# SAGUS SPEAKS

Sagus Legal
Advisors & Advocates

**This Newsletter covers key Regulatory & Policy Updates, Government Notifications and Judicial Pronouncements.**

## REGULATORY & POLICY UPDATES

### RBI issued Guidelines on Default Loss Guarantee in Digital Lending[1]

Reserve Bank of India has *vide* its notification dated 08.06.2023 has issued the Guidelines on Default Loss Guarantee in Digital Lending ("DLG Guidelines"), permitting arrangements between Regulated Entities ("REs") and LSPs or between two REs involving Default Loss Guarantee ("DLG"), subject to specified conditions. The key highlights of the DLG Guidelines are summarized as below:

(i) *Applicability*: The DLG Guidelines are applicable to all Scheduled Commercial Banks, Cooperative Banks, and Non-Banking Financial Companies ("NBFCs") (including Housing Finance Companies ("HFCs").

(ii) *Forms of DLG*: RE shall accept DLG only in one or more of the following forms: (a) Cash deposited with the RE; (b) Fixed Deposits maintained with a Scheduled Commercial Bank with a lien marked in favour of the RE; and (c) Bank Guarantee in favour of the RE.

(iii) *Structure of DLG Arrangements*: DLG arrangements must be backed by an explicit legally enforceable

[1] Guidelines on Default Loss Guarantee in Digital Lending

contract between RE and DLG provider, which must, *inter alia*, contain the following details:

- Extent of DLG cover;
- Form in which DLG cover is to be maintained with RE;
- Timeline for DLG invocation; and
- Disclosure requirements under DLG Guidelines.

(iv) *Capping on DLG*: RE shall ensure that the total amount of DLG cover on any outstanding loan portfolio shall not exceed 5% of the loan portfolio. In implicit guarantee arrangements, DLG provider shall not bear performance risk of more than the amount equivalent to 5% of the underlying loan portfolio.

(v) *Recognition of Non-Performing Asset* ("NPA"): Recognition of individual loan assets as NPA and consequent provisioning shall be the responsibility of RE as per the extant rules, irrespective of any DLG cover available at portfolio level.

(vi) *Tenor of DLG*: The term of the DLG agreement shall not be less than the longest tenor of any loan in the underlying loan portfolio.

(vii) *Disclosure Requirements*: REs shall put in place a mechanism to ensure that LSPs with whom they have a DLG arrangement publish on their website the total number of portfolios and the respective amount of each portfolio on which DLG has been offered.

(viii) *Due Diligence and other requirements with respect to DLG provider*: REs shall put in place a board approved policy before entering into any DLG arrangement.

### RBI issued a framework for Compromise Settlements and Technical Write-offs.[2]

RBI *vide* its notification dated 08.06.2022 issued the Framework for Compromise Settlements and Technical Write-offs ("Framework") covering all REs i.e., Commercial Banks, NBFCs (including HFCs), Cooperative Banks and Financial Institutions.

As per the Framework, a 'compromise settlement' shall mean any negotiated arrangement with a borrower to fully settle the claims of an RE against such borrower in cash and may include the RE taking a haircut along with a corresponding waiver of claims of the RE against the borrower to that extent. A part settlement, or a settlement with a payment period in excess of 3 months will not be considered a compromise settlement and will not be governed by the Framework.

A 'technical write-off' shall mean a case where non-performing assets remain outstanding at borrowers' loan account level but are written-off (fully or partially) by the RE only for accounting purposes, without involving any waiver of claims against the borrower, and without prejudice to the recovery of the same.
The key highlights of the Framework are as follows:

(i) *Board Approved Policy*: RE shall put in place its Board approved policy for compromise settlements and technical write-offs. Such policy shall lay down the process to be followed, necessary conditions precedent (such as minimum ageing, deterioration in collateral value, etc.,) and delegation of powers for sanction / approval of compromise settlements and technical write-offs.

(ii) *Cooling Period*: There shall be a cooling period as determined by the respective Board approved policies before REs can assume fresh exposures to borrowers who have participated in a compromise settlement. However, for credits other than farm credit exposures, the cooling period should be of at least 12 months.

