Newsletter

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Editor's note

Dear Readers,

We are pleased to share with you the SNG Newsletter for the month of December, 2023. In this issue we have covered significant legal developments and updates through the month of December, 2023.

The recent judicial pronouncements by both the Delhi High Court and the Supreme Court have brought forth crucial clarifications and interpretations under the Arbitration and Conciliation Act, 1996, shaping the landscape of alternative dispute resolution in India. The Supreme Court, in a landmark decision led by the Chief Justice of India, has affirmed the validity of the "group of companies" doctrine in Indian arbitration jurisprudence. This doctrine recognizes that entities within a corporate group can be treated as a single economic unit in certain situations. The judgment, based on Sections 2(1)(h) and 7 of the Arbitration Act, brings clarity to the legal standing of corporate groups in arbitration proceedings, allowing for a holistic understanding of the relationships and responsibilities within such entities.

The Supreme Court, upholding a significant development in arbitration law, has affirmed that awards passed by unilaterally appointed arbitrators are non-executable. The dismissal of a Special Leave Petition challenging the Delhi High Court's judgment reinforces the principle that arbitration processes must adhere to fairness and equity. This decision provides a clear stance against the enforceability of awards rendered by arbitrators appointed without mutual consent, ensuring the integrity of the arbitration process.

The recent rulings by the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) touch upon crucial aspects of the insolvency resolution process, ranging from personal guarantees to the nature of commercial borrowing.

The Reserve Bank of India (RBI) has recently undertaken a number of policy measures, reflecting its dynamic approach to economic governance and regulatory oversight. The diverse set of directions, advisories, and regulations touch upon various aspects of the financial landscape, from government securities lending to the burgeoning realm of crypto assets. These updates showcase RBI'S multifaceted approach to financial regulation, encompassing traditional areas such as government securities and foreign exchange management. The regulator's proactive stance is evident in its efforts to balance innovation with prudence, ensuring the stability and integrity of the financial system.

SEBI's recent decisions underscore its commitment to fostering a dynamic, transparent, and resilient financial market. These regulatory interventions, spanning various segments, are indicative of SEBI's proactive stance to address emerging challenges, encourage market growth, and ensure investor protection. The strategic alignment of regulations with evolving market dynamics positions SEBI as a vigilant guardian of India's financial ecosystem.

SEBI recently convened a board meeting in Mumbai, ratifying a series of decisions aimed at refining and strengthening the regulatory framework across diverse segments of the financial market. These decisions, spanning the spectrum from Non-Profit Organizations to Real Estate Investment Trusts (REITs) and Accreditation of Investors, reflect SEBI's commitment to adaptability, transparency, and ease of doing business.

The Digital Personal Data Protection Act (DPDP Act, 2023) in India significantly transformed personal data governance, granting individuals more control over their digital information. Particularly impactful for banks and financial institutions, the DPDP Act, 2023 designates them as data fiduciaries with strict obligations. However, challenges arise in cross-border transactions, revealing ambiguities in the DPDP Act, 2023, especially in relation to sectoral regulations such as those by the Reserve Bank of India (RBI). Our lawyers, Srishti Bansal and Shreya Govil share their views in an article titled, 'Steering the Cross-Border Data Transactions: Unravelling the Discrepancy in DPDP Act, 2023 and the RBI notification in banking operations' which is also included in this newsletter.

I hope you will find this edition useful.

Best wishes,

Rajesh Narain Gupta

Managing Partner,
SNG & Partners

A. ARBITRATION & CONCILIATION ACT, 1996:

1. Delhi High Court opines: Upon agreement to constitute an Arbitral Tribunal, parties cannot resist arbitration citing non-fulfilment of pre-arbitral steps

The Delhi High Court disposed of a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 for the appointment of a Sole Arbitrator to adjudicate the disputes between the parties by stating that *"respondent having agreed to constitute the Arbitral Tribunal cannot now seek to resist arbitration by seeking to rely upon Clause 63 of the GCC."*

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2. Supreme Court determines the validity of "group of companies" doctrine in Indian arbitration jurisprudence: Analysis of the constitution bench judgment

A CJI-led constitution bench of the Supreme Court has upheld the validity of the "group of companies" doctrine in Indian arbitration jurisprudence. This doctrine is based on the interpretation of Section 2(1)(h) along with Section 7 of the Arbitration and Conciliation Act, 1996. This doctrine involves the recognition that, in certain situations, entities within a corporate group can be considered as a single economic unit, and the actions or intentions of one entity may be attributed to another within the same group.

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3. Delhi High Court rejects section 14 Limitation Act benefits, citing lack of diligent prosecution; dismisses section 34 petition under Arbitration and Conciliation Act for non-prosecution

In a recent verdict, the Delhi High Court, presided over by Justice Rajiv Shakdher and Justice Tara Vitasta Ganju, has ruled against the application of Section 14 of the Limitation Act in a case involving U.P. Jal Vidyut Nigam Ltd and C.G. Power & Industrial Solution Ltd. The court observed that the petitioner, due to a lack of diligence, allowed its Section 34 petition under the Arbitration and Conciliation Act, 1996 to be dismissed twice for non-prosecution.

