from the Electronic Cash Ledger. Many taxpayers who previously were unable to file an appeal within the allotted time frame will benefit from this.

Conclusion

In conclusion, the meeting has yielded several significant recommendations that aim to provide relief to taxpayers and streamline the taxation system. These recommendations address various issues, including corporate guarantees, export remittances, GST Appellate Tribunals, service rates, and an amnesty scheme. The emphasis on transparency, fairness, and simplification of tax procedures demonstrates the Council's commitment to fostering cooperative federalism and enhancing the ease of doing business in India. These measures are expected to benefit both taxpayers and the overall economic environment, reflecting a step in the right direction for the Indian taxation system.

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·https://www.taxmann.com/research/gst-new/top-story/222330000000022580/detailed-analysis-of-recommendations-of-52nd-gst-council-meeting-news

·https://www.grantthornton.in/globalassets/1.-member-firms/india/assets/pdfs/alerts/gt_tax_alert_52nd_gst_council_meeting_key_recommendations_and_decisions.pdf

https://cleartax.in/s/52nd-gst-council-meet-news

NCLT Allahabad Allows the SBI to withdraw CIRP Petition against Bajaj Hindusthan Sugars

-Ashita Mathur

Introduction

Bajaj Hindusthan Sugar Ltd. (hereinafter referred to as "BHSL") has a storied history of financial difficulties, a saga that dates back to 2014, a period preceding the establishment of the National Company Law Tribunal (NCLT). Recent reports shed light on BHSL's substantial outstanding dues to sugarcane farmers, resulting in widespread protests staged in front of sugar mills across the Indian subcontinent. Most notably, the state of Uttar Pradesh has become the epicentre of these demonstrations, characterised by sit-in protests conducted in front of all 14 Bajaj Sugar Mills within the state. The crux of the matter revolves around the farmers' claims of not receiving full payments for their crops since the year 2020.

According to the aggrieved farmers, BHSL's mills were notorious for delaying payments by an alarming 12-14 months, in stark contrast to the stipulated 14-day payment cycle mandated by the Sugarcane Control Act. This protracted delay in compensation has fuelled mounting discontent among the farming community.

SBI Leads a Lender's Consortium to the NCLT

However, BHSL's woes extend beyond their indebtedness to sugarcane farmers. Multiple banks, spearheaded by the State Bank of India (SBI), had asserted claims of debts totalling over Rs. 4600 crore in the beginning of 2023. BHSL, in response, asserted that they had swiftly addressed and resolved these financial obligations shortly after SBI's initiation of legal proceedings through the NCLT. Furthermore, BHSL's financial stability is under scrutiny, given that their last recorded annual profit was reported in 2012. The company has reportedly faced consistent losses over the past decade, raising concerns about its long-term viability in the industry.

On the 25th of October, the Allahabad Bench of the NCLT gave an order allowing the withdrawal of the application submitted by the consortium of lenders, which had been filed under Section 7 of the Insolvency and Bankruptcy Code (IBC), as the consortium had itself acknowledged the debt had been repaid.

However, it is imperative to note that before this order was issued, the Agragami Kissan Samiti U.P., a farmers' organisation primarily composed of sugarcane cultivators, had applied to be impleaded in the ongoing legal proceedings.

The Way Ahead

In the present scenario, it is conceivable that the NCLT might entertain an application for Corporate Insolvency Resolution Process (CIRP) solely based on the claims put forth by the farmers. The intricacies of this legal battle signify the evolving dynamics in India's corporate and agricultural sectors, and the outcome of this matter could set a notable precedent for how similar disputes are adjudicated in the future.Top of Form

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·https://the-ken.com/story/a-265m-companys-guide-to-defaulting-on-loans-and-evading-insolvency/
https://www.businesstoday.in/latest/corporate/story/nclt-dismisses-petition-against-bajaj-hindustan-sugar-after-sbi-files-withdrawal-plea-403348-2023-10-26
·https://indianexpress.com/article/business/companies/nclt-dismisses-sbis-petition-against-bajaj-hindusthan-sugar-9001235/

Post-Brexit Britain scraps cap on banker bonuses inherited from EU

-Rashi Upadhyay

Introduction

In a much-discussed move, the United Kingdom has removed the banker's bonus cap, one of the major restrictions derived from the European Union. The decision is of particular significance as a large number of bankers which were affected by this cap were based in London. This move comes as a part of a series of changes undertaken by the UK to deviate from the EU laws in the post-Brexit UK. Bankers Bonus are a form of reward paid to employees working in the financial sector who have helped in substantially increasing the earnings of the bank. Critics of the cap have pointed out repeatedly how the restriction does not achieve its desired result but merely changes the method in which bankers get paid.

What is the cap?

The cap was introduced in 2014 as a result of the 2008 financial crises post which several regulations were undertaken as a part of what is known as the Capital Requirements Directive. These rules aimed to secure the financial sector to avoid crises like these in the future (200% with shareholders' approval). Resultantly, an upper limit of twice the annual salaries was imposed on the banker's bonus. The reason for the cap could be traced to the culture of bonus which promoted and appreciated short-term profits, in turn, leading to frequent crashes and instability in the financial market.
However, even at the time the cap was introduced, it faced strong opposition from the UK including even an attempt of overturning the same.

Rationale for the decision taken by the UK

The cap was criticised as it led to may unintended consequences. First, since the bonus was now fixed, the bankers had gotten an increase in the base salary itself.