(iii) *Treatment of accounts categorized as fraud and willful defaulter*: REs may undertake compromise settlements or technical write-offs in respect of accounts categorized as willful defaulters or fraud without prejudice to the criminal proceeding underway against such debtors.

(iv) *Consent Decrees*: Wherever an RE has commenced recovery proceedings against a borrower, that is pending before a judicial forum, any settlement arrived at with such borrower shall be subject to obtaining a consent decree from the concerned judicial forum.

## GOVERNMENT NOTIFICATIONS

### MCA notified the Limited Liability Partnership (Amendment) Rules, 2023.[3]

The Ministry of Corporate Affairs ("MCA") *vide* its notification dated 02.06.2023 has notified the Limited Liability Partnership (Amendment) Rules, 2023 and has revised the Limited Liability Partnership Form 3 which deals with the information with respect to Limited Liability Partnership Agreement. Under this revised form, MCA has mandated the additional disclosures pertaining to details of the contribution (in terms of money or property or other benefit) by each partner, services to be performed by each partner, profit-sharing ratios of each partner and disclosure of the number of amendments/ changes made in Limited

[2] Framework for Compromise Settlements and Technical Write-offs

[3] Limited Liability Partnership (Amendment) Rules, 2003.

Liability Partnership ("LLP") agreement till date along with specific reasons for such change in the LLP agreement.

## IBBI issued Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) Guidelines, 2023.[4]

The Insolvency and Bankruptcy Board of India ("Board") is required to recommend name of an Insolvency Professional ("IP") in a corporate insolvency resolution process or individual insolvency for appointing an Interim Resolution Professional ("IRP"), Resolution Professional ("RP"), liquidator and/ or Bankruptcy Trustee ("BT"), only after receiving reference from the National Company Law Tribunal ("NCLT") and/ or Debt Recovery Tribunal ("DRT") in this regard.

However, this was causing administrative delays in the appointment of IPs. The Board felt the need to prepare a common panel of IPs from those registered with it and share the list in advance with the Adjudicating Authority ("AA") to expedite the process and avoid delays.

In this regard, the Board has issued the Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) Guidelines, 2023 ("Guidelines") which provides a procedure for preparing a common panel of IPs to act as IRPs, liquidators, RPs, or BTs.

In terms of the Guidelines, an IP is eligible to be included in the panel, if:

(i) no disciplinary proceeding, whether initiated by the Board or by the Insolvency Professional Agency, is pending;
(ii) IP has not been convicted at any time in the last three years by a court of competent jurisdiction;
(iii) IP has submitted expression of interest along with consent to act as IRP, RP, liquidator or BT, on appointment by the NCLT and DRT;
(iv) IP holds an Authorization for Assignment which is valid till the validity of the panel.

The panel will have a validity of six months and will be reconstituted at the end of such period. The first panel will be effective from 01.07.2023 to 31.12.2023.

## Ministry of Consumer Affairs, Food and Public Distribution issued advisory barring the retailers from collecting personal contact details for purchasing a product.[5]

The Ministry of Consumer Affairs, Food and Public Distribution *vide* an advisory dated 26.05.2023 has directed all retailers that the mobile number of consumers should not be taken without the express consent of consumers at the time of sale of any goods or services and providing mobile number by consumers should not be a mandatory pre-condition for sale of a product. Further, restricting consumers from buying, returning or exchanging a product, seeking refund, or resolving consumer grievance solely on the ground that the consumer has not shared his mobile number will constitute as an unfair trade practice under the Consumer Protection Act, 2019 ("CP Act, 2019"). In the absence of breach of any other terms and conditions of sale, mere non-sharing of phone numbers cannot be a ground to deprive the consumers from exercising their rights under the CP Act, 2019.

