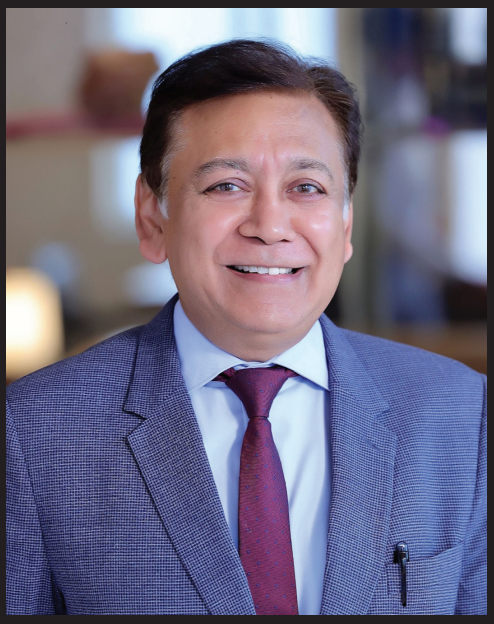
Newsletter

Volume 35, Dec 2024

SNG & PARTNERS
Advocates & Solicitors
ESTD 1962

INDEX

INDEX



Editor's note

Dear Readers,

I am pleased to share with you our newsletter for the month of December, 2024, covering significant legal and regulatory developments ranging from RBI/SEBI to judicial precedents under IBC, Arbitration Act and many more.

In a landmark decision, Hon'ble Supreme Court, relying upon the "group of companies" doctrine in Indian arbitration jurisprudence, held that once there exists a valid arbitration agreement, the referral court should not venture into contested questions involving complex facts.

The Bombay High Court has provided needed clarity on the simultaneous initiation of arbitration proceedings and proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act.

The recent judicial pronouncements have further refined and expanded the interpretation of the Insolvency and Bankruptcy Code, 2016 (IBC), addressing critical aspects of insolvency resolution, creditor rights, and procedural norms. CIRP can be initiated against a third-party hypothecator if it has covenanted to pay the dues/shortfall.

The recent updates from the Reserve Bank of India (RBI) are set to create significant ripple effects across various sectors of the economy, financial institutions, and stakeholders. Compliance with UNSC sanctions under UAPA has been reinforced, ensuring robust anti-terrorism financing measures. Interest rate ceilings on FCNR(B) deposits were raised, encouraging foreign currency inflows. The Cash Reserve Ratio (CRR) was reduced, increasing bank liquidity to boost lending. Finally, collateral-free agricultural loan limits were raised to 2 lakh, improving credit access for farmers and supporting rural development. These updates signal progressive reforms.

The recent key highlights from the Securities and Exchange Board of India (SEBI) include revised business continuity protocols for stock exchanges, ensuring seamless operations during outages, and enhanced SMS/email alert frameworks to improve investor communication. SEBI has also emphasized due diligence by mandating electronic document repositories for public issues and revised capacity planning for market infrastructure institutions. A Master Circular on Depositories has been issued covering Beneficial Owner Accounts, Depository Participants, Issuers, and Depositories, with cross-referencing among sections.

In this issue, we feature two in-depth thought papers by our in-house experts, Sana Khan, Associate Partner, and Pankaj Bajpai, Senior Associate.

Sana's article, **Is Arbitration Clause Losing Its Sheen in a RERA Agreement for Sale?** explores the diminishing significance of arbitration clauses in agreements for sale under the Real Estate Regulatory Authority (RERA). While arbitration has long been valued for its cost-effectiveness and efficiency, RERA's statutory dispute resolution framework is increasingly taking precedence.

Pankaj's article, Addressing **Unregulated Lending Practices**, examines the pressing need to tackle the challenges of unregulated lending, particularly in the digital era. He provides a nuanced analysis of the proposed bill, highlighting its potential implications for stakeholders in finance, law, and public policy.

I hope you will find this edition useful.

Best wishes,

Rajesh Narain Gupta

Founder & Chairman,
SNG & Partners

A. ARBITRATION AND CONCILIATION ACT, 1996

1. Supreme Court: Once there exists a valid arbitration agreement, then it would not be justifiable for referral courts at the referral stage to venture into contested questions involving complex facts