For example, if the total earnings of a banker before the cap was €5 mn (distributed as €3 mn salary and €2 mn bonus), the banker post the cap would demand an increase in the salary itself to €4 mn totalling the earnings to be the same, if not more. Hence, the reason for which the cap was introduced was never achieved. Therefore, the Bank of England has been pushing for providing flexibility to the UK banks to inculcate better risk management.

It has also been argued that the removal of the cap would attract more individuals towards this field, thereby promoting healthy competition. The move is predicted to attract more talent and investment in the banking sector of the UK. Besides, some restrictions such as the requirement of 40% of bonuses be deferred over at least four years, with half of the bonus being paid in shares are still intact.

However, practically, it has also been pointed out that this decision comes too late as the bonuses for this year have already been paid out and it will take some time for the banks to incorporate these changes into their system.
Arguments against the move by the UK

The very reason that the cap was introduced was that the earning share of the bankers turned out to be more than the earnings of the firm itself. Principally, the move has attracted criticism from the labour leaders alleging that such leniency would lead to more resources being directed in an already lucrative banking sector.

Labour leader Sir Keir Starmer in response to the criticism remarked that “pay rises for bankers, pay cuts for district nurses”. Notably, UK has been facing its longest-ever recession with large and persistent inequalities in the system complemented with poor growth. Hence, introduction of such measures is bound to raise concerns over the deepening of such inequalities.

Read more :

https://www.standard.co.uk/news/uk/what-cap-bankers-bonuses-amount-scrapped-b1115679.html

https://www.washingtonpost.com/business/2023/10/24/uk-boe-scraps-banker-bonus-caps-but-british-finance-workers-shouldn-t-cheer/13c2bed4-7293-11ee-936d-7a16ee667359_story.html

https://www.reuters.com/world/uk/uk-regulators-confirm-plan-scrap-cap-bankers-bonuses-2023-10-24/

Oracle and SAAS Firm Amdocs Collaboration: A Means to drive consumers growth?

-Yohan Tittus Matthew

Introduction

What is SaaS?

Software as a service (SaaS) is a cloud-based software delivery model where the cloud provider creates and manages cloud application software, offers automated software upgrades, and lets users download software on a pay-per-use basis over the internet. All of the traditional software and hardware, including as middleware, application software, and security, are managed by the public cloud provider. In comparison to managing on-premises systems and software, SaaS clients may build, grow, and update business solutions more rapidly, anticipate total cost of ownership more accurately, and do all of this at significantly lower prices.

What is its relevance?

Software as a Service (SaaS) holds immense importance for businesses due to its transformative benefits. SaaS eliminates the need for costly in-house infrastructure and software management, as SaaS providers handle hardware, software, and maintenance in their data centres or the cloud. This accessibility from anywhere with an internet connection facilitates remote and hybrid work models. Moreover, the subscription-based model reduces upfront and ongoing costs, allowing businesses to plan their software expenses efficiently. SaaS offers rapid deployment, on-demand scalability, and high reliability with robust cybersecurity measures. Automatic updates and seamless integration with other systems enhance flexibility and customization, while real-time data and analytics empower businesses with valuable insights for informed decision-making.

Amdocs, a leading provider of software and services for communications, media, financial service providers, are expanding their worldwide partnership with Oracle to help clients on their road to cloud and digital adoption with Oracle Cloud Infrastructure (OCI).

Key Takeaways of the partnership

·**Cloud Integration**: Oracle's secure and scalable cloud infrastructure will be combined with Amdocs' customer experience solutions, allowing organizations to leverage cloud-native technologies for improved customer engagement and operational efficiency.

·**Customer Insights**: By merging Oracle's data analytics and AI with Amdocs' platforms, businesses can gain important customer insights, allowing them to make data-driven choices and provide tailored services.

·Streamlined Operations: The collaboration intends to improve efficiency, save costs, and accelerate product launches by streamlining billing, revenue management, order processing, and service fulfilment.

·**Tailored Industry Solutions**: Amdocs' industry knowledge, notably in telecommunications and media, will be supplemented by Oracle's cloud technology, allowing the cooperation to create sector-specific solutions.

·**Scalability and Flexibility**: The scalability of Oracle Cloud enables businesses to adapt quickly to changing market conditions and evolving customer demands in today's fast-paced business environment.

A Driving force for Digital Transformation:

In today's rapidly evolving digital landscape, businesses must adapt swiftly to maintain their competitiveness. The Oracle-Amdocs collaboration serves as a catalyst for expediting digital transformation initiatives in enterprises. By offering a diverse range of cloud-based solutions, such as data analytics, artificial intelligence, and automation tools, businesses can modernize their operations, boost efficiency, and remain at the forefront of technological advancements. This collaboration significantly contributes to businesses fully embracing digital transformation.

Accelerating Growth and Innovation

The Oracle-Amdocs collaboration comes at an opportune time, as organizations seek comprehensive cloud-based solutions to drive growth and innovation. Its emphasis on customer experience management is critical, as it recognizes that providing exceptional customer experiences is critical for customer retention and attraction. Businesses can improve customer retention through deeper insights, accelerate innovation by rapidly deploying new digital services, achieve operational excellence through streamlining operations, and secure a competitive advantage through superior customer experiences and agility in a dynamic business environment by leveraging Oracle's cloud infrastructure and Amdocs' expertise.

Future Prospects and Industry Impact:

The Oracle-Amdocs cooperation has much brighter future possibilities and industry effect. Aside from the benefits to individual firms, this collaboration has the potential to change the future of technology. It is positioned to create new benchmarks not only in SaaS and cloud computing, but also in the larger digital scene, by encouraging innovation and technical growth. As firms throughout the world see the benefits of this collaboration, it is expected to encourage similar collaborations, establishing a culture of cooperation and information exchange within the technology sector.