## Ministry of Consumer Affairs, Food and Public Distribution issued the Legal Metrology (Packaged Commodities) (Amendment) Rules, 2023[6]

The Ministry of Consumer Affairs, Food, and Public Distribution *vide* its notification dated 05.06.2023 has issued the Legal Metrology (Packaged Commodities) (Amendment) Rules, 2023 ("Amendment Rules, 2023"). Pursuant to the Amendment Rules, 2023 the effective date of Legal Metrology (Packaged Commodities) (Amendment) Rules, 2022 ("Amendment Rules, 2022")[7] has been changed from 01.06.2023 to 01.07.2023. The key highlights of the Amendment Rules, 2022 are as follows:

(i) The unit sale price in rupees, rounded off to the nearest two decimal place, shall be declared on every prepackaged commodity in the following manner:
- per gram where net quantity is less than one kilogram and per kilogram where net quantity is more than one kilogram;
- per centimeter where net length is less than one metre and per metre where net length is more than one metre;
- per mililitre where net volume is less than one litre and per litre where net volume is more than one litre;

[4] Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) Guidelines, 2023
[5] Advisory barring the Retailers from collecting personal contact details for purchasing a product
[6] Legal Metrology (Packaged Commodities) (Amendment) Rules, 2023
[7] Legal Metrology (Packaged Commodities) (Amendment) Rules, 2022

- per number or unit if any item is sold by numbers or units.

(ii) For packages containing alcoholic beverages or spirituous liquor, the State Excise Laws and the rules made thereunder shall be applicable within the State in which it is manufactured.

(iii) Further, declaration of unit sale price is not required for the pre-packaged commodities in which retail sale price is equal to the unit sale price.

## MNRE notified a new dispute resolution mechanism to consider unforeseen disputes.[8]

The Ministry of New and Renewable Energy ("MNRE") *vide* an order dated 07.06.2023 has prescribed a new dispute resolution mechanism (in supersession of the dispute resolution mechanism provided *vide* an order dated 18.06.2019, which was amended from time to time) to consider unforeseen disputes between renewable energy power developers/ EPC contractors and SECI/ NTPC/ NHPC/ SJVN/ any other Renewable Energy Implementing Agency ("REIA") designated by MNRE beyond the scope of contractual agreements ("Order"). The key highlights of the Order are as follows:

(i) Setting up of three-member Dispute Resolution Committee ("DRC") with the approval of Minister New and Renewable Energy ("Minister"). The committee members of DRC shall comprise eminent persons located in Delhi NCR.

(ii) The mechanism of DRC will apply to:
- All RE schemes/ programs/ projects being implemented by REIA;
- Contractual agreements between REIA and EPC Contractor, executing RE power projects owned by REIA, provided REIA undertakes to abide by the decision coming out of this mechanism.

(iii) In case of all disputes, whether covered by Power Purchase Agreement ("PPA")/ EPC contract/ Agreement or not, the application/ request will be made first to REIA. REIA must pass speaking orders on such application/ request.

(iv) DRC will consider appeals against the decisions given by the REIA on following disputes:
- All requests for extension of time due to recognized 'Force Majeure' events;
- All requests for extension of time not covered under the terms of contract;
- All disputes other than those pertaining to 'Extension of Time' between REIA and RE Power Developers/ EPC Contractors.

(v) DRC will examine all cases referred to it in a time bound manner and submit its recommendations to MNRE, not later than 21 days from the date of the reference.

(vi) The recommendations of DRC along with MNRE's observations will be placed before the Minister for a final decision. Further, MNRE will examine and put the recommendations to the Minister with comments from the Integrated Finance Division, within 21 days of receipt of the recommendations from the DRC.

## MoP issued Guidelines for Tariff Based Competitive Bidding Process for Procurement of Firm and Dispatchable Power from Grid Connected Renewable Energy Power Projects with Energy Storage Systems.[9]

The Ministry of Power ("MoP") *vide* its resolution dated on 09.06.2023 has issued 'Guidelines for Tariff Based Competitive Bidding Process for Procurement of Firm and Dispatchable Power from Grid Connected Renewable Energy Power Projects with Energy Storage Systems' ("Guidelines"). The Guidelines have been issued with an objective to provide firm and dispatchable power to the Distribution Companies ("DISCOMs") from Renewable Energy ("RE") sources, to facilitate RE capacity addition in the energy market and to provide a transparent, fair and standardized procurement framework based on open competitive bidding.