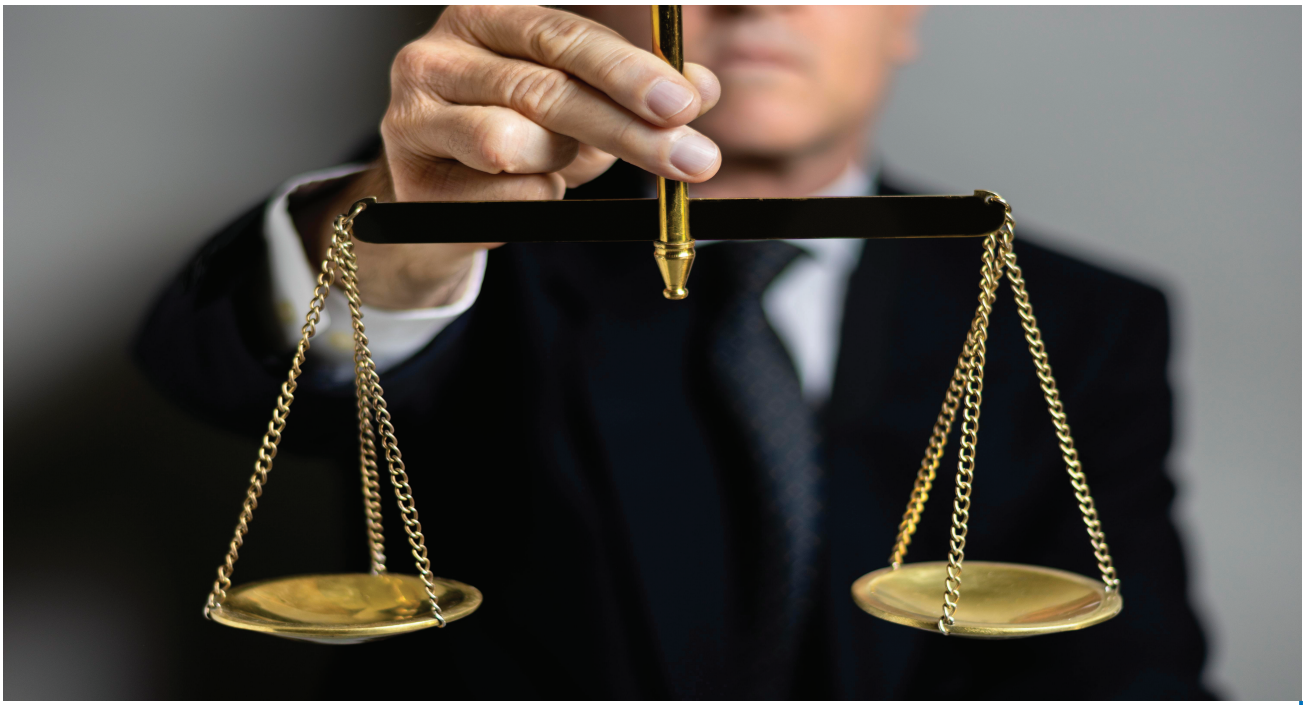
A CJI-led constitution bench of the Supreme Court, reiterated its earlier judgments titled Cox and Kings Ltd. v. SAP India Pvt. Ltd. & Anr. reported in 2023 INSC 1051 in which while propounding the concept of "Group Companies" in the jurisprudence of Indian arbitration, interalia it was held that conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement, the requirement of a written arbitration agreement under Section 7 does not exclude the possibility of binding non-signatory parties and the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory is bound by the arbitration agreement or not.

Read More

2. Bombay High Court Opines: Both proceedings under SARFAESI and arbitration can proceed parallelly.

The single-judge bench of the Bombay High Court held that SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is in the context of an adjudicatory proceeding. The SARFAESI proceedings and arbitration proceedings thus can proceed parallelly.

Read More



B. INSOLVENCY AND BANKRUPTCY CODE, 2016 (IBC)

1. SC: Resolution plan can be submitted by promoters even if MSME registration is acquired post commencement of CIRP

The Supreme Court, in its interpretation of Section 240A of the Insolvency and Bankruptcy Code, 2016, declared that promoters can submit a resolution plan irrespective of obtaining MSME registration post the initiation of the Corporate Insolvency Resolution Process (CIRP) as ineligibility under Section 29A(c) occurs at the time of submitting the resolution plan and not at the time of initiation of CIRP.

Read More

2. NCLAT: Pendency of proceedings before NCLT for approval of scheme of arrangement does not preclude Financial Creditor to proceed with application u/s 7 IBC"

In a case regarding the insolvency proceedings of **Jaiprakash Associates Limited (JAL)**, the NCLAT delivered a judgment that examined the validity of claims made by the Corporate Debtor in the context of ongoing restructuring efforts and defaults. The Tribunal scrutinized the debt resolution strategies, including the Master Restructuring Agreement (MRA), and the status of the Corporate Debtor's financial obligations. The case raised questions about the applicability of restructuring agreements and the nature of defaults when such agreements were in progress.

The Court rejected the Corporate Debtor's argument regarding the cessation of default due to a pending scheme of arrangement as the Master Restructuring Agreement did not cover the six facilities mentioned in the Section 7 application filed by the creditor and held that the mere fact that the proceeding for approval of scheme of arrangement which was initially approved by the lenders remains pending from 2018 to 2024 cannot be a ground for rejection of petition.

Read More

3. NCLAT clarifies eligibility of Resolution Applicant: 'The term 'entity' in MIB guidelines can include individuals'

NCLAT examined the procedural aspects of the Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") and upheld the decisions made during the Challenge Process conducted by the Resolution Professional (hereinafter referred to as "RP"). The Tribunal emphasized that: "Challenge Process dated 27.10.2023 was conducted in accordance with the CIRP Regulations as well as the Process Note dated 12.10.2023."

This observation came after the Appellants challenged the bidding process, alleging violations of CIRP regulations and claiming that the selected bidder's offer was invalid. The Tribunal further upheld the authority of the Committee of Creditors (hereinafter referred to as "CoC") to conduct negotiations for value maximization post-Challenge Process, and affirmed that the Resolution Professional had properly verified the eligibility of the Successful Resolution Applicant (hereinafter referred to as "SRA").

Read More

4. NCLAT disposes of appeals, emphasizes necessity of reasoned Interim Orders in Corporate disputes

National Company Law Appellate Tribunal disposed of the Company Appeals, concerning an impugned order passed by the National Company Law Tribunal (NCLT) dated 20.11.2024. The appeals challenged the interim order directing the Respondents not to give effect to a resolution if passed at the Extra-Ordinary General Meeting (EMG) scheduled for that date. The Tribunal emphasized the importance of assigning reasons for interim orders, particularly in cases affecting the rights of the parties involved.

Read More

5. NCLAT dismisses appeal against NCLT's AGM order, stresses substantive rights must be affected

National Company Law Appellate Tribunal (NCLAT) held that an appeal under Section 421 of the Companies Act, 2013, against an interlocutory order permitting the holding of an Annual General Meeting (AGM) without affecting substantive rights, is not maintainable. This decision arose from a case involving allegations of oppression and mismanagement against the majority shareholders of a company. Notably, the Tribunal emphasized that procedural orders do not qualify for appeal unless substantive rights are determined.

Read More

6. Who will have the first charge over the property in question i.e. Secured Creditor or the State / Central Government (Crowns debt) on account of non-payment of dues of the Sales Tax department?

The Supreme Court emphasized that "the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority," under Section 26E of the SARFAESI Act.