Furthermore, as the sector grapples with the ramifications of such powerful relationships, this collaboration has the potential to impact regulatory and policy considerations. It may also result in new educational and research opportunities.

Conclusion

The Oracle-Amdocs collaboration signifies a pivotal moment in the realm of enterprise solutions. By combining their expertise, Oracle and Amdocs are not just providing services; they are propelling a revolution in how businesses operate, innovate, and serve their customers.

As businesses adopt these advanced technologies, they are not merely incorporating solutions; they are embracing a future where growth, efficiency, and customer satisfaction are seamlessly integrated into their operational DNA.

Read more :

https://www.ibm.com/topics/saas

https://www.oracle.com/in/applications/what-is-saas/

https://www.amdocs.com/news-press/amdocs-and-oracle-accelerate-service-providers-journey-cloud

https://www.businesstoday.in/industry/it/story/oracle-and-saas-firm-amdocs-collaborate-to-help-customers-drive-growth-398900-2023-09-19

https://www.oracle.com/ae/news/announcement/ocw-amdocs-and-oracle-accelerate-service-providers-journey-to-the-cloud-2023-09-18/

https://www.entrepenuerstories.com/latest/oracle-and-amdocs-forge-strategic-collaboration-to-accelerate-customer-growth/

https://www.entrepenuerstories.com/latest/oracle-and-amdocs-join-forces-a-collaboration-powerhouse-driving-business-growth/

Pilot Recruitment Dispute in the Indian Aviation Sector: Akasa Air vs. Air India Express

-Divyanshi Shukla

Introduction

The aviation industry in India has been marked by a contentious dispute between two prominent airlines, Akasa Air and Air India Express, concerning the hiring of pilots. The conflict emerged when a significant number of pilots at Akasa Air resigned from their positions without adhering to the mandatory notice period, as specified in their employment contracts and DGCA (Directorate General of Civil Aviation) regulations.

Background of the Case

The discord commenced when 19 pilots at Akasa Air resigned by the end of July, a number that subsequently increased to a total of 43 pilots who left without complying with the stipulated notice period. As per the Civil Aviation Requirements (CAR) 2017, captains are obliged to serve a 12-month notice period, while first officers must serve a six-month notice. Recognizing the gravity of the situation, Akasa Air sought the intervention of the aviation regulator and the Ministry of Civil Aviation in August. However, these regulatory bodies declined to intervene, citing that the rule was under dispute by multiple pilot unions and was currently awaiting resolution in the Supreme Court. The airline also expressed its concerns to the Bureau of Civil Aviation, highlighting that the pilots who had resigned without adhering to the notice period still retained their Aerodrome Entry Permits (AEPs) and showed no intention of returning them. Akasa Air urged the authority to include these non-compliant pilots on its "Stop-list", contending that their continued possession of licenses violated regulations.

On the other hand, Air India Express was accused by Akasa Air of recruiting pilots before they had completed the stipulated notice period, thereby contravening aviation regulator norms and affecting Akasa Air's operations. Air India Express refuted these allegations, asserting that the recruited pilots had fulfilled their obligations by paying bond amounts of up to Rs 50 lakh, which covered their training expenses

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Given that both airlines operated Boeing 737 Max aircraft and shared similar training and procedures, it was argued that hiring from one another was a practical choice. Akasa Air and Air India Express eventually resorted to legal action after mediation attempts proved unsuccessful.

Current Status

In response to the standoff, Akasa Air filed a writ petition against the DGCA in the Delhi High Court after the regulator declined to intervene. The court's decision affirmed that the aviation authority possessed the authority to take necessary action against non-compliant pilots under CAR rules. The ruling stated that there were no restrictions on the DGCA's ability to act in this matter. The ongoing dispute has had severe repercussions for Akasa Air, including financial losses and damage to its reputation. The airline was forced to abruptly cancel and reschedule numerous flights due to the departure of pilots, resulting in significant operational disruptions. This led to a decrease in Akasa Air's market share, dropping from 5.2% to 4.2% in August. To address the pilot shortage, the airline implemented a strategy of increasing pilot salaries, raising them by an average of 60%. Captains now begin at Rs 4.5 lakh per month, while first officers start at Rs 1.8 lakh.

Conclusion

The pilot recruitment dispute between Akasa Air and Air India Express sheds light on the complexities and legal intricacies surrounding pilot mobility and notice periods in the Indian aviation sector. While the dispute has had tangible consequences for Akasa Air, including operational disruptions and financial losses, it also underscores the challenges and competition within the industry. This situation highlights the need for clear and enforceable regulations regarding pilot recruitment and notice periods to ensure fair practices and prevent such conflicts. The ongoing legal proceedings and regulatory actions in response to this dispute will serve as a critical precedent for resolving similar disputes in the future, emphasizing the importance of adhering to contractual agreements and aviation regulator norms. Ultimately, the outcome of this case will shape the dynamics of pilot recruitment and employment practices within the Indian aviation industry.