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4. Calcutta High Court opines: Sec. 29A of the Arbitration Act is about ensuring parties and arbitral tribunal do not contribute to an inordinate long arbitration process

The Calcutta High Court allowed an application for an extension of the mandate of an arbitrator after calling the respondent a "slumbering litigant who also made calculated moves to frustrate the arbitration." The Court highlighted that "Section 29A underlines the distinction between an

indifferent litigant who allows the mandate to terminate and a vigilant litigant who makes its best effort to meet the timelines but is caught in the games played by the opponent."

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4. Supreme Court agrees: Awards Passed by Unilaterally Appointed Arbitrators are Non-Executable

The Supreme Court of India has expressed its agreement with the recent landmark development in the arbitration arena that an award passed by a unilaterally appointed arbitrator is not executable.

The Apex Court dismissed the Special Leave Petition filed by Kotak Mahindra Bank impugning the Delhi High Court's Judgment, which upheld the judgment passed by the Commercial Court, which had refused the execution of an Award passed by a unilaterally appointed arbitrator.

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B. INSOLVENCY AND BANKRUPTCY CODE, 2016

1. NCLAT, New Delhi rules: Extinguishment of personal guarantee in resolution plan does not contravene IBC

The Hon'ble National Company Law Appellate Tribunal (NCLAT), New Delhi Bench expounded that the Resolution Plan providing for extinguishment of personal guarantee as approved by the Committee of Creditors (CoC), did not contravene any provisions of Section 30(2)(e) of the Insolvency and Bankruptcy Code, 2016 (IBC).

It was further noted that as per IBC, in the event of liquidation of the Corporate Debtor, the payment to which a Financial Creditor, who does not vote in favour of the Resolution Plan is entitled to payment in accordance with Section 53(1).

It was ruled that no provision in IBC mandated the Successful Resolution Applicant to make an upfront payment to the dissenting Financial Creditors. The payment to dissenting Financial Creditors was given priority, and whether payment was upfront or in instalment did not make any difference.

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2. NCLAT, New Delhi Bench opines: Raising of amount by an agreement is a commercial borrowing

The Hon'ble National Company Law Appellate Tribunal (NCLAT), New Delhi Bench expounded that that list under Section 5(8) of the Insolvency and Bankruptcy Code, 2016 (IBC) was not exhaustive but inclusive. Further, the raising of the amount by the Company through the Share Subscription-cum-Shareholders Company Agreement was commercial borrowing, since the said transaction has a direct effect on the business, which was carried out by the Corporate Debtor, i.e. construction of the building and township.

It was opined that the raising of the amount through the Agreement had the commercial effect of borrowing. Moreover, the expression 'time value of money' encompassed in itself the concept of the time value of the disbursement.

The Bench noted that the Section 7 application was not filed solely based on consent award, but underlying agreements as well.

It was opined that the legislature could never have intended to keep a debt, which is crystallized in the form of a Decree, outside the ambit of Section 5(8).

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3. NCLT, Mumbai Bench rules: No debt due if the assignment deed is insufficiently stamped

The National Company Law Tribunal (NCLT), Mumbai Bench expounded that an instrument, which is not stamped or insufficiently stamped in accordance with the Stamps Act, is not enforceable and, hence is a void contract in terms of provisions of the Contract Act. Accordingly, such an instrument cannot be taken as evidence by the Court.

In the present case, since the liability of the Corporate Debtor arose from the assignment deed, there was no debt due on account of the deed being insufficiently stamped.

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4. NCLAT, New Delhi Bench upholds distinction between workmen of sub-contractor and workmen of Corporate Debtor

The National Company Law Appellate Tribunal (NCLAT), New Delhi Bench opined that Appellant who never submitted any claim before the Resolution Professional claiming to be workmen could not be allowed to contend at this stage that they are workmen and they should be paid at par with the workmen of the Corporate Debtor for an amount which was admitted in the Corporate Insolvency Resolution Process (CIRP) by the Resolution Professional.

Further, it was noted that Section 53 of the Insolvency and Bankruptcy Code, 2016(IBC) ") itself provides different treatment in the distribution of assets where workmen dues are dealt with in Section 53(1)(b) and operational debt at much lower ladder.

The Bench held that when the Resolution Plan differentiates between payment to the workmen as well as to the Operational Creditors, such distinction is in accordance with law and cannot be faulted.

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5. NCLT, Mumbai Bench: Insolvency Resolution Process Costs include rent as payable by the Corporate Debtor who is in possession of a property

The National Company Law Tribunal (NCLT), Mumbai Bench held that the amounts due (rentals for the period) to an owner or lessor where such property is occupied by or in the possession of the corporate debtor, who was barred to recover his property on account of Moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC) is included in the definition of Insolvency Resolution Process Costs.

Accordingly, the dues of the Applicant were admitted in the liquidation proceedings. However, it was clarified that the dues would be settled only as per Section 53 of the IBC.

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6. NCLT, New Delhi rules: Amendment in pleadings under Section 7 can be done at any stage

The National Company Law Tribunal (NCLT), New Delhi Bench held that the amendment of pleadings in an Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 can be done at any stage of the matter.

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7. NCLAT, New Delhi partially allows Appeal, revives Insolvency Application in SBI vs. Dharamraj Aluminium Industries Case

The National Company Law Tribunal (NCLT) and subsequent National Company Law Appellate Tribunal (NCLAT), New Delhi Bench rulings denied the benefit of Section 14 and emphasized SBI's failure to seek leave from the court to proceed with recovery actions during the winding-up proceedings. The NCLAT partially allowed the appeal, reviving the Section 7 application based on a one-time settlement offer, providing Dharamraj Aluminium an opportunity to respond.