The case involved a dispute over the ownership and mutation of land purchased at an auction conducted by a bank under the SARFAESI Act, following a default by the previous owner. The Court's observations pointed to a broader principle of securing the interests of those who acquire properties through legitimate auction processes, particularly when debts are settled by secured creditors.

Read More

7. Whether CIRP can be initiated against a mere hypothecator, who is neither a borrower nor has executed the deed of guarantee: : Supreme Court

The Supreme Court recently observed that if in a Deed of Hypothecation, a hypothecator (who is neither a borrower not has executed any deed of guarantee) in addition to creation of charge, has undertaken the obligation to pay the lender amount due under the relevant facilities or to make good the shortfall in realization of the outstanding debt to the lender in the event charged assets are not sufficient to satisfy the outstanding debts, it amounts to a guarantee in terms of Section 5(8) of the Code. Further it has been held that as per the definition of 'financial debt' under Section 5(8) of the IBC, there is no requirement that a debt becomes financial debt only when default occurs. Under Section 5(7) of the IBC, any person to whom financial debt is owed becomes a Financial Creditor even if there is no default in payment of debt.

"The amount of any liability in respect of any of the guarantees for money borrowed against the payment of interest is a financial debt under Section 5(8) of the IBC..... There is no requirement under Section 5(8) of the IBC that there can be a debt only when there is a default. The moment it is established that the financial debt is owed to any person, he/she becomes a Financial Creditor", further added the Court.

This remark came as part of its deliberation on whether appellants, who acted as Secured Creditors, should be classified as Financial Creditors under the Insolvency and Bankruptcy Code (referred to as "IBC"). The case stemmed

from a dispute over the classification of appellants, who had provided security through a Deed of Hypothecation (DoH), but had not directly lent funds to the corporate debtor, Reliance Infratel Ltd. (RITL).

Read More

8. Non-Fund Based facilities cannot be refused to be disbursed when approved Resolution Plan contains a clause for their disbursement – NCLAT

In a recent ruling, the National Company Law Appellate Tribunal (NCLAT) observed that *"the commercial wisdom of the Committee of Creditors (CoC) is central to the feasibility and viability of the Resolution Plan,"* as per Section 30(4) of the Insolvency and Bankruptcy Code.

The NCLAT's observation emphasized that the commercial decisions made by the CoC, particularly regarding the roll-over of Non-Fund Based (NFB) facilities, must be respected once a resolution plan is approved. The issue at hand was whether the Respondents (Corporate Debtor and investors) were entitled to the release of NFB limits without further evaluation of the borrower's financial condition, as prescribed by the terms of the approved Resolution Plan.

Read More

C. RESERVE BANK OF INDIA (RBI)

1. Banks must review Inoperative Accounts / Unclaimed Deposits

A circular issued by the Reserve Bank of India (RBI) refers to the RBI circular DOR.SOG (LEG).REC/64/09.08.024/2023-24, dated January 01, 2024, regarding inoperative accounts and unclaimed deposits. It mandates banks to review accounts with no customer-induced transactions for over a year, segregate accounts for government schemes like DBT/EBT, and trace account holders.

Banks must activate such accounts smoothly and raise customer awareness via campaigns. It also advises facilitating KYC updates and organizing special campaigns to reduce frozen accounts. Banks are required to report quarterly progress to the Senior Supervisory Manager starting December 31, 2024.

Read More

2. Implementation of Section 51A of UAPA,1967: Updates to UNSC's 1267/ 1989 ISIL (Da'esh) & Al-Qaida Sanctions List: Amendments in 03 Entries

A circular issued by RBI updates the UNSC's 1267/1989 ISIL (Da'esh) & Al-Qaida Sanctions List with amendments to three entries. Regulated Entities (REs) are instructed to ensure compliance with Section 51A of the UAPA, 1967, by checking their records for individuals/entities listed in the UNSC's terrorist-linked lists. REs must follow the procedures outlined in the UAPA Order and take necessary actions as per the updated listings. The details are available on the UNSC website, and any delisting requests must be forwarded to the Ministry of Home Affairs.

Read More

3. Amendment to Framework for Facilitating Small Value Digital Payments in Offline Mode

A circular issued by RBI updates the RBI's Offline Framework for small value digital payments. The transaction limit for UPI Lite has been increased to INR-1,000, with a total limit of INR-5,000, as announced in the Statement on Developmental and Regulatory Policies dated October 09, 2024.

The updated framework, effective immediately, amends the previous limits of INR-500 per transaction and INR-2,000 total for offline payments.

Read More

4. **Interest Rates on Foreign Currency (Non-resident) Accounts (Banks) [FCNR(B)] Deposits**

A circular issued by RBI updates the interest rate ceilings for FCNR(B) deposits. Effective December 06, 2024, the ceiling for deposits of 1 to less than 3 years is increased to Overnight ARR plus 400 basis points, and for deposits of 3 to 5 years, to Overnight ARR plus 500 basis points. These changes will be in effect until March 31, 2025.