Read More :

https://www.reuters.com/business/aerospace-defense/indian-carrier-akasa-flying-less-after-some-pilots-quit-abruptly-memo-2023-09-20/

https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/chief-executives-of-air-india-akasa-joust-over-poaching-of-pilots/articleshow/104848575.cms

https://www.businesstoday.in/industry/aviation/story/air-india-akasa-air-ceos-clash-verbally-over-poaching-of-pilots-report-404026-2023-10-31

https://timesofindia.indiatimes.com/business/india-business/rare-verbal-spat-air-india-akasa-air-ceos-exchange-barbs-over-poaching-of-pilots-report/articleshow/104850493.cms

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Equal Rights for Homebuyers: A Closer Look at Vishal Chelani & Ors v. Debasis Nanda

-Rishika Jain

The recent case of Vishal Chelani & Ors v. Debasis Nanda (2023) ibclaw.in 117 SC presented the complex interface of the Insolvency and Bankruptcy Code, 2016 with the Real Estate (Regulation and Development) Act, 2016 and forced the Supreme Court to shed light on whether refunded homebuyers should be identified as financial creditors under the IBC.

Background of the Case

The case starts with the appellant homebuyers investing in a real estate project developed by Bulland Build tech Pvt. Ltd. Upon constant delay and incompletion of the project in time, the home buyers were forced to approach the Uttar Pradesh Real Estate Regulatory Authority for relief and were granted a decree for a refund.

However, a simultaneous proceeding was initiated against the developer under the IBC, which presented a relief in the form of a resolution plan. In a move to differentiate between those homebuyers who sought remedies under RERA and those who did not, it was seen that those who did not seek RERA remedies enjoyed 50% better conditions.

The dissatisfied appellants then contented before the National Company Law Tribunal, who rejected their application. Upon appeal to the National Company Law Appellate Tribunal, they got the same result, since the tribunal found no valid ground for interference in the resolution plan.The parties then, thus, approached the Supreme Court for relief. The issue for consideration was whether homebuyers, who have sought remedies under the RERA, could be classified as financial creditors, and whether there should be differential treatment between them and those who did not seek remedy under RERA.

Legal Framework

The IBC recognizes three primary categories of creditors, namely: Financial Creditors, Operational Creditors, and other creditors.

Section 5(7) defines a financial creditor as any person to whom a financial debt is owed. Section 5(8)(f) clarifies that financial debt includes amounts paid by allottees under real estate projects and should be deemed to have the commercial effect of borrowings. The terms 'allottee' and 'real estate project' have been defined in the RERA.

Prior to the amendment of IBC, homebuyers were not recognized as financial creditors in most instances. However, due to the plight of countless homebuyers across the nation due to their limited legal recourse, there was an impetus to amend the IBC.

Judgement of the Court

Despite the contention of the resolution professional, who had said that appellants who received RERA funds should not be granted additional benefits by being classified as financial creditor, the Supreme Court ruled in favour of the appellants.

It relied on Section 5(8)(f) of the IBC, that extends the financial creditor status to home buyers and allottees without differentiation.

It rejected the premise that home buyers who have been granted funds under RERA should be distinguished under the IBC. Seeking different remedies under the RERA would not alter the appellant's status of homebuyer.

The Supreme Court also claimed that treating a segment differently only because they had chosen to reclaim their deposit along with interest and others had not would not be fair. Such a differentiation would also be against the principles of Article 14 of the Constitution by being arbitrary and unjust.

It also relied on Section 238 of the IBC which reinforces the primacy of IBC provisions over other laws and emphasized on its overriding effect.

The impugned order was therefore overturned and the appellants were declared financial creditors under Section 5(8)(f) of the IBC and granted equal treatment as other homebuyers with the resolution plan.

Conclusion

It is crucial to safeguard the rights of primary stakeholders, such as homebuyers, to ensure their protection and also to prevent the misuse of insolvency laws.

Non differential treatment of homebuyers seeking remedy under RERA and being recognized as a financial creditor would lead to equitable treatment in the liquidation process, thereby ensuring equitable asset distribution.

This judgement sets a precedent for future cases involving the intersection of real estate regulations and insolvency laws in India, and ensures uniform treatment of homebuyers under the latter.

Read more :

https://www.majmudarindia.com/are-home-buyers-financial-creditors-under-the-ibc/

https://www.livelaw.in/top-stories/supreme-court-rera-decree-investment-refund-homebuyers-financial-creditor-235192?infinitescroll=1

https://www.linkedin.com/pulse/role-homebuyers-ibc-law-comprehensive-analysis-supreme-jadhav/

Critical Analysis of Competition Commission of India (Lesser Penalty) Regulations, 2023 (LPR 2023)

- Utkarsh Maheshwari

Brief Background

The proposed Competition Commission of India (Lesser Penalty) Regulations, 2023 (hereinafter referred as LPR 2023) has been released by the Competition Commission of India (hereinafter referred to as CCI for perusal and feedback from interested parties before November 6, 2023. Upon official recognition, the existing Competition Commission of India's Lesser Penalty Regulations (LPR) from year 2009 will be supplanted by this new version. The regulation will inter alia, provide an overhauled streamlined application and withdrawal process along with a detailed procedure for providing leniency in penalties to corporations or individuals. The applicants must be willing to reveal their participation in a cartel operation and assist in subsequent investigations carried out by CCI to benefit from the scheme. The upcoming LPR 2023 model would pave the way towards effective implementation of lesser penalty plus or leniency plus facility penalty reduction scheme as envisaged under the recently passed Competition (Amendment) Act, 2023.on plans.
This article comprehensively describes the changes in the LPR 2023 as compared to LPR 2009 with its effects and implications.

What is a cartel?

According to The Competition Act, 2002, a "Cartel includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services".
The three common components of a cartel are: An agreement, between competitors, to restrict competition.

Conditions and procedure for grant of leniency plus

Within the scope of the Leniency Plus scheme, applicants who are either business entities or individuals presently part of a cartel or previously associated with one or more cartels can participate.