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C. RESERVE BANK OF INDIA

1. Reserve Bank of India (Government Securities Lending) Directions, 2023

Based on the comments received from banks, market participants and other interested parties, the Reserve Bank of India (Government Securities Lending) Directions, 2023 have been issued. The Directions apply to all Government securities lending transactions, undertaken in Over-the-Counter markets.

The directions come into effect immediately.

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2. Investments in Alternative Investment Funds (AIFs)

Due to regulatory concerns raised in relation to transactions of Regulated entities (REs) involving AIFs such as the substitution of direct loan exposure of REs to borrowers, with indirect exposure through investments in units of AIFs, Reserve Bank of India (RBI) has issued an advisory to avoid evergreening through this route.

i. REs shall not make investments in any scheme of AIFs which has downstream investments either directly or indirectly in a debtor company of the RE.
ii. If an AIF scheme, in which RE is already an investor, makes a downstream investment in any such debtor company, then the RE shall liquidate its investment in the scheme within 30 days from the date of such downstream investment by the AIF. If REs have already invested into such schemes having downstream investment in their debtor companies as on date, the 30-day period for liquidation shall be counted from the date of issuance of this circular. REs shall forthwith arrange to advise the AIFs suitably in the matter.
iii. In case REs are not able to liquidate their investments within the above-prescribed time limit, they shall make 100 percent provision on such investments.

It has also been advised that investment by REs in the subordinated units of any AIF scheme with a 'priority distribution model' shall be subject to full deduction from RE's capital funds.

The instructions come into effect immediately.

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3. Statement on Developmental and Regulatory Policies

The Reserve Bank of India (RBI) through Press Release came out with a statement on various developmental and regulatory policy measures relating to:

a. Financial Markets

The regulatory framework for hedging of foreign exchange risks has been more refined to enhance operational efficiency and ease access to foreign exchange derivatives, especially for users with small exposures. This will also ensure that a broader set of customers with the necessary risk management expertise are given the flexibility to manage their exposures efficiently.

The Master Direction will be issued separately.

b. Regulations

It has been decided to come out with a unified regulatory framework on connected lending for all the regulated entities of the Reserve Bank. A draft circular in this regard will be issued for public comment.

c. Payment Systems and Fintech

It is proposed to enhance the limit for payments to hospitals and educational institutions from INR 1 lakh to INR 5 lakh per transaction. Separate instructions will be issued shortly.

It is further proposed to exempt the requirement of Additional Factor of Authentication (AFA) for transactions up to INR 1 lakh for the following categories, viz., subscription to mutual funds, payment of insurance premiums and payments of credit card bills. The other existing requirements such as pre-and post-transaction notifications, opt-out facility for users, etc. shall continue to apply to these transactions. The revised circular will be issued shortly.

Another proposal is to set up a Repository for capturing essential information about FinTechs, encompassing their activities, products, technology stack, financial information etc. FinTechs would be encouraged to provide relevant information voluntarily to the Repository which will aid in designing appropriate policy approaches. The Repository will be operationalised by the Reserve Bank Innovation Hub in April 2024 or earlier. Necessary guidelines for this will be issued separately.

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4. RBI Cautions against unauthorized campaigns on Loan waiver

The Reserve Bank of India (RBI) observed certain misleading advertisements enticing borrowers by offering loan waivers.

Further, it was noticed that in certain locations, campaigns are being run by a few persons, which undermines the efforts of banks in enforcing their rights over the securities charged to the banks. Such entities are misrepresenting that dues to financial institutions including banks need not be repaid. Such activities undermine the stability of financial institutions and, above all, the interest of the depositors. It may also be noted that associating with such entities can result in direct financial losses.

Therefore, RBI has released a press release cautioning the Members of the public to not fall prey to such false and misleading campaigns and to report such incidents to law enforcement agencies.

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5. Processing of e-mandates for recurring transactions

Reserve Bank of India (RBI) has decided to increase the limit from INR 15,000/- to INR 1,00,000/- per transaction for the following categories:

a. subscription to mutual funds,
b. payment of insurance premiums, and
c. credit card bill payments.

The circular shall come into effect immediately.

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6. Regulating Crypto Assets

The International Monetary Fund (IMF) - Financial Stability Board (FSB) Synthesis Paper including a Roadmap was welcomed by the New Delhi Leaders' Declaration.

The paper was also presented during the Leaders' Summit and provides valuable guidance, to the G-20 but also the non-G20 jurisdictions, in moving forward with clearer policies on crypto assets.

Accordingly, all jurisdictions, including India, are expected to evaluate the country-specific characteristics and risks in order to reach an appropriate consideration of any necessary measures on crypto assets.

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7. Card-on-File Tokenisation (CoFT) – Enabling Tokenisation through Card Issuing Banks

On 20.12.2023, The Reserve Bank of India (RBI) issued a notification relating to Tokenisation and has enabled the Card Issuing Bank for Card-on-File Tokenisation (CoFT).

The RBI notification dated September 07, 2021, permitted card issuers to offer tokenization services as Token Service Providers (TSP). TSP refers to the entity that tokenizes and de-tokenizes the card credentials, whenever required by card holder. Before the 2021 notification, only card networks were allowed to act as TSPs.