Read More

5. **Maintenance of Cash Reserve Ratio (CRR)**

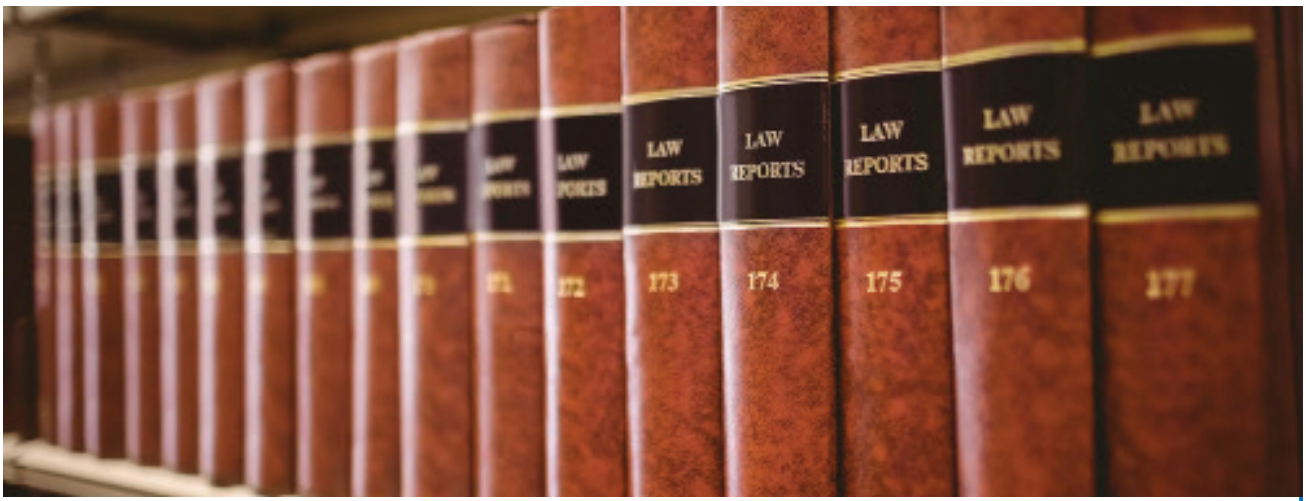
A circular issued by RBI announces a reduction in the Cash Reserve Ratio (CRR) by 50 basis points in two equal tranches. The CRR will be 4.25% from December 14, 2024, and 4.00% from December 28, 2024. The notification was issued on December 06, 2024.

Read More

6. **Credit Flow to Agriculture – Collateral free agricultural loans**

A circular issued by RBI raises the limit for collateral-free agricultural loans to ₹2 lakh per borrower, up from ₹1.6 lakh. Banks are advised to waive collateral and margin requirements for such loans and implement the changes by January 1, 2025. Publicity for the changes is also recommended.

Read More



D. SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

1. Master Circular for Depositories

A Master Circular for Depositories has been issued by SEBI to consolidate and provide access to all relevant circulars and directions up to September 30, 2024. It supersedes the Master Circular issued on October 06, 2023 with updates on repealed regulations. The circular, effective from the date of issuance, includes updates and rescindments of previous circulars, as outlined in Schedule A. Actions taken under rescinded circulars will be deemed valid under the new provisions.

The circular covers Beneficial Owner Accounts, Depository Participants, Issuers, and Depositories, with cross-referencing among sections. It is issued under SEBI's powers to protect investor interests and regulate the securities market. The circular is available on the SEBI website.

Read More

2. Business Continuity for Interoperable Segments of Stock Exchanges

SEBI issued a circular on Business Continuity for interoperable segments of stock exchanges, focusing on Business Continuity Planning (BCP) and Disaster Recovery Sites (DRS) for Market Infrastructure Institutions (MIIs). The first phase mandates the use of Software as a Service for Clearing Corporations' Risk Management Systems. The second phase addresses potential outages at stock exchanges, allowing participants to hedge positions via other exchanges.

Exchanges are required to create reserve contracts for exclusive scrips and derivatives during outages and consider introducing new index derivatives. NSE and BSE will prepare a joint Standard Operating Procedure (SOP) for alternative trading venues. Exchanges must implement systems, amend regulations, and report progress to SEBI. The provisions will be effective from April 1, 2025.

Read More

3. SMS and E-mail alerts to investors by stock exchanges

SEBI, through its circulars (CIR/MIRSD/15/2011 dated August 2, 2011, and Clause 33 of the Master Circular for Stock Brokers dated August 9, 2024), has issued guidelines on SMS and email alerts to investors. The circular permits stock brokers to upload the same mobile number/email for multiple clients within a family or authorized persons of entities like HUFs, corporates, partnerships, and trusts under specific conditions. These amendments are effective immediately. Stock exchanges are instructed to notify members and update relevant regulations. The circular is available on SEBI's website.

Read More

4. Repository of documents relied upon by Merchant Bankers during due diligence process in Public issues

SEBI issued a circular requiring merchant bankers to upload and maintain due diligence documents on a Document Repository platform set up by stock exchanges. This platform aims to facilitate the electronic storage and access of documents related to public issues. Merchant bankers must upload documents within specific timelines starting January 2025.

The documents should be relevant, complete, and legible, and accessible only through individual login credentials. SEBI will have access for supervisory purposes. The circular applies to draft offer documents filed on or after January 1, 2025, and is available on SEBI's website.

Read More

5. Revised Guidelines for Capacity Planning and Real Time Performance Monitoring framework of Market Infrastructure Institutions (MIIs)

SEBI issued revised guidelines for capacity planning and real-time performance monitoring of Market Infrastructure Institutions (MIIs) through a circular. MIIs, including stock exchanges, clearing corporations, and depositories, are required to ensure proactive capacity planning and real-time monitoring of IT systems.

The guidelines emphasize system scalability, stress testing, performance monitoring, and alert systems. MIIs must submit revised capacity planning frameworks to SEBI within 3 months. Provisions related to capacity planning will come into effect in 3 months, while others are effective immediately. This circular supersedes previous provisions and is available on SEBI's website.

Read More

6. Enhancement in the scope of optional T+0 rolling settlement cycle in addition to the existing T+1 settlement cycle in Equity Cash Markets

SEBI issued a circular to enhance the scope of the optional T+0 rolling settlement cycle, in addition to the existing T+1 cycle. The number of eligible scrips for the T+0 cycle will be increased to the top 500 scrips by market capitalization starting from January 31, 2025. All stock brokers will be allowed to participate, and custodians will implement necessary systems for institutional investor participation.

A Block Deal window will be available in the T+0 settlement cycle. MIIs are required to publish operational guidelines and provide fortnightly reports. The provisions will be effective from January 31, 2025, and May 1, 2025, for different aspects.