If an organization is already under scrutiny, it can give 'comprehensive and truthful crucial details' about another yet unexposed cartel to CCI. For their involvement in the original cartel, every participant in this leniency process stands to bag up to 30% off their penalties. For informing regarding additional cartels however; those providing vital information may receive complete cancellation (100%) on any financial penalty if they're first-off- in the-mark disclosing essentials. Other participants like second and third could also lower their fines by approximately half at 50%, followed by as much as 30%.

Information to be provided: The applicant must provide the following information : (i) vital disclosure i.e., full and true disclosure of information or evidence which is sufficient for the CCI to establish a prima facie opinion on the existence of a newly disclosed cartel; (ii) details of the investigation with respect to the existing cartel wherein it has obtained priority status; and (iii) justify how the newly disclosed cartel is a new/separate cartel arrangement vis-à-vis the existing cartel.

Timeline for application: To avail the benefits of leniency plus, the applicant must submit their application before the Director General who submits its investigation report to the CCI in respect of the existing cartel.

Other consideration(s): Due regard will be given to the likelihood of the newly disclosed cartel being detected by the CCI / Director General in the absence of the leniency plus or any other factor that the CCI may feel is relevant.
It is noteworthy that CCI will exercise discretion in deciding on penalty reductions based on the quality and timeliness of the information provided by the applicant.

Key changes in the draft regulation

a. Withdrawal of application allowed: The LPR 2023 framework offers leniency and leniency plus applicants the liberty to retract their petition at any point ahead of receiving a report from CCI's Director General on their submission.

b. Forfeiture of application: A leniency / leniency plus applicant forfeits the benefits under the leniency/ leniency plus facility in case of: (i) non-compliance with the conditions on which the leniency/ leniency plus was granted; (ii) submission of false evidence or wilfully omitting material information; and (iii) disclosures that do not satisfy the test of "vital disclosures" (as provided under the LPR 2023). In case of forfeiture, the leniency / leniency plus applicant will be treated at par with any other defendant who has not availed the benefit of leniency / leniency plus.

c. Only written application will be allowed: Parties looking to avail penalty reductions under the leniency / leniency plus facility must submit a written application. Oral applications will no longer be accepted.

d. Hub and spoke cartels recognised: The LPR 2009 regime only recognized "horizontal" cartels (i.e., cartels between competitors). In line with the recognition afforded to hub and spoke arrangements as a "cartel" in the Amendment Act, the LPR 2023 will extend the benefit of the leniency and leniency plus facility to the participants of hub and spoke cartels as well (i.e., cartel amongst competitors through or involving vertically linked players / other facilitators in the market).

e. Waterfall mechanism for leniency plus: The LPR 2023 clarifies that the benefit under leniency plus will only be given to one leniency plus applicant. Accordingly, the CCI will consider only one leniency plus application at a time. Unless the CCI rejects a leniency plus application filed by the first applicant, no subsequent applications will be considered. There is no clarification on whether "subsequent leniency plus applicants" would be informed that their applications are in queue and not presently considered, or would it be left for such applicant(s) to ascertain their status on account of lapse of time.

Conclusion and Analysis

Some jurisdictions do not adhere to set guidelines for extending additional leniency plus facility cuts, yet a majority of advanced jurisdictions limit the highest discount to under 30%. Hence, deductions above would serve as motivation for existing applicant(s) to provide truthful and thorough disclosure crucial to the CCI.

The implementation of the "leniency plus" structure is a well-received progression as it enhances an existing successful leniency system in India. Additionally, it equips CCI with more power to discover several cartels while conserving time and resources invested in cartel investigations. Considering that under the Amendment Act, CCI now has the authority to levy fines based on global turnover which gives them a larger scope for enforcement; this makes incentives presented by the "leniency plus" regime even more enticing.

However, it is important to note that the grant of" leniency plus" hinges on the 'likelihood' of the CCI or the DG detecting the second cartel, and the factors for determining such 'likelihood' are not enumerated in the Draft. Consequently, it may not be feasible for applicants to self-evaluate the efficacy of their "leniency plus" application. Thus, there is a likelihood that a multi-product conglomerate will experience greater success with the advantage of "leniency plus". This is because little resemblance might exist concerning conduct/product/service between initial and subsequent cartels - no shared participants or culpable leaders present in both cases relate them further. It paves the way towards higher credit allocation from submitted disclosures to CCI.

Read More :

https://www.cci.gov.in/images/stakeholderstopicsconsultations/en/draft-lesser-penalty-regulations1697431514.pdf

http://164.100.58.95/sites/default/files/advocacy_booklet_document/Leniency.pdf

https://www.cci.gov.in/images/legalframeworkact/en/the-competition-act-20021652103427.pdf

Infolex_Competition_Commission_of_India_publishe_the_Draft_LPR_October_2023.pdf (induslaw.com)

Navigating the Skies: IBC and the Exemption Saga – Aircraft Objects Soar Above Insolvency Moratorium

- Animisha Dwivedi

Brief Background

The government through a notification dated 3rd October 2023 brought in a wave of relief for creditors and lessors of the airline sector. The Ministry of Corporate Affairs has issued the notification whereby aircraft, aircraft engines, airframes and helicopters will no-more be subjected to the moratorium under the Insolvency and Bankruptcy Code, 2016 (IBC). The current regime of Airline Insolvency in India is governed by the Insolvency and Bankruptcy Code, 2016 (IBC) but unlike insolvency in other businesses, the airline sector suffers from various complexities in the insolvency process. The resolution of such complexities is not exactly covered under the law operative in India. The notification comes as a crucial step by the government as it aligns with the Cape Town Convention, 2001 and the Protocol on Matters Specific to Aircraft Equipment, both of which together attempt to ease the difficulties in controlling the insolvency of airline sector.