RBI press release dated October 06, 2023, mentioned, "At present, Card-on-File (CoF) token can only be created through merchant's application or webpage. It is now proposed to introduce CoF token creation facilities directly at the issuer bank level. This measure will enhance convenience for cardholders to get tokens created and linked to their existing accounts with various e-commerce applications. Instructions in this regard will be issued separately". It is pertinent to note that as per the 2021 notification, the issuer banks were only required to provide the cardholder with a list of merchants in respect of whom the CoFT has been opted by the cardholder and to de-register any such token.

Further, the RBI through the 2023 notification has enabled CoFT directly through card issuing banks. The token can now be generated through mobile or internet banking services. The token generation can be done only with the customer's explicit consent and AFA validation. The card issuer shall provide a list of merchants for whom it can provide tokenization services. Customers can now on their own maintain tokens with specific merchants or with all of them and the AFA validation may be combined for all of them. The cardholder may tokenize the card at any time as per their convenience, either on receipt of the new card or later. The token will then be made available by the issuer bank on the merchant's payment page.

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8. Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2023

Reserve Bank of India (RBI) has decided to revise the instructions contained in Para B of circular DoR.RET. REC.43/12.01.001/2023-24 dated October 16, 2023.

Accordingly, the Reverse Repo transactions of a bank with non-banks (other institutions) should be reported as under:

i. For original tenors up to and inclusive of 14 days - Not required to be reported in Form A.
ii. For original tenors more than 14 days - Item VI(a) of Form A [i.e. Loans, cash credits and overdrafts under Bank Credit in India (excluding inter-bank advances)].

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9. Reverse Repo transactions – Reporting in Form 'A' Return

Reserve Bank of India (RBI) has decided to revise the instructions contained in Para B of circular DoR.RET. REC.43/12.01.001/2023-24 dated October 16, 2023.

Accordingly, the Reverse Repo transactions of a bank with non-banks (other institutions) should be reported as under:

i. For original tenors up to and inclusive of 14 days - Not required to be reported in Form A.
ii. For original tenors more than 14 days - Item VI(a) of Form A [i.e. Loans, cash credits and overdrafts under Bank Credit in India (excluding inter-bank advances)].

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10. Reserve Bank of India (Financial Benchmark Administrators) Directions, 2023

A review of the Reserve Bank of India (Financial Benchmark Administrators) Directions, 2023 was conducted to put in place a holistic risk-based framework covering all benchmark administrators in financial markets regulated by the Reserve Bank. The directions have been revised and issued accordingly.

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11. Implementation of INR 5 Lakh limit per transaction for specific categories in UPI

As per the Reserve Bank of India (RBI) Statement on Development and Regulatory Policies dated December 08, 2023, there is a requirement to enhance the transaction limit in Unified Payments Interface (UPI) for specific categories.

Therefore, the per transaction value limit in UPI has now been increased to INR 5 Lakhs for merchants under categories aligned to hospital and educational services. This is only applicable for Verified Merchants.

Members are required to undertake requisite changes and ensure compliance by January 10, 2024.

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12. Enhancing UPI payment experience

For better customer experience, National Payments Corporation of India (NPCI) has permitted linkage of multiple payment instruments on Unified Payments Interface (UPI) including savings, current, RuPay Credit Card, PPI wallet etc.

The set of compliances towards the objective of enhancing the UPI payment experience includes:

a. maintaining superior customer experience while performing UPI Transaction
b. All merchant acquiring entities have to pass appropriate 'Featured supported value' within response validate address API.
c. Acquirers to enable merchants for full suite UPI experience across all UPI payment account types.

The compliance has to be done latest by January 31, 2024.

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D. SECURITIES EXCHANGE BOARD OF INDIA

1. SEBI Board Meeting

The following has been ratified in SEBI's Board meeting conducted in Mumbai:

a. Minimum issue size of public issuance of Zero Coupon Zero Principal Instruments by Non-Profit Organizations is reduced from INR 1 Crore to INR 50 lakh.

b. Minimum application size of public issuance of Zero Coupon Zero Principal Instruments by Non-Profit Organizations is reduced from INR 2 lakh to INR 10,000.

c. Substituting 'Social Impact Assessor' in place of 'Social Auditor'.

d. A regulatory framework for Index Providers to foster transparency and accountability in governance has been approved. The framework will be in accordance with IOSCO Principles for financial benchmarks.

e. Amendments to SEBI (Real Estate Investment Trusts) Regulations, 2014 in order to create a regulatory framework for the facilitation of Small & Medium REITs has been approved.

f. Fresh investment by (Alternative Investment Funds (AIF) beyond September 2024 to be held in dematerialized form.

g. The mandate for appointment of a custodian, currently applicable to schemes of Category III AIFs and to schemes of Category I and II AIFs with a corpus of more than INR 500 Crore, shall be extended to all AIFs.

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2. Revised framework for computation of Net Distributable Cash Flow (NDCF) by Real Estate Investment Trusts (REITs)

Securities Exchange Board of India (SEBI) has decided to standardize the framework for the calculation of available Net Distributable Cash Flows (NDFC) to promote ease of doing business. Therefore, a revised computation of NDCF by REITs and its Holdcos/SPVs is provided.

The revised framework will be applicable w.e.f. April 01, 2024.