Under the Guidelines, the generator must supply firm and dispatchable RE in terms of the Request for Selection ("RfS"). In case of non-compliance, the generator will be penalized. The generator is further required to install a storage facility to ensure availability of power.

A single tariff bid will be invited with a minimum bid quantum of 50 MW. The electronic-bidding process will be a single-stage, two-part (Technical Bid & Financial Bid) process. After completing the evaluation and auction, the successful bidder will be issued a letter of award within 110 days of issuance of RfS. The PPA and power sale agreement will be signed within 140 days from the date of RfS. The PPA period will typically be 20 years from the scheduled

[8] MNRE notified a new dispute resolution mechanism to consider unforeseen disputes

[9] Guidelines for Tariff Based Competitive Bidding Process for Procurement of Firm and Dispatchable Power from Grid Connected Renewable Energy Power Projects with Energy Storage Systems

commencement of supply date, extendable up to 25 years. The power supply should begin within 24 months (for projects up to 1,000 MW) or 30 months (for projects larger than 1,000 MW) from executing the PPA.

## MoP issued an order delegating power for approval under Sections 68 and 164 of the Electricity Act, 2003.[10]

The MoP *vide* its order dated 09.06.2023 has delegated the powers under Section 68 of the Electricity Act, 2003 ("Electricity Act") and powers under Section 164 of Electricity Act vested with Central Electricity Authority ("CEA") to Joint Secretary (Transmission), MoP.

Section 68 of the Electricity Act provides for erection and installation of overhead lines which require prior approval of appropriate government. In any inter-state transmission line laid down by transmission licensee or generating company with dedicated transmission line connected to inter-state transmission system, requisite approval is now required to be obtained from Joint Secretary (Transmission), MoP in the manner prescribed.

Further, now the Joint Secretary (Transmission), MoP shall be the authority to exercise powers under Section 164 of the Electricity Act. Section 164 vest powers which the Telegraph Authority possess under the Indian Telegraph Act, 1885, to a public officer as appointed by appropriate government for the purpose of placing electrical lines or electrical plants for transmission of electricity or telephonic/ telegraphic communications necessary for proper coordination of work.

The order dated 09.06.2023 further provides the revised standard operating procedure for grant of approval by Joint Secretary (Transmission), MoP under Section 68 and 164 of Electricity Act. As per the revised procedure, for obtaining approval under Section 68 of the Electricity Act, the proposal shall be submitted on National Single Window System ("NSWS") portal enclosing the following:

(i) Request letter giving name of transmission scheme and the details of overhead transmission line included in the scheme,
(ii) board resolution for authorized signatory;
(iii) copy of the Connectivity granted by transmission utility, for generation projects, and
(iv) copy of gazette notification/Ministry office order, for inter-state transmission.

Further entities seeking approval under Section 164 of Electricity Act shall get such transmission scheme published in the official gazette and in at least two local newspapers. Entities shall consider the objections, if any, received from interested persons and finalize the optimal route alignment. Thereafter, the entities shall submit the application on NSWS portal with supporting documents as provided in the checklist annexed with the order dated 09.06.2023.

## CEA issued the National Electricity Plan 2022-2032.[11]

The Central Electricity Authority ("CEA") on 31.05.2023 issued the National Electricity Plan (Volume I Generation) ("NEP 2023"). The NEP includes a review of the period 2017-22, detailed additional requirements during the upcoming period of 2022-27 and the perspective plan for the years 2027-32. Some of the major highlights of NEP 2023 are as follows:

(i) For the period of 2017-22, the scheduled capacity addition from conventional sources (Coal, Gas, and Nuclear) was 51,561.15 MW as per NEP 2018. The capacity addition achieved from conventional sources was 30,667.91 MW.

(ii) India's cumulative installed capacity of renewable energy (including large hydro) increased from156,607.9 MW to 167,750.3MW between 31.02.2022 and 31.12.2022.