The IBC Moratorium

The Insolvency and Bankruptcy Code, 2016 provides that once a corporate debtor is admitted to insolvency process, certain regulations come in place. Section 14 of the IBC imposes a moratorium whereby both the corporate debtor as well as the lessors and creditors are prohibited from taking certain actions until the completion of the Corporate Insolvency Resolution Process (CIRP). The sub-section (1) of Section 14, imposes a moratorium on recovery of assets by the creditors and lessors which are under the possession of the Corporate Debtor (CD) and also on the foreclosure, recovery or enforcement of any security created by the CD.

The moratorium under IBC stood in direct conflict with the Cape Town Convention and the Protocol on Matters Specific to Aircraft Equipment which promote the interests of creditors and lessors during the Insolvency process.

Under the Protocol and Convention, the creditor and lessor can take possession of the aircraft object from the corporate debtor after 60 days of the date of commencement of the proceedings. The two-month window is to provide the debtor with an opportunity to resolve the defaults and provide a guarantee to fulfill the dues.

Even though India acceded to the above Convention and Protocol in 2008, the implementing legislations haven't been passed yet. The Cape Town Convention Bill was first introduced in the Parliament in 2018 but wasn't passed. Last year, public comments were invited on the bill but no further action has been taken yet. Thus, the Notification comes at an important time proving India's commitment to its obligations under the Convention and also serves to enhance its compliance ranking by the Aviation Working Group.

The Government Notification

The Notification applies to 'transactions, arrangements or agreements, under the Convention and the Protocol, relating to aircraft, aircraft engines, airframes and helicopters'. Prior to this notification, Section 14(1) vested the adjudicating authority with the power to impose a moratorium on the Corporate Debtor company that was accepted into the IBC's Corporate Insolvency Resolution Process (CIRP). The purpose was to ensure value maximization of the Corporate Debtor during CIRP. The notification has been issued by exercising the power vested by Section 14(3) of IBC which reads as 'The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator'. Government has thus created an exemption whereby any sort of transaction, arrangement or agreement entered into between airlines and financers as well as creditors will not attract the moratorium laid out in Section 14(1).

This exemption is only with respect to certain components registered in the International registry, that is, aircraft, aircraft engines, airframes and helicopters. As a result, lessors and creditors will no longer have to wait for the winding up of the insolvency proceedings to take possession of these aircraft objects. Once CIRP commences, the stakeholders will now be free to approach the adjudicating authority to get the assets deregistered as well as reclaim their possession.

The Notification holds considerable value for all the stakeholders in the aircraft object leasing and financing sector in India. It will allow creditor and lessors to take possession of the airline objects subsequent to commencement of insolvency proceedings. Due to the moratorium rule, there were considerable apprehensions preventing foreign financers and lessors to deal with the Indian aviation sector. This move is thus aimed at enhancing trust and instilling greater confidence and predictability in international financing and leasing of aircrafts in Indian markets.

As a result, the cost of leasing and lending will also be reduced, making the sector more viable. The move is also aimed at enhancing India's reputation it terms of its compliance with the Cape Town Convention and Protocol. India had been placed under the watchlist of the Aviation Working Group, the global watchdog which monitors the compliance with the obligations in the Convention. Furthermore, the country's ranking had also been lowered in September this year. The same has been perceived as one of the causes of rising leasing rates in the India aviation sector. The exemption notification is therefore expected to ease the tension that has increased in the past months.

Effect on pending cases – Question of retrospectivity

Though not in full conformance with the Convention and Protocol, especially the two-month waiting period, the moratorium exemption does hold a great importance for the sector. In the wake of the ongoing insolvency proceeding of Go First, the change has become all the more important. NCLT had imposed a blanket moratorium, preventing the creditors and lessors from seeking deregistration of the aircraft objects.

Following this order, the lessors had raised their concerns with respect to the IBC rule being in direct conflict with their rights under the Convention and Protocol. The question that now arises is whether the notification will have retrospective or prospective application since there is no mention of the new rule's applicability on pending proceedings. In front of the Delhi High Court, which is where the lessors have challenged the moratorium and their right to reclaim possession, the DGCA had submitted that the notification will have retrospective effect but the same has been challenged by the Resolution Professional. Thus, although a great relief for the lessors and creditors in general, it might be a bit too early for the lessors involved in the ongoing proceedings to rejoice just yet.

Conclusion

Though uncertainties and doubts persist, there are undeniable reliefs for the financers of Indian carriers which in the long run will be beneficial for the airlines as well. Lessors, aircraft owners, and engine owners are now in a better position to reclaim assets from noncompliant lessees. For now, even though the government has reminded the stakeholders that it respects and acknowledges its commitments under the Convention, going ahead there is a need to expedite the process of introducing an implementing legislation. The IBC rules are not enough to deal with the complexities of insolvency proceedings in the aviation sector and such piece meal changes are insufficient to make the code compliant with our international obligations.