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3. Revised framework for computation of Net Distributable Cash Flow (NDCF) by Infrastructure Investment Trusts (InvITs)

Securities Exchange Board of India (SEBI) has decided to standardize the framework for the calculation of available Net Distributable Cash Flows (NDFC) to promote ease of doing business. Therefore, a revised computation of NDCF by InvITs and its Holdcos/SPVs is provided.

The revised framework will be applicable w.e.f. April 01, 2024.

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4. Credit of units of AIFs in dematerialised form

Securities Exchange Board of India (SEBI) has decided to specify the process that has to be followed for dematerialising/ crediting the units issued, in cases where investors are yet to provide demat account details to AIFs.

Managers shall reach out to investors to obtain details. AIF industry and depositories have to adopt implementation standards as formulated by the pilot Standard Setting Forum for AIFs (SFA).

Units will be credited to separate demat accounts when units are issued to existing investors who have not provided their demat account details.

The circular will come into force with immediate effect.

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5. Upstreaming of clients' funds by Stock Brokers (SBs) / Clearing Members (CMs) to Clearing Corporations (CCs)

Securities Exchange Board of India (SEBI) vide circulars circular no. SEBI/HO/MIRSD/MIRSD-PoD-1/P/CIR/2023/084 dated June 08, 2023, and circular no. SEBI/HO/MIRSD/MIRSD-PoD-1/P/CIR/2023/110 dated June 30, 2023, had specified the framework requiring SB/CMs to upstream (i.e. placed with) clients' funds to CCs.

To address the operational difficulties in implementation, the revised framework has been set out.

Changes have been made in respect of the following:

a. Receipt/payment of funds by SBs and CMs from/to their clients
b. Upstreaming via FDR created out of clients' funds
c. Upstreaming via pledge of units of Mutual Fund Overnight Schemes (MFOS)

It has further been clarified that bank instruments provided as collateral i.e., FDRs and BGs cannot be upstreamed to CCs.

The provisions of this circular shall come into force with immediate effect.

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6. Simplification of requirements for grant of accreditation to investors

To provide flexibility and facilitate ease of accreditation of investors, it has been decided to simplify the requirements for granting accreditation to investors.

a. Accreditation Agencies may access the Know Your Custom (KYC) documents of applicants available with them in the capacity of Key Registration Agencies.
b. Accreditation is to be granted solely based on the KYC and the financial information of the applicants.
c. Revision in the validity period of the accreditation certificate.

The provisions of this circular shall come into force with immediate effect.

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7. Amendment to Circular dated July 31, 2023, on Online Resolution of Disputes in the Indian Securities Market

The circular dated July 31, 2023, on Online Resolution of Disputes in the Indian Securities Market has been modified by Securities Exchange Board of India (SEBI). Some of the key modifications are:

a. Clause 2

   'including institutional/corporate clients' added after 'Investors/Clients.

b. Clause 3(b)

   The following has been added towards the end:

   "The seat and venue of mediation, conciliation and/or arbitration shall be in India and can be conducted online.

   The fees, charges and costs for the independent mediation institution or independent conciliation institution and/or independent arbitration institution (and of the mediators/conciliators/arbitrators), and other applicable costs, charges and expenses may be as prescribed by such institution/s or as agreed upon by the parties with such institution/s.

   The claims/complaints/disputes that arise from the

activities or roles performed or to be performed by the specified intermediaries or regulated entities pertaining to the Indian securities market are in scope of this clause."

c. Clause 20(a)

The following has been added towards the end:

"The nature of determination made by the conciliator is only to provide an admissible claim value of the complaint/dispute for purposes of appropriate slab for computation of fees being applied for online arbitration. Subject to the foregoing, the investor/client, the market participant and the arbitrator/s would not be bound by such determination for the making or defending or deciding the claim/complaint/dispute, as the case may be."

d. Schedule B

The following has been added:

1A. Commodities Clearing Corporations

5A. ESG Ratings Providers and their clients

This circular shall come into force with immediate effect.

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8. Business Continuity for Clearing Corporations through Software as a Service (SaaS) Model

To strengthen the Business Continuity framework of Market Infrastructure Institutions (MIIs), in relation to major software malfunctions, it was decided initially that the systems would be designed to provide additional tools for business continuity in case of issues with Risk Management Systems (RMS) of CCs.

To manage disruptions impacting the availability of RMS, it is now proposed to have a Service (SaaS) Model.

The mechanism has been discussed with the Technical Advisory Committee of SEBI and CCs.

The Stock Exchanges, CCs and Depositories are requested to take the necessary steps for requisite infrastructure and systems. Further, a. business continuity policy has to be submitted within 2 months from the date of this circular.

The circular will come into force with immediate effect.

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9. Extension of timelines for providing 'choice of nomination' in eligible demat accounts and mutual fund folios

For ease of compliance and convenience of investors, it has been decided to extend the date for submission of 'choice of nomination' in eligible demat accounts and mutual fund folios to June 30, 2024.