(iii) The projected capacity addition requirement during the period 2022-27 to meet the peak demand and energy requirement for the year 2026-27 is 211,819 MW comprising of 31,880 MW of Conventional capacity (Coal-25,580 MW and Nuclear-6,300 MW) and 179,939 MW of Renewable based Capacity (Large Hydro-10,462 MW, Solar-131,570, Wind-32,537 MW, Biomass-2,318 MW, Small Hydro-352 MW PSP-2700 MW) excluding likely Hydro based Imports of 3720 MW. Additionally, the likely Battery Energy Storage System requirement will be 8,680MW/ 34,720MWh during this period.

(iv) Further, it has been observed that apart from under construction coal-based capacity of 26.9 GW, the additional coal-based capacity required till 2031-32 may vary from 19.1 GW to around 27.1 GW across various scenarios.

(v) The total fund requirement for the period 2027-2032 has been estimated to be Rs. 19,06,406 Crores. This fund requirement does not include advance action for the projects which may get commissioned after 31.03.2032.

[10] MoP issued an order delegating power for approval under Sections 68 and 164 of the Electricity Act, 2003

[11] National Electricity Plan (Volume I Generation)

(vi) The average emission factor is expected to reduce to 0.548 kg CO2/kWh in the year 2026-27 and to 0.430 kg CO2/kWh by the end of 2031-32.

Further, NEP 2023 acknowledges the issues of climate change as the reason for delays in various projects during 2017-22.

NEP 2023 has also recommended that DISCOMs be incentivized to implement energy efficiency projects like lighting, air conditioning, pumps, refrigerators etc., and develop strong coordination of energy policy at Central and State level.

## JUDICIAL PRONOUNCEMENTS

### High Court of Delhi held that interest under Section 31(7) of the Arbitration & Conciliation Act can be awarded even when the contract prohibits grant of interest.[12]

The High Court of Delhi *vide* its judgement dated 25.05.2023 in the matter of ***M/s Mahesh Construction v. Municipal Corporation of Delhi & Anr.*** held that a clause in an agreement/ contract which prohibits the payment of interest on delayed payments, does not prohibit the grant of interest by an arbitrator under Section 31(7) of the Arbitration & Conciliation Act, 1996 ("A&C Act"). Since the interest is compensatory in nature, the power of the arbitrator cannot be restricted by such narrow clauses in the contract.

### High Court of Kerala held that the Debt Recovery Tribunal must pass interim orders with proper application of mind and not mechanically.[13]

The High Court of Kerala *vide* its judgement dated 24.05.2023 in the matter of ***Jimmy Thomas v. Indian Bank & Ors***. held that there should be application of mind by the Debt Recovery Tribunal ("DRT") while granting interim orders in Securitization Applications ("SA") filed under Section 17 of the Securitization & Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act"). The Court noted that considering the drastic nature of powers conferred on the banks/ financial institutions under the SARFAESI Act, the DRT should apply its mind to the contentions raised in the SA and pass interim orders on well-settled principles governing the grant of interim relief i.e., existence of *prima-facie* case, balance of convenience and irreparable injury. The Court further held that an interim order passed in SA which records that DRT is not entering into the merits of the matter, is a failure on the part of DRT to properly exercise its jurisdiction. The interim order must be a speaking order duly demonstrating its reasonableness as an order *sans* reason does not pass the test of fairness and reasonableness.

### High Court of Delhi held that arbitration clause continues to be operative even when parties extend the term of the contract by way of written communications.[14]

The High Court of Delhi *vide* its judgment dated 30.05.2023 in ***Unique Décor (India) Pvt. Ltd. v. Synchronized Supply Systems Ltd*** held that the arbitration clause continues to be operative when the parties have extended the term of the rent agreement by written communications and such an extension should not be considered as a novation of the rent agreement.

Further, on scope of interference by a court to refer a dispute to arbitration under Section 8 of the A&C Act, the Court reiterated that it stands on equal footing as Section 11 of the A&C Act. The courts while adjudicating an application under Section 8 of A&C Act should examine the *prima facie* existence of the arbitration agreement between the parties.

### High Court of Calcutta held that a clause making arbitration an option for resolution of dispute is not a valid arbitration agreement under Section 7 of A&C Act.[15]

The High Court of Calcutta *vide* its judgement dated 08.06.2023 in the matter of ***Blue Star Limited v. Rahul Saraf*** held that an arbitral clause in an agreement which merely provides for a possibility of arbitration, is not binding upon parties and is not a valid arbitration agreement. If the arbitration clause does not make it mandatory for the parties to refer the dispute to arbitration and provides them the option of either litigating before the Court or referring the dispute to arbitration, such arbitration clause is not binding and valid.