Read More

7. Relaxation from the ISIN restriction limit for issuers desirous of listing originally unlisted ISINs (outstanding as on December 31, 2023)

SEBI issued a circular relaxing the ISIN restriction limit for issuers converting unlisted ISINs outstanding as of December 31, 2023, to listed ISINs. These converted ISINs will be excluded from the maximum limit of ISINs maturing in a financial year, as specified in Chapter VIII of the NCS Master Circular. This modification aims to encourage the listing of outstanding unlisted ISINs, following Regulation 62A of the LODR Regulations. The circular is issued under SEBI's powers to protect investors and regulate the securities market.

Read More

8. Classification of Corporate Debt Market Development Fund (CDMDF)as Category I Alternative Investment Fund

SEBI issued a circular classifying the Corporate Debt Market Development Fund (CDMDF) as a Category I Alternative Investment Fund (AIF) under Regulation 3(4)(a) of the AIF Regulations. CDMDF, established to act as a Backstop Facility for investment-grade corporate debt securities, aims to enhance corporate bond market development and secondary market liquidity during times of stress. The circular is issued under SEBI's powers to protect investor interests and regulate the securities market.

Read More

9. SEBI amends AIF Regulations to clarify pro-rata and pari-passu rights of investors of AIFs

SEBI issued a circular amending the AIF Regulations, 2012, to clarify pro-rata and pari-passu rights of investors in AIF schemes. Pro-rata rights must be maintained for investments and distributions, except when an investor is excluded or defaults on contributions. Differential rights may be offered to select investors, provided they don't affect others' rights. AIFs may offer subordinate units to certain entities, such as the manager, sponsor, or government-controlled bodies. Existing AIFs with priority distribution models are restricted from accepting new commitments. Compliance with these provisions is required, and the circular is effective immediately.

Read More

10. Measures to address regulatory arbitrage with respect to Offshore Derivative Instruments (ODIs) and FPIs with segregated portfolios vis-à-vis FPIs

SEBI has issued a circular modifying certain requirements for Offshore Derivative Instruments (ODIs) and Foreign Portfolio Investors (FPIs) with segregated portfolios. The changes, outlined in the amended FPI Master Circular (No. SEBI/HO/AFD/AFD-PoD-2/P/CIR/P/2024/70), include conditions for the issuance of ODIs, disclosure requirements for ODI subscribers, and the handling of FPIs with segregated portfolios.

ODIs must now be issued only through a dedicated FPI registration with no proprietary investments. New disclosure obligations are imposed on ODI subscribers meeting specific criteria, and a revised procedure for validating compliance will be implemented. Transitional measures allow existing ODIs with derivatives as underlying to be redeemed within one year, and ODI issuing FPIs must obtain separate dedicated registration if necessary. The provisions are effective immediately, with certain provisions taking effect after five months.

Read More

11. Market Intermediaries must categorize and share data within 60 days for purpose of Research / Analysis

SEBI's circular (SEBI/HO/DEPA-III/DEPA-III_SSU/P/CIR/2022/25) mandates market intermediaries to share data in two categories: public data for research and private, restricted data. Public data includes aggregate and anonymized data, while private data covers sensitive information. MIIs must categorize data and share lists with SEBI for approval within 60 days. Sample data and request forms should be posted on their websites. The circular is effective immediately, with implementation reports due in three months.

Read More

12. SEBI outlines Industry Standards on Reporting of BRSR Core

SEBI issued a circular outlining industry standards for Business Responsibility and Sustainability Report (BRSR) Core disclosures, developed by the Industry Standards Forum (ISF) with input from ASSOCHAM, CII, FICCI, and SEBI. These standards are designed to ensure compliance with SEBI's LODR regulations. Listed entities must adhere to these standards starting FY 2024-25. Stock exchanges are instructed to inform their listed entities and ensure compliance. The circular is accessible on SEBI's website.

Read More

13. SEBI modifies time limit for uploading Draft Scheme Information Documents

SEBI issued a circular modifying the requirement for uploading Draft Scheme Information Documents (SID). Previously, SIDs were to be uploaded on SEBI's website for 21 working days for public comments. Following a review, it was decided that SIDs will now be uploaded for 8 working days. After receiving SEBI's observations, Asset Management Companies (AMCs) may file the final offer documents. The modifications to the Master Circular on Mutual Funds (dated June 27, 2024) come into effect immediately. The circular was issued under SEBI's regulatory powers.

Read More

E. THE BANNING OF UNREGULATED LENDING ACTIVITIES BILLS

Present scenario

Popping of unregulated money lending activities and rampant surge in borrowings has led to soaring high of loan default cases on one hand, and volatility in banking industry on the other, leading to economic digression.

Its' not only about the population living in small towns and villages that are most affected by unlawful lending, but, the urban youth also, who get caught in the fancy digital applications emerged during and after Covid period. One of the defining features of digital lending is its flexibility in offering loans quickly, without even requiring extensive documentation or formal credit checks. This adaptability makes digital/ informal lending appealing to those unable to meet the stringent requirements of formal financial institutions. Unlike banks/ financial institutions/NBFCs, the digital lenders can disburse funds almost immediately.

The growing number of such lenders disburse loans to borrowers based on their income and cash flow statements, and then impose exorbitant interest rates, in addition to processing fees and hidden charges. Resultantly, the borrowers end up losing their assets, and sometimes their lives, due to trauma and illegal harassment faced by the recovery agents. These lenders typically collect the borrowers' personal data from various digital payment platforms, and resort to various illegal and unauthorised means for whipping out the money advanced to their borrowers.

Despite the directions of RBI to the android applications over google play store and apple software, to either provide RBI licences or confirm that they are facilitating lending through licensed partners, the demon of digital money lending business has marked steady and substantial growth and thus a regulatory stop & check measure was the need of the hour.

Challenges faced by borrowers from digital money lending

Due to very nature of the lending and the risk factors, the lending rates are much higher than those in formal financial channels. These rates are often compounded monthly, further increasing the cost of borrowing. Despite this, borrowers frequently turn to digital lenders for their accessibility and ease.