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10. Modifications to provisions of Chapter XXI of NCS Master Circular dealing with registration and regulatory framework for Online Bond Platform Providers (OBPPs)

Certain modifications have been issued in Chapter XXI of the NCS Master Circular dealing with registration and regulatory framework for Online Bond Platform Providers (OBPPs).

a. Clause 5.2

"An entity acting as an Online Bond Platform Provider shall offer only the following products or securities or services on its Online Bond Platform:

5.2.1.Listed debt securities, listed municipal debt securities and listed securitised debt instruments

5.2.2. Debt securities, municipal debt securities and securitised debt instruments proposed to be listed through a public offering;

5.2.3. Listed Government Securities, State Development Loans and Treasury Bills;

5.2.4. Listed Sovereign Gold Bonds; and

5.2.5. Other products or securities or services that are regulated by a financial sector regulator viz. SEBI, RBI, IRDAI or PFRDA."

b. Clause 5.3.4

"It is also reiterated that an entity acting as an Online Bond Platform Provider shall divest itself of offerings of other products or securities or services which are not permitted under clause 5.2 of this Chapter."

c. Insertion of clause 3.4.4 of Annex-XXI-A

"All Orders with respect to securities as specified in clause 5.2.5 of this Chapter shall be as per the applicable laws and regulations of the respective financial sector regulators."

If any OBPPs fail to comply, they will be held liable in accordance with the Securities Exchange Board of India (SEBI) Act and rules, regulations and circulars as applicable.

The circular will come into force with immediate effect.

Read More

E. Steering the Cross-Border Data Transactions: Unravelling the Discrepancy in DPDP Act, 2023 and the RBI notification in banking operations

Introduction:

With the passage of the Digital Personal Data Protection Act in India in the year 2023 (hereinafter referred to as **"DPDP Act, 2023"** or the "Act"), personal data governance underwent a radical modification. This historic law established a framework that gives people more power in the digital sphere and redefined their sovereignty over their personal data. The DPDP Act, 2023, a crucial step in data regulation, has a big influence on organisations that handle sensitive data, especially banks and other financial institutions. Under the DPDP Act, 2023, banks play a crucial role as data fiduciaries, with strict obligations and compliance requirements to protect consumer data.

This note seeks to explore the complex relationships between the difficulties presented by cross-border transactions and the DPDP Act, 2023 with an emphasis on the latter's effects on banks.

The DPDP Act, 2023 has certain ambiguities as it makes its' way through the uncharted territory of data protection, particularly when it comes to cross-border data transfers and how its directions interact with industry laws like those issued by the Reserve Bank of India **("RBI")**. This intersection generates a complexity that necessitates supplementary investigation and a coordinated strategy to guarantee efficient data governance and enable financial institutions to conduct smooth international transactions. This study strives to analyse the discrepancies between the DPDP Act, 2023 and RBI notifications in the context of cross-border transactions by looking at the DPDP Act's, 2023 definitions, the responsibility placed on banks as data fiduciaries, and the current regulatory environment. It also seeks to propose possible paths towards harmonization by taking cues from global frameworks such as the EU's General Data Protection Regulation (hereinafter referred to as **"GDPR"**) and imagining a unified strategy that strikes a balance between the operational realities of banks involved in cross-border transactions and data protection imperatives.

Understanding the DPDP Act, 2023:

The DPDP Act, 2023, for the first time creates a data privacy law in India. It requires consent to be taken before the personal data is processed. For businesses, it creates limitations and the need to provide a notice whenever data is to be collected and processed. It also mandates that adequate safeguards need to be put in place. The law requires the creation of a grievance redressal mechanisms by businesses. The Data protection board would handle complaints and is empowered to impose penalties in case of non-compliance.

Following are some of the key definitions, vital to understand the DPDP Act, 2023:

(i) D*ata Principal*- As defined under Section 2 of the Act, a data principal is an individual to whom all the personal data is connected. But there are exceptions

under the Act, like in case of a minor child (under the age of 18), the parent or guardian of such child would be the data principal. Another exception is people with disabilities, here their guardians would be the data principals.

(ii) *Consent Manager*- They are registered with the board and are the point of contact to enable the data principal to give, manage, review, and withdraw her consent through an accessible, transparent and interoperable platform.

(iii) *Data Fiduciary*- As defined under Section 2(k) of the Act, data fiduciary is someone who alone or with others determines the purpose and means of processing personal data.

(iv) *Significant Data Fiduciary*- As notified under Section 10(f) the Act, they deal with large chunks of sensitive data and have higher standards of compliance.

Banks as Data Fiduciaries:

Banks and other financial institutions come to be viewed as data fiduciaries under the DPDP Act, 2023 which makes them subject to compliance under the Act. As banks very often determine the purpose and means of processing customer data, banks process and store data to provide basic banking services to their customers. They use customer data to prevent money laundering, and for many other purposes customer data is used by banks.

Moreover, the conversation regarding banks and data is not restricted to the DPDP Act, 2023. Banks have been acting as data fiduciaries for a long time and this has been recognized by various bills and sectoral regulators previously. Due to this guideline, and bills like 'The Personal Data Protection Bill, 2019' or the 'Report on the Justice Srikrishna Committee of 2018' and 'Master Direction of the Reserve Bank of India on NBFC regarding Account Aggregators' were introduced. They highlighted the fact that banks are essentially data fiduciaries and put regulations in place to protect individual's data. This also pushes us to the next line of thought, the need for banks to take consent from their customers i.e., the data principals with respect to their personal data and need for them to protect their customer's data. These are some of the duties of banks as data fiduciaries, the DPDP Act, 2023 puts many other duties on banks.

Duties of Banks as Data Fiduciaries:

Banks as data fiduciaries have certain duties and obligations they need to comply to and the idea is that the people giving their data to the banks should have their rights protected, one way of doing this is through consent. The basic objective is to empower individuals, such that consent over their data is free, informed, explicit, specific, and revocable. The DPDP Act, 2023 requires banks to seek the consent of the data principal, and this is done by sending a notice. The notice must determine the purpose for which the data is being processed. Banks need to have a complaint raising mechanism and they should inform the customer about it. The consent given

to the banks can be withdrawn freely. Banks must ensure full compliance with these requirements of the Act.