The Court relied on Supreme Court's judgment in *Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719* wherein it was held that for a clause to become an arbitration agreement, it must clearly indicate the willingness of the parties to refer the dispute to arbitration. The Court further held that mere mentioning of terms like '*arbitration*' or '*arbitrator*' in the heading or existence of these terms in a scattered manner in a clause, do not make such clause a valid arbitration agreement. The clause must reflect the clear intention of the

[12] FAO 212/2010
[13] O.P. (DRT) No. 360 of 2022
[14] F.A.O. (Comm.) No. 69 of 2023
[15] Arb. Petition No. 852 of 2022

parties and meeting of minds to mandatorily submit disputes to arbitration.

**High Court of Delhi held that the contention regarding de jure ineligibility of an arbitrator is a plea of lack of jurisdiction which can also be raised as an additional ground in the petition under Section 34 of A&C Act.[16]**

The High Court of Delhi *vide* its judgment dated 01.06.2023 in the matter of ***Man Industries (India) Limited v. Indian Oil Corporation*** held that the contention that the arbitrator is *de jure* ineligible is a plea of lack of jurisdiction, which can be raised at any stage of the proceedings and can be allowed to be raised as an additional ground in the application under Section 34 of A&C Act. A party by its participation in the arbitration proceedings or by filing of applications under Section 29A seeking extension of the mandate of the arbitrator cannot waive the ineligibility of the arbitrator under Section 12(5) of the A&C Act. The Court further held that a person who has interest in the outcome of the case must not have the power to appoint the arbitrator.

**High Court of Delhi held that an arbitration clause ceases to exist with the novation of the agreement if the novated agreement does not contain any arbitration clause.**[17]

The High Court of Delhi *vide* its judgement dated 02.06.2023 in the matter of ***B.L. Kashyap and Sons Ltd v. Mist Avenue Private Ltd***. has held that if the novated agreement does not contain any arbitration clause, then the arbitration clause in the original agreement would cease to exist.

In the instant matter, the parties entered into a construction agreement in 2014 which contained an arbitration clause. Thereafter, the parties entered into a Memorandum of Understanding ("MoU") which expressly mentioned that the construction agreement shall stand cancelled upon the enforcement of MoU and did not contain any arbitration clause. Relying on the terms of the MoU and the judgment of the Supreme Court in the matter of *Union of India v. Kishorilal Gupta [AIR 1959 SC 1362]*, the Court held that the arbitration clause in an agreement would perish with its novation.

**High Court of Allahabad held that under the MSMED Act, 2006, Facilitation Council has absolute discretion to select the forum for arbitration between the parties.[18]**

The High Court of Allahabad *vide* its judgement dated 05.06.2023 in the matter of ***Bata India Limited & Anr v. U.P. State Micro and Small Enterprise Facilitation and Anr***. held that the discretion granted to the Facilitation Council under Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 ("MSMED Act, 2006") with respect to the selection of forum for arbitration between the parties, is absolute and has overriding effect over any other law.

The Court further held that the Facilitation Council can act as conciliator as well as an arbitrator in the same proceedings. Section 18(3) of the MSMED Act, 2006 provides that where the conciliation initiated under Section 18(2) by the Facilitation Council has failed, the Facilitation Council may itself take up the dispute for arbitration or refer the matter to any institution or center for arbitration. Referring to Section 24 of the MSMED Act, 2006 which provides overriding effect to Section 15 to 23 of the MSMED Act, 2006, the Court concluded that the provisions of Section 18 of the MSMED Act, 2006 have an overriding effect. Therefore, the prohibition under Section 80 of the A&C Act that the conciliator cannot act as an arbitrator, shall have no application in the exercise of the discretion by the Facilitation Council under MSMED Act, 2006.