Digital lending also couples with itself various illegal and unethical recovery means. While some lenders rely on social pressure to recover debts, others resort to coercive practices, leading to precarious exploitation.

Since the digital lending business operates outside the purview of regulatory check, it comes with various pros and cons. On one hand, the lack of formal regulation allows lenders and borrowers greater flexibility in resolving disputes, whereas on the other hand, it exposes borrowers to risks of exploitation and lack of legal recourse in cases of disputes. Though digital lending helps those who are excluded from formal financial services due to lack of credit history or formal employment, however, its' unregulated

nature poses significant risks, including unfair lending terms, and social harm through coercive recovery practices.

Introduction

To address the issues, on December 13, 2024, the Ministry of Finance introduced the Banning of Unregulated Lending Activities (Draft) Bill ("Bill"), proposing a set of measures, including banning of unregulated lending. The Bill has been drafted on the basis of a report submitted by the Working Group on Digital Lending (WGDL) constituted by the RBI, with a view to curb unregulated lending activities and to protect the interest of borrowers.

Key provisions

Chapter I- definitions

1. "Digital Lending" means a remote and automated public lending activity, largely by use of digital technologies for customer acquisition, credit assessment, loan approval, disbursement, recovery, and associated customer service.
2. "Lender" means any person, who undertakes lending activities.
3. "Public lending activity" means business of financing by any person whether by way of making loans or advances or otherwise of any activity other than its own at an interest, in cash or kind but does not include loans and advances given to relative(s).

   Explanation: (i) For the purposes of this clause, the expression "relative" shall have the same meaning as assigned to it in the Companies Act, 2013 (18 of 2013);

(ii) For the purpose of this clause, the expression "business" means an organised activity undertaken by a person with the purpose of making gains or profits, in cash or kind.

Chapter II – Banning of unregulated lending activities

1. The Bill seeks to ban the unregulated lending activities, including digital lending, and prohibits the lender from directly or indirectly, promoting, operating, or issuing any advertisement in pursuance of an unregulated lending activity, that are not regulated under the existing governing laws in India i.e., the Reserve Bank of India Act, 1934 and the State Bank of India Act, 1955, etc.
2. The Bill prohibits any person to knowingly make any statement or promises which is false, deceptive, or misleading, which can induce other persons to take loan from lenders involved in unregulated lending activity.
3. The Appropriate Government, in consultation with the concerned Regulator(s), may notify certain activities to be banned under this Act by classifying it as an unregulated lending activity, for the purposes of this Act.

Chapter III - Enforcing Authorities

1. The Bill provides for the appointment of a competent authority, not below the rank of Secretary to that Government , allowing such authority to enforce the provisions of the Bill, including conducting investigations or inquiry.
2. The Bill bestows such competent authority with the same powers as vested to a civil court under the Civil Procedure Code, 1908, for discovery & inspection, enforcing attendance, receiving evidence on affidavits, and issuing commission for examination of witnesses. All proceedings of such competent authority shall be deemed to be treated as judicial proceedings within meaning of Sections 227 and 265 of the Bharatiya Nyaya Sanhita, 2023.
3. The competent authority shall, in case of suspected unregulated lending activity, have the authority to demand statements, information, or impound and retain any records from any lender regarding the loans they have issued. The Bill also proposes for appointment of Designated Courts in concurrence with the Chief Justice of the concerned High Court to try an offence under this Bill.
4. The appropriate Government, will constitute one or more Designated Courts to be presided over by a Judge not below the rank of a District and Sessions Judge or Additional District and Sessions Judge and no Court other than the Designated Court shall have jurisdiction in respect of any matter to which the provisions of this Act apply.

Chapter IV - Information on Lenders

1. The Bill has proposed to maintain and operate an online database for information on lenders operating in India and which shall have the facility for public to search information about lenders undertaking regulated lending activities and shall also facilitate reporting of illegal lenders or cloned lenders.
2. Such a database will allow individuals to verify legitimate lenders and will facilitate the reporting of illegal lenders or prohibited lending activities. Moreover, all lenders that continue their business after the enforcement of the Bill are required to report to a designated authority about their operations in the manner and timeframe that will be notified.
3. The Bill also proposes for sharing of information of business by lender who carries on its business as such on or after the commencement of this Act about its business in such form and manner and within such time, as may be prescribed.
4. The Competent Authority may, if it has reason to believe that any loan is being offered or granted pursuant to an activity which is unregulated lending activity, direct any lender to furnish such statements, information or particulars, as it considers necessary, relating to or connected with the loans given by such lender. Further, the Competent Authority shall share all information with the CBI and/ or State Police and with the Authority which may be designated by the Central Government.

Chapter V -Offences and Punishment

1. The Bill proposes that lender who lends money, by issuing advertisement in pursuance of unregulated lending activity, will be punished with imprisonment for a term which shall not be less than two years but which may extend to seven years and with fine which shall not be less than two lakh rupees but which may extend to one crore rupees.
2. The Bill also proposes that lender who uses unlawful means to harass and recover the loan, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to ten years and with fine which shall not be less than five lakh rupees but which may extend to twice the amount of loan.
3. Additionally, the Bill proposes that person who make false and deceptive statement to induce borrowers to take loan from unregulated lending firm, will be punished with imprisonment for a term which shall not be less than one year but which may extend to five years and with fine which may extend to ten lakh rupees.
4. Further, the Bill proposes that whoever having been previously convicted of an offence punishable under this Chapter, except the offence of failing to give intimation or information in pursuance of loan offered through unregulated lending activity, is subsequently convicted of an offence, will be punished with imprisonment for a term which shall not be less than five years but which may extend to ten years and with fine which shall not be less than ten lakh rupees but which may extend to fifty crore rupees.