Under Section 8 of the Act, the Banks need to take meticulous steps to prevent data breaches and in case of such breach inform the Data Protection Board as well as the data principal along with IN-CERT, and the nodal agency within six hours. Banks need to implement appropriate technical and organizational measures to ensure effective compliance. In case a data principal withdraws consent, then the banks must erase such data in its possession. The banks need to provide the information of the data protection officer ("DPO") and their official details. DPO is the point of contact of the data principals for the grievance redressal mechanism. The banks would need to provide grievance redressal mechanisms to the data principals as mentioned above.

Banks, which qualify as the significant data fiduciaries, have some additional compliances they need to adhere to. As specified above, Section 10 of the Act defines "significant data fiduciaries," who manage large chunks of sensitive data, which also states that they hold a huge customer base, for example HDFC which has a customer base of around 12 (twelve) crore people. This essentially makes banks, which manage large chunks of sensitive customer data as significant data fiduciaries. The compliance norms and liability are also higher for them. They have to appoint a DPO, an independent auditor who would carry out data audits to evaluate the compliance of the bank in accordance with the provisions of the Act.

Banks protect their customer's data by using multiple techniques. Some of them are as follows:

(i) Data Encryption- Banks need to make sure that their systems have the highest encryption standard. A banking app, for example should ensure nobody can see what the user is doing on the app even if the data is intercepted.

(ii) Risk Assessment- Banks need to periodically ensure that their IT infrastructure is sufficient. This is done through periodic risk assessments, which point out the vulnerabilities in the infrastructure and same can be corrected.

(iii) Monitor and Analyze User Data- Banks need to monitor the activity of their users as this would help in detection of any signs of a cyber-attack.

(iv) Manage Third Party Risks- Financial institutions and banks need to closely monitor whenever third parties are given access to the data. Their access to critical data should be very limited.

In case of non-compliance, the Act also imposes penalties on the banks under Section 57-61 wherein the banks are ought to pay compensation under Section 64 of the Act.

The Act applies to cross border transactions, and data to be stored and processed outside of India as well. Under Section 16 of the Act, it is highlighted that DPDP Act, 2023 has extra-territorial application. The next part of this note will discover how banks would navigate through this sphere of cross-border transactions.

Banks and Cross-border Transactions/ Transfer and the ambiguity within the DPDP Act, 2023:

Banks and other financial institutions that collect and process data come under the category of the DPDP Act, 2023. There are banks which engage in cross-border payment systems leading to transfer of data outside of India. The Act allows for cross-border transfer of data under Section 16 of the Act, but it does not specify any kind of mechanism to be followed by the banks. Moreover, it allows for laws or acts with a higher degree of protection to have precedence over it, which makes it very difficult for the banks to understand what compliances they need to abide by to avoid the infringement of the rights of their data principals or customers. For the act to govern these financial institutions/ banks, there must be a clarity in the Act. The Act does not provide any specific criteria for approving the cross-border transfer of data and does not provide much clarity over the compliances to be followed by the banks with regards to personal data of individuals. This pushes one to look at the sectoral regulators because if they provide a higher degree of protection, they are to be followed.

But what is the role of banks in such cross-border transactions and how do banks' balance between the DPDP Act, 2023 and existing sectoral regulations regarding such cross-border transactions. The next section would explore the same.

Disharmony between RBI notification and the DPDP Act, 2023:

As the Act does not provide much clarity over the possible course of action as stipulated above, there are only speculations over what kind of safeguards can the DPDP Act, 2023 provide. There are no specific safeguards mentioned but one could assume that there could be a requirement to take specific consent in the case of cross-border transactions and in case of infringement or violations the Data Protection Board of India can be approached. It is the adjudicatory body under the Act which can pass binding orders. As mentioned in Section 16 of the Act, regulations and rules providing higher protection would be given primacy in case of cross-border transactions. This pushes us to look at the RBI regulation on 'Storage of Payment System Data'.

In the year 2018, RBI released a notification to better monitor Storage of Payment System Data. This is done by providing unfettered supervisory access to such stored data with the system providers as well as the data with their service. The notification says that all system providers need to ensure that their entire payments system data is stored in India. The data should contain end to end transaction details of the information collected/ carried. Processed as part of the message/ payment instruction. Banks need to comply to the notification within 6 (six) months and submit a compliance report by October 15, 2018. The System providers need to submit a system audit report and the audit is to be conducted in CERT-IN and auditors need to certify the completion of the activity. The system audit report is to be approved by the board of system providers and then to be submitted to the RBI. The FAQ's released with the notifications point

out that the entire payment system should be stored in India only. And the data stored outside of India should be deleted within the prescribed time-limit.

Here, while looking at the RBI notification, one can clearly mark that there are a lot of discrepancies and disharmony between the DPDP Act, 2023 and the RBI notification. The Act gives primacy to stronger legislation which is the RBI notification, but the notification does not have many of the groundbreaking aspects of the Act. The most prominent aspect of the Act is its penalty imposition system, the RBI notification does not engage with the question of such penalty. The DPDP Act, 2023 and the RBI notification both talk about having an auditor carry out audits, but no clarity over whether the independent auditor appointed by the significant data fiduciary would be eligible to do so. Moreover, the notification makes RBI, the decision-making authority to whom the audit-report is to be submitted whereas the DPDP Act, 2023, has the Data Protection Board of India which is the adjudicatory authority and incase of non-compliance to the provisions of the Act, people can approach the board.