Read more :

·https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/centre-exempts-aircraft-from-moratorium-protection-of-ibc/articleshow/104163621.cms
·https://www.business-standard.com/economy/news/corporate-affairs-ministry-exempts-avaition-from-ibc-s-moratorium-clause-123100401176_1.html
·https://corporate.cyrilamarchandblogs.com/2023/10/sky-is-the-actual-limit-for-ibc-exemption-from-moratorium-over-aircraft-objects-during-insolvency/

Meta Platforms Inc v Competition Commission of India: A Corporate Conundrum

- Aprameya Setlur

Brief Background

The case involving Meta Platforms Inc (formerly Facebook) and the Competition Commission of India (CCI) intersects with corporate laws, antitrust regulations, and digital market dynamics. This legal battle is a testament to the global scrutiny faced by tech giants and their market dominance.

Relevant Facts of the Matter

WhatsApp, acquired by Facebook in 2014 and now under the name "Meta Platforms," made significant updates to its policies in 2016, notifying users of data usage for advertising. Existing users had an opt-out choice, while new users didn't. This led to legal challenges. In 2021, WhatsApp announced another policy update, sparking further legal issues, including an investigation by the Competition Commission of India into potential abuse of dominance by WhatsApp and Facebook. Court challenges were upheld, prompting appellants to file new appeals against the judgments.

Legal Framework

The appellants, represented by Harish Salve and Mukul Rohatgi, argue that WhatsApp's end-to-end encryption protects user privacy, emphasizing users' voluntary acceptance of terms. They challenge the Competition Commission of India's jurisdiction, urging restraint until higher courts decide on the policies. They criticize the CCI's lack of sufficient reasoning and failure to establish an abuse of dominance under Section 4. Facebook India Online Services Pvt. Ltd. seeks to be involved, asserting its separation from Facebook Inc. and the need for proper allegations before scrutiny. They cite legal precedents supporting the rights of an "aggrieved person" to seek appeal recourse.

The respondent's argument emphasizes that the CCI's investigation on the 2021 Policy focuses on competition law, separate from the privacy concerns addressed by the Supreme Court. They assert the Competition Act's precedence and the CCI's jurisdiction. They stress that the investigation considers potential violations under the Act, citing confidentiality measures and the legislative intent to enforce competition laws alongside other statutes. Additionally, they argue against the application of res judicata due to changing circumstances and highlight Facebook's potential misuse of WhatsApp information as a reason for the investigation. They assert the CCI's jurisdiction to investigate the entire Facebook group and address the quasi-inquisitorial nature of the investigation, suggesting it's prudent for the applicant to implead itself in the appeal.

Judgement

The Court upheld the CCI's investigation against WhatsApp over potential Competition Act violations due to its dominant market position and data-sharing practices in the 2021 Policy. Facebook and WhatsApp's appeal was rejected for lacking merit, and Facebook India Online Services Pvt. Ltd.'s application was denied. The CCI was given the green light to continue its investigation as deemed appropriate, confirming the judgment in the W.P.(C) 4378/2021 & W.P.(C) 4407/2021 cases

Impact on the Corporate World

The outcome of this case has set a crucial precedent for the regulation of big tech companies globally. If the CCI prevails and proves Meta's violations, it may trigger a domino effect in other jurisdictions, leading to intensified scrutiny and potential regulatory measures against other tech giants. This could shape the future landscape of digital markets and encourage fair competition.

For corporations, especially those in the tech and digital advertising sectors, this case underscores the importance of compliance with antitrust laws and the ethical use of consumer data. Companies will likely reevaluate their business strategies and practices concerning data usage and market dominance to avoid falling into similar legal entanglements.

The implications for the broader corporate world are substantial. Some of them could be:

1. More stringent regulatory frameworks
2. Impacting business models, mergers and acquisitions
3. The collection and usage of consumer data.

Businesses may need to reconsider their market strategies and operational practices to align with evolving regulatory standards.

Critical Analysis

This case is a culmination of the ongoing global debate surrounding big tech firms and their market dominance. The allegations against Meta Platforms echo concerns raised in various jurisdictions about the monopolistic tendencies of tech giants. Meta's control over vast amounts of user data and its potential impact on digital advertising creates an atmosphere where competitors struggle to thrive.

The crux of the matter lies in how data and advertising revenue intertwine. Meta's access to an extensive pool of user data allows it to offer highly targeted advertising services. This, in turn, could hinder fair competition by making it challenging for smaller platforms to attract advertisers and compete on an equal footing. The case raises significant questions about market competition, consumer welfare, and the extent of regulatory oversight required in the digital age.

Conclusion

The Meta Platforms Inc v Competition Commission of India case encapsulates the intricate interplay between corporate power, market dominance, consumer welfare, and regulatory oversight. It underscores the need for a balance between fostering innovation and ensuring fair competition in the digital era. The case's outcome will undoubtedly reverberate across the corporate landscape, reshaping market dynamics and regulatory approaches for tech giants worldwide.

Read More :

WhatsApp: SC dismisses pleas against CCI probe into WhatsApp's privacy policy - The Economic Times (indiatimes.com)

Supreme Court dismisses plea by WhatsApp, Meta challenging CCI probe (moneycontrol.com

META /WHATSAPP FACE ANTITRUST PROBE ON ITS NEW DATA PRIVACY POLICY IN INDIA – SUPREME COURT DISMISSES THE SLP AGAINST CCI PRIMA FACIE ORDER OF INVESTIGATION | (competitionlawyer.in)

Supreme Court upholds CCI's investigation of WhatsApp's privacy policy - Commentary - Lexology

Revolutionizing Investment Landscape: Exploring the 2023 Company Law Amendment Rules on Dematerialization of Securities

- Amar Prem Prakash

Brief Background

On October 27, 2023, the Ministry of Corporate Affairs (MCA), issued notifications on two significant amendments to the rules established under the Companies Act of 2013. The Act aims to improve the quality of corporate governance and protect investors from fraud and also seeks to promote competition in the marketplace and increase corporate transparency. The aforementioned amendments consist of the Companies (Management and Administration) Second Amendment Rules, 2013 (referred to as "MA Rules 2023") and the Companies (Prospectus and Allotment of Securities) Second Amendment Rules, 2023 (referred to as "PAS Rules 2023"). The aforementioned adjustments have been implemented with the aim of enhancing openness in the management of company affairs. These amendments will be effective upon their publication in the Official Gazette, ensuring a timely implementation process.