Chapter VI - Investigation, Search And Seizure

1. Every offence punishable under this Act, except the offence under section 15, shall be cognizable and non-bailable.
2. On receipt of information from a police officer, if the Competent Authority has reason to believe that the offence relates to unregulated lending activities the Competent Authority shall refer the matter to the Central Government for investigation by the Central Bureau of Investigation.
3. Police officer, after following the due protocol prescribed in the Bill, may o enter and search any building, break open any door, seize any record or property and detain, search, take into custody and produce before any Designated Court any such person whom he has reason to believe to have committed any offence punishable under this Act.
4. Where it is not practicable to seize the record or property, the officer may make an order in writing to freeze such property, account, deposits or valuable securities maintained by any lender.

Chapter VII – Miscellaneous

Where any newspaper or other publication, contains any statement, information or advertisement promoting, or inducing any person to apply for any loan from any lender involved in unregulated lending activity, the appropriate Government may direct such newspaper or publication to publish a full and fair retraction, free of cost, in the same manner and in the same position in such newspaper or publication as may be prescribed.

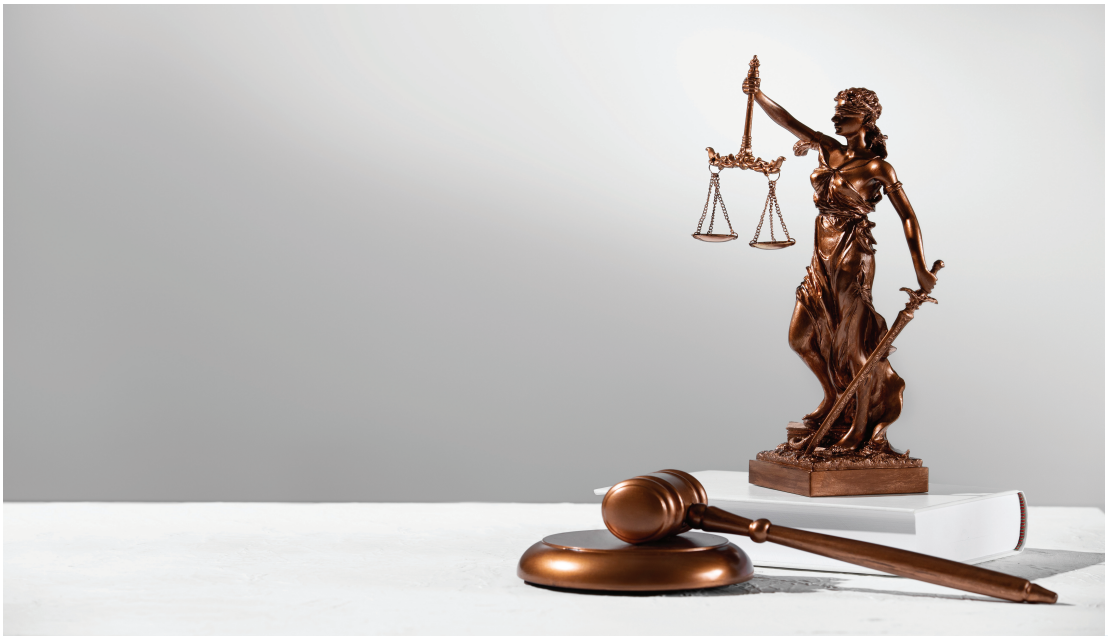
Opinion

In our opinion the definition of Lender should mean any person, who undertake public lending activities. Further as only relatives have been kept outside the definition of public lending, any loan to friends etc on interest etc shall fall within the ambit and recovery so such friendly loans may be hit if the Bill is passed in its present form.

Even though the Bill provides for strong protection to borrowers by addressing the risk of rapidly growing unregulated lending, including digital lending platforms, the enforcement mechanism provided to the competent authorities under the Act, which authorizes search & seizure without a warrant, including arrests, the mechanism is required to be implemented judiciously.

We are of the opinion that the Bill can achieve its objectives, without causing unintended consequences, only if it strikes a balance between strict enforcement and safeguarding access to legitimate credit.

Author : Pankaj Bajpai



F. IS ARBITRATION CLAUSE LOSING ITS SHEEN IN A RERA AGREEMENT FOR SALE?

"An ounce of mediation is worth a pound of arbitration and a ton of litigation"

— Joseph Grynbaum

Arbitration has traditionally been a key component in myriads of legal contracts, including agreements for sale of real estate and has been perceived as time efficient and cost-effective alternative to litigation. In the context of an agreement for sale under the Real Estate Regulatory Authority ("RERA") and recent approach of the Hon'ble Bombay High Court, a paradigm shift is noticed in weighing the efficacy and relevance of an arbitration clause in agreements between the promoter and homebuyer.

Shift in the dispute resolution landscape:

In the past decade, the Real Estate (Regulation and Development) Act 2016 was introduced with an object to enhance transparency, accountability, and efficiency in the real estate sector. Before the advent of RERA, homebuyers often found themselves in a vulnerable position.

RERA attempted to introduce expeditious resolution of disputes between developers and homebuyers. The Act mandates that homebuyers can approach the Authority or the Appellate Tribunal in case of grievances, bypassing pre-existing mechanisms under Consumer Protection Act as well as Arbitration. RERA specifically includes provisions which address issues such as delayed possession, non-compliance of project specifications and other contractual breaches. As a result, homebuyers have a direct and statutory mechanism for redressal.

Is RERA disputes 'non-arbitrable'?

RERA exercises it jurisdiction upon such projects which are registered under its realm. It also has the jurisdiction to decide which real estate projects must be registered and which ones do not require registration. It mandates that disputes related to the performance of the contract (e.g., delays in possession, defective construction, non-payment, etc.) must be brought before the RERA or the Real Estate Appellate Tribunal (REAT). These authorities are empowered to resolve matters concerning real estate transactions, and thus, disputes covered under RERA fall under their jurisdiction. Including an arbitration clause in a RERA agreement for sale may conflict with the mandatory provisions of RERA, which require disputes to be first addressed by the RERA authority and, if necessary, appealed to the Appellate Tribunal. This may override the agreement to arbitrate because, for matters under RERA jurisdiction, the statutory process takes precedence. Consequently, the reliance on arbitration clauses in RERA Agreements for Sale is diminishing as the law itself provides an alternative dispute resolution mechanism that better serves the interests of homebuyers.