But now if we look at both of them together, the RBI notification and the DPDP Act, 2023 seem to be unconnected. Even if primacy is given to the RBI Notification, there are a lot of gaps which remain uncatered. This creates ambiguity for both the banks and the data principals.

Thus, there is a strong need to harmonize these sectoral regulations and to understand the in- dept knowledge relating to the DPDP Act, 2023 and simultaneously try to find a solution in light of the same.

Understanding the legislative intent behind the DPDP Act, 2023:

In order to harmonize the DPDP Act, 2023 with sectoral regulators we must first understand the legislative intent behind the Act.

The 'B.N. Srikrishna committee' was part of the aftermath following the Puttuswamy Judgement. The above stated committee discussed various aspects of data protection including cross-border transactions and the committee focused on the concept of free and fair digital economy. It talked about compulsory and periodic audits of the records of data with regard to cross-border transactions. Furthermore, the committee recommends the imposition of liabilities in case harm is caused to the principal in the transfer of such data. Now if these recommendations are viewed with the lens of the DPDP Act, 2023, the requirement to conduct audits and the idea of imposing penalties finds its basis here. This brings us to the understanding that the intention to give protection and monitoring of cross-border transactions was supposed to be done by the Data Protection Act. But the DPDP Act, 2023 in its current form, does not provide much information of how such cross-border transactions would work. Thus, there is a need to look at the international frameworks on which the DPDP Act, 2023 relies and how they are dealing with the question of cross-border transactions.

GDPR and Cross Border Transfers/ Transactions by Banks:

The DPDP Act, 2023 has drawn inspiration for its data protection measures for GDPR, the Data Protection Act of the EU. This inspiration can traced back to the 'Joint Committee' on the 'Personal Data Protection Bill, 2019'. The joint committee talked about the legal framework of GDPR, and highlighted its features like informed consent, automated decision-making, breach notification, imposing penalties of data fiduciaries in case of data breach, etc. most of which have been incorporated in the DPDP Act, 2023.

GDPR regulates cross-border transactions and as it is very evident that taking inspiration from the legal framework of GDPR is not completely out of scope, the same can be done for cross-border transactions.

The GDPR applies to all of Europe without any exceptions, it applies to Swiss banks when offering cross-border services to customers domiciled in the EU. Moreover, there is particular emphasis on GDPR compliance by foreign companies. GDPR provides rights to audit and to impose administrative fines, which can maximum EUR 20 million or 4% of the country's yearly turnover.

Articles 44, 45, 46 and 49 of GDPR are for cross-border transactions. The legal framework of GDPR in case of cross-border transactions pushes for certifications, consent by data principal, safeguards to protect the data principal. The safeguards include:

(i) Standard Contractual Clauses- These are standard clauses that the European commission has approved and provide adequate safeguards to personal data. Organisations can use this to protect data sent outside of EU.

(ii) Binding corporate rules- These rules essentially mean relying on corporate statutes in order to safeguard data. These are legally binding rules approved by a competent adjudicatory authority. They regulate transfer and processing of data.

(iii) Ad hoc Contractual Clauses- These clauses need approval from the relevant data protection authority to provide safeguards to appropriate safeguards for personal data. The provide a certification mechanism and the code of conduct, these are approved by the data protection authority.

GDPR emphasizes explicit consent of the data subject- Personal data may be transferred to another country if explicit consent is given by the data principal.

And in case under GDPR, if data is being transferred to a country where there is no GDPR protection then the same should be informed by the company. Now if we use the practices under GDPR and look at the DPDP Act, 2023 and the RBI notification through it we can come to a possible solution.

A Possible Solution:

The 'Srikrishna committee' and the 'Joint Parliamentary committee' both emphasis on the need to harmonize sectoral laws and regulations with the data protection laws.

Section 16, of the Act, while talking about cross-border transactions does not really talk about storage of data under it which is seen in the RBI notification. As briefed above, there is a lack of clarity over auditing and who would be carrying out the auditing there is confusion over who would be the decision-making authority. These laws can be harmonized by making the necessary amendments to the DPDP Act, 2023 to accommodate the notifications or the regulations released by the sectoral regulators. Moreover, steps need to be taken to inform both the data principals and the data fiduciaries about these differences. Thus, there must be active dissemination of information by the government. One can also look at the example of Swiss Banks and how they are being governed by GDPR for their cross-border transactions. Thus, the best way to resolve this irregularity is to rely on international frameworks like GDPR as they have been the basis of the DPDP Act, 2023.

Post DPDP Act 2023, the cost of compliance on banks has already increased and they have to rather spend money to set up systems which safeguard data, hire independent auditor, hire DPO(s) and other attached costs. If there are gaps between the DPDP Act, 2023 and sectoral regulations, it is likely to push these costs even further. Therefore, there is a need for more committees to be set up to harmonize these gaps and one way of doing so is incorporating the safeguards mentioned in the GDPR. Moreover, as these would be cross-border transactions where the dealings would be with international players, it would be best to harmonize the laws while relying on international norms.

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