Introduction Overview of Company Law Amendment Rules 2023

The revisions implemented in the MA Rules 2023 have incorporated the concept of a "designated person" in relation to the beneficial ownership of business shares, wherein the beneficial owner of a share differs from the registered owner of said share i.e. the director(s) whose name is entered in the register of members of a particular company is different and the person who actually enjoys the right of ownership is different.

There is now a need for each company to assign an individual i.e "designated person" who is to be responsible for supplying the Registrar of Companies which is an office under the Ministry of Corporate Affairs (MCA), which deals with the administration of companies and Limited Liability Partnerships (LLPs) in India, with information pertaining to the beneficial interests associated with the company's shares.

The available options for designating an individual who will assume responsibility, which encompass the company secretary, key managerial staff (except the company secretary), or all directors (in the absence of both a company secretary and key managerial persons). The individual appointed as the designated person is mandated to bear the responsibility of supplying information and offering cooperation to the Registrar or any other authorized officer regarding the beneficial ownership of the company's shares.

Moreover, prior to the official designation of an individual, certain individuals are considered to have been designated. This encompasses the individual holding the position of company secretary, or in cases where there is no company secretary, the managing director or manager. In cases where there is an absence of a company secretary, managing director, or manager, each director has responsibility for the management and decision-making processes.

It is a requirement for each corporation to provide information regarding the designated individual in its Annual Report, thereby promoting transparency and adherence to regulations. In the event that a company opts to modify its appointed individual at any given point, it is imperative that the firm notifies the Registrar by means of submitting an e-form in accordance with the regulations outlined in the Companies (Registration Offices and Fees) Rules of 2014. Each corporation must appoint an individual via a board resolution and report this in the annual return. If the 2022-23 fiscal year submission is already complete, it can be included in the following year's reports.

Applicability of the Amendment

The revisions implemented in the PAS Rules 2023 entail the compulsory dematerialization of securities i.e. the process of converting physical shares and securities into digital or electronic form, for all private enterprises, with the exception of small companies and government companies. This clause was previously limited in its applicability to public enterprises. The measures will be implemented immediately, and enterprises will have a period of 18 months from the end of the financial year to comply with the necessary dematerialization requirements. It should be noted that a private firm, excluding small companies as of March 31, 2023, is obligated to adhere to the compulsory dematerialization of securities within a timeframe of 18 months following the conclusion of the fiscal year 2022-2023. Specifically, this requirement must be fulfilled on or before September 30, 2024.

Implications Effects and Implications on Private Companies

A privately-owned corporation, subject to the provisions of this Amendment, shall be obligated to now acquire the International Securities Identification Number ("ISIN") for all existing securities released by the organization. The ISIN code is a 12 digit (alphanumeric) numbering system for unique representation of stocks and bonds. It is issued by the National Numbering Agency. They are to enable the process of dematerialization for all currently held securities upon request from the respective holders. It is imperative that the complete ownership of the promoters, directors, and key managerial personnel (KMPs) is maintained solely in dematerialized form before initiating any proposal for the issuance or repurchase of securities on or after September 30, 2024. Public firms are now required to provide information regarding the share warrants issued within three months of the beginning of the Amendment by January 27, 2024. This information should be sent to the Registrar. The purpose of this response is to provide an explanation of a share warrant. A share warrant is a financial instrument that grants the holder the right to purchase a specific number of shares at a fixed or pre-determined price.

These companies are required to initiate the process of requesting individuals holding share warrants to surrender them and obtain equity shares of the respective company in dematerialized form, as mandated by the amendment.

Effective October 1, 2024, it is mandated to exclusively issue all securities in dematerialized format. In addition, the submission of semi-annual returns to both the Ministry of Corporate Affairs is required for the purpose of reporting the shares held in dematerialized form.

The amendment mandates that shareholders of privately held corporations shall be obligated to acquire a Permanent Account Number (PAN), which serves as an Income Tax Identification Number, if it has not been previously obtained and a dematerialized account with a Depository Participant, that is, an agent of the depository who are the intermediaries between the depository and the investors that are governed by an agreement made between the two under the Depositories Act. After September 30, 2023, shareholders of a private company will still have the option to retain their shares in physical form. However, starting from October 1, 2024, shares of a firm can only be granted to shareholders who own a demat account.

Analysis & Conclusion

These amendments modifications aim to enhance transparency and minimize the occurrence of fraudulent activities, as well as reduce the risks associated with loss and theft. Moreover, the implementation of the share transfer process is anticipated to enhance efficiency and mitigate the financial burden associated with the printing and distribution of physical certificates. This will assist regulators in effectively addressing benami transactions, money laundering, and related illicit activity.

Read More :

https://www.jsalaw.com/newsletters-and-updates/mandatory-dematerialization-of-shares-for-non-small-private-companies/#:~:text=The%20Ministry%20of%20Corporate%20Affairs,shares%20before%20October%201%2C%202024.
https://vinodkothari.com/2023/10/diktat-of-demat-for-private-companies/