**NCLAT held that remedies under Indian Law continues to available when one party submits to non-exclusive jurisdiction of a country other than India while other party retains the right to initiate proceedings before any court of competent jurisdiction.[19]**

The Principal Bench of National Company Law Appellate Tribunal ("NCLAT") *vide* its judgement dated 26.05.2023 in the matter of ***Rajesh Kumar Modi v. Punjab National Bank (International) Limited*** held that if under the facility agreement the Corporate Debtor has submitted to the non-exclusive jurisdiction of a country other than India and the Financial Creditor has retained the right to initiate proceedings before any court of competent jurisdiction, in such event, an insolvency petition under the Indian Law i.e., Insolvency and Bankruptcy Code ("IBC") will be maintainable.

In the instant case, the Appellant challenged the order of NCLT allowing the petition filed by the Financial Creditor

[16] O.M.P. (Comm.) No. 252 of 2018
[17] O.M.P (COMM) 190 of 2019
[18] Arb Pet No. 826 of 2014
[19] Company Appeal (AT) (Insolvency) No. 53 of 2023

under Section 7 of the IBC. The Appellant contended that the concerned facility agreement stipulated that the agreement will be governed by the English Law and the Court of England shall have the jurisdiction to settle any dispute arising out it. However, the Respondent contended that the lender bank is allowed to take concurrent proceedings in any number of jurisdictions. The Respondent relied on relied on Clause 35.1(c) of the facility agreement contending that as per the said Clause, the lender can initiate proceedings related to a dispute before any courts (apart from courts in England) with jurisdiction to the extent allowed by law. Further, under Clause 35.2 of the facility agreement, the borrower (Corporate Debtor) has irrevocably and generally consented in respect of proceedings anywhere.

The NCLAT, taking into consideration Clauses 35.1 and 35.2 of the facility agreement, observed that as per the terms of the agreement, the borrower has irrevocably agreed to submit to the non-exclusive jurisdiction of the Courts of England and the lender bank is entitled to initiate proceedings against the borrower in any court of competent jurisdiction. The NCLAT further observed that under Section 60 (1) of the IBC, in relation to insolvency resolution and liquidation of the corporate debtor, NCLT has territorial jurisdiction over the place where the registered office of the corporate person is located. In the instant case, the corporate office of the Corporate Debtor was located in Mumbai. Therefore, the NCLAT held that the Financial Creditor is entitled to file an insolvency petition before NCLT, Mumbai.

## NCLAT held that it does not have the power to review but under the inherent powers it has the power to recall its own judgment.[20]

The NCLAT *vide* its judgment dated 25.05.2023 in the matter of ***Union Bank of India (Erstwhile Corporation Bank) Vs. Dinkar T. Venkatasubramanian & Ors.*** held that though the power of review is not conferred upon the NCLAT, however, the NCLAT has the power to recall its judgment by invoking inherent powers under Rule 11 of the NCLAT Rules, 2016.

The NCLAT further held that power to recall is not the power to re-hear the case to find out any apparent error in the judgment (which is the scope of a review) but to rectify a procedural error in delivering the judgment. The NCLAT, accordingly, held that its earlier judgements passed in the cases of *Agarwal Coal Corporation Private Ltd. v. Sun Paper Mill Limited & Anr, [I.A. No.265/2019 in Company Appeal (AT)(Ins.) No.412/2019]* and *Rajendra Mulchand Varma & Ors. v. K.L.J Resources Limited & Anr [I.A. No. 3303/2022 in Company Appeal (AT)(Ins.) No.359/2020]* wherein it was observed that NCLAT does not have power to recall its judgement does not lay down the correct position of law.

[20] Company Appeal (AT) (Insolvency) No. 729 of 2020

## ABOUT SAGUS LEGAL

Sagus Legal is a full-service law firm that provides comprehensive legal advisory and advocacy services across multiple practice areas. We are skilled in assisting businesses spanning from start-ups to large business conglomerates including Navratna PSUs, in successfully navigating the complex legal and regulatory landscape of India. Our corporate and M&A, dispute resolution, energy, infrastructure, banking & finance, and insolvency & restructuring practices are ranked by several domestic and international publications. We also have an emerging privacy and technology law practice.


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