Recently, in Rashmi Realty Builders Pvt. Ltd. vs. Rahul Rajendrakumar Pagariya & Ors.[1], the Hon'ble Bombay High Court framed and answered in the negative a question of law in the Second Appeal being;

"Whether the jurisdiction of Real Estate Regulatory Authority established under Section 20 of the Real Estate Regulation and Development Act, 2016 is ousted, if the agreement between the promoter and the allottee contains arbitration clause?"

While passing the Order, the Hon'ble Court made certain crucial observations. It pondered over non-arbitrable disputes in light of the guidelines set by the Apex Court in Booz Allen and Hamilton INC vs. SBI Home Finance Limited & Ors.[2] as well as Vidya Drolia & Ors. vs. Durga Trading Corporation [3]. The Apex Court, in Vidya Drolia (supra) had held that in rem disputes, or those involving public interest, such as tenancy rights, land laws, or disputes under public law, are generally not arbitrable. Similarly, as per Booz Allen (supra); the well-recognized examples of non-arbitrable disputes are:

a) Disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
b) Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
c) Guardianship matters;
d) Insolvency and winding-up matters;
e) Testamentary matters (grant of probate, letters of administration and succession certificate); and
f) Eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

The Hon'ble Bombay High Court, in Rashmi Realty (supra) observed that, "In the peculiar nature of disputes under RERA, although a dispute may be filed by an individual allottee against promoter, however the decision will affect the plot and building i.e. rights of other allottees and rights of association of allottees may also be affected. Thus, the dispute covered by RERA cannot be termed as "a right in personam". It further went on to observe that the parameters for determining whether a dispute is non-arbitrable highlight that disputes under RERA have an "Erga Omnes effect" i.e. they impact not only the individual allottee and promoter but also other allottees and the Association of Allottees. Since such disputes affect a wider group, including third parties, it was concluded that disputes between an individual allottee and promoter under RERA are non-arbitrable, as they involve broader public interests beyond just the two parties involved.

---

1 BHC Second Appeal No.434 Of 2023
2 (2011) 5 SCC 532
3 (2021) 2 SCC 1 - AIRONLINE 2020 SC 929

Interplay between the frameworks of Arbitration and RERA:

So, when it comes to RERA agreement for sale between promoters and homebuyers, the question to ponder about is the need of an Arbitration Clause when the disputes with respect to interpretation of the agreement is rendered non-arbitrable. It is a settled position under the law that an Arbitration clause shall not oust the jurisdiction of RERA and also that the provisions of the Act were to be in addition to, and not in derogation of, the provisions of any other laws. .[4] It is also a settled position that Arbitrators shall not have the authority to address matters that fall squarely within the scope of RERA to adjudicate, such as issues related to project registration or violations of statutory obligations by the promoters.

Also, as per Section 16 of the Arbitration and Conciliation Act, 1996; the Arbitrator has the authority to determine whether it has jurisdiction to hear a dispute and to rule on objections raised by any party concerning its jurisdiction. When a dispute arises between the promoter and the homebuyer and there is an arbitration clause in the agreement, Section 16 becomes relevant in determining whether the Arbitral Tribunal has the jurisdiction to hear the matter. If one of the parties challenges the jurisdiction of the Tribunal (e.g., claiming that the dispute is not arbitrable under the agreement or is governed by RERA provisions) and if the tribunal rules on its jurisdiction under Section 16, then it is unlikely that such ruling will sustain. Such ambiguity in scope to choose the forum in the event of a dispute will only create challenges for home buyers.

Conclusion:

It is opined that RERA's exclusive jurisdiction over real estate disputes shall render futile, any attempts to govern the contracts between promoter and homebuyer through Arbitration. An Arbitration clause could still be utilized for certain disputes related to such breach of contract which do not directly impacting consumer protection. However, the requirement of carving out a dispute resolution mechanism mutually agreed between promoter and allottee in an agreement for sale has diminished to a large extent. It can only be hoped that we do not end up with tons of litigation which could have been resolved in an ounce of alternate dispute resolution mechanism.

Author : Sana Khan, Associate Partner

4 Section 88 and 89 of the Real Estate (Regulation and Development) Act 2016

EXCLUSIVE ALLIANCE PARTNERS - R&P PARTNERS and A.R. GUPTA & ASSSOCIATES, AHMEDABAD

CHENNAI | COIMBATORE | HYDERABAD | MADURAI | KOCHI | TRIVANDRUM

www.sngpartners.in

DELHI

One, Bazar Lane,
Bengali Market,
New Delhi 110001

+91 11 43582000

13, Babar Road,
Bengali Market
New Delhi 110001

+91 11 43011624/25/26

R – 26, Ground Floor,
South Extension Part II,
New Delhi 110049

+91 11 46175500

I-6, Jungpura-B,
New Delhi – 110014

+91 11 46175500

BENGALURU

2nd Floor, 15/7, Saraf Towers,
Primrose Road,Off M G Road,
Ashoka Nagar,
Bengaluru 560001

+91 80 46675151

MUMBAI

9th Floor, Nehru Centre,
Dr. Annie Besant Road,
Worli, Mumbai - 400 018

+91 22 69215151

1011-1015 Raheja Chambers,
10th Floor, Nariman Point,
Free Press Journal Marg,
Mumbai 400021

+91 22 6825 5151

13th Floor, Earnest House
NCPA Marg,
Nariman Point
Mumbai-400021

+91 22 6983 5751

This newsletter has been developed by **SNG & PARTNERS** in exclusive collaboration with Latest Laws.com Helping Good People Do Good Things