



CLASIS LAW

# Newsletter

May 2018

**Clasis Law has been ranked amongst the Top 40 Indian Law Firms by RSG Consulting Rankings 2017**

## Welcome to the May Edition of the Clasis Law Newsletter

This edition brings to our readers a featured article titled “The Impact of General Data Protection Regulations on Indian Companies”.

The new European Union General Data Protection Regulation (“GDPR”) was adopted on May 24, 2016 and will come into effect on 25 May 2018, after a two year transition period. This regulation stipulates that any and all businesses within the European Union (EU), or dealing with the EU will have to comply with GDPR. This will make all the businesses liable to protect any data that is categorised as “personal”. For Indian businesses, this can be a serious setback as the EU is one of India’s key trading partners.

We continue to highlight certain key judgements passed by the Hon’ble Court as well as changes in Corporate and Commercial laws and updates on Projects and Intellectual Property.

Your inputs and feedback are always welcome and we look forward to our interactions with you.

“Clasis Law’s Head of Pan India Operations & Corporate Practice, Vineet Aneja is recognized as one of India’s Most Trusted Corporate Lawyers by ICCA, 2017”

### Contents

**The Impact of General Data Protection Regulations on Indian Companies**

Page 2

**Legal Alerts**

Page 5

**Corporate and Commercial**

Page 6

**Projects, Energy and Natural Resources**

Page 8

**IP Update**

Page 9

**Recent Events**

Page 11

**Offbeat**

Page 13



## The Impact of General Data Protection Regulations on Indian Companies

*Privacy is not an option, and it shouldn't be the price we accept for just getting on the Internet. The companies that do the best job on managing a user's privacy will be the companies that ultimately are the most successful.*

The new European Union General Data Protection Regulation (“**GDPR**”) was adopted on May 24, 2016 and will come into effect on 25 May 2018, after a two year transition period. This regulation stipulates that any and all businesses within the European Union (EU), or dealing with the EU will have to comply with GDPR. This will make all the businesses liable to protect any data that is categorised as “personal”. For Indian businesses, this can be a serious setback as the EU is one of India's key trading partners.

Simply put, data privacy is obtaining consent of the individual to collect personal data, being transparent as to why it is being collected, and deleting it when consent is withdrawn. A fine line separates implicit consent (withdrawing) or explicit consent (allowing). Protecting data involves active steps to prevent breaches and leaks.

With little time remaining before GDPR comes into force on May 25, 2018, this is a fitting time for several companies to reconsider their policies and procedures with respect to data privacy and protection and ensure preparedness ahead of time. Once it takes effect, it will replace the 1995 Data Protection Directive (Directive 95/46/EC).

### **Applicability of GDPR to Indian companies that process data**

The definition of data ‘processing’ under Article 4 (Definitions) of the GDPR has a very wide connotation. It has been defined to mean any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

Extra territorial Applicability of GDPR – Article 3 (Territorial scope) of GDPR makes it clear that these regulations will be applicable regardless of whether the processing takes place in EU or not. Therefore, an Indian company processing personal data in context of activities of an establishment of a controller or processor in EU, will fall within the ambit of GDPR.

### **Lawfulness of processing data**

In terms of Article 6 of GDPR, processing of data needs to be justified and proportional. Justifying lawful data processing can be done by ensuring the data is processed under the following rationale:

- a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
- b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
- c) processing is necessary for compliance with a legal obligation to which the controller is subject;
- d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;
- e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; and
- f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.



### **The challenges that GDPR poses for India**

The GDPR is a legally binding regulation, not a directive, that brings service providers directly under its purview. It affects Indian companies that have expanded or plan to expand globally. Certain challenges have been enlisted herein below:

- The regulation will limit EU companies' outsourcing options which will result in obvious opportunity losses for businesses in India;
- India's comparatively feeble data protection laws makes India less competitive as outsourcing markets in this space where other economies are updating their regulatory practices to ensure smooth inter-state operability;
- Largely inflexible, GDPR reduces the extent to which businesses can assess risks and make decisions when it comes to transferring data outside the EU;
- The regulations target service providers directly who will have to face high costs such as investment in "cyber insurance" whilst adopting new technology; and
- Infringements of certain provisions of GDPR shall be subject to a maximum administrative fine up to €20 million, or in the case of an undertaking, up to a maximum of 4 per cent of the total worldwide annual turnover of the preceding financial year, whichever is higher.

### **Obligations of Indian companies that process data**

Prior to undertaking any processing activity, Indian companies will be required to enter into a contract with their customer (generally, a data controller). Such contract will, inter alia, stipulate the subject-matter and duration of processing activity, its nature and purpose and the type of personal data and categories of data subjects. It being clarified here that a data controller controls the overall purpose and means, or the 'why' and 'how' the data is to be used whereas the data processor does not control the data and cannot change the purpose or use of the data.

By way of such contract, a customer (the data controller) will seek from an Indian company a flow down of the following obligations:

- Implementation of appropriate organisational measures to ensure (i) pseudonymisation and encryption of personal data; (ii) confidentiality and integrity of processing systems; (iii) restoration of availability and access to personal data after a physical or technical incident; and (iv) regular testing and evaluation of such measures (Article 32);
- In the event of a personal data breach, the same must be notified to the customer without undue delay (Article 34); and
- Carry out a data protection impact assessment prior to commencement of the processing activity, where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons (Article 35).

One may feel that this does not change anything significantly as Indian companies even today have such contracts with their customers. The key difference here is that, the GDPR mandates that, the contract between data controller and processor should necessarily comprise of the obligations aforementioned. In addition to the foregoing, a processor (in the instant case an Indian company) carrying out data processing shall also be obligated to allow the customer to conduct an audit and inspection of its systems to demonstrate compliance with the above. Additionally, upon request, it shall be obligated to delete or return all personal data to the controller at the end of service contract. Further, the right of a data processor to subcontract their obligations has been curtailed and made conditional to the data controller's approval (Article 28). Lastly, a processor a controller or processor may transfer personal data to a third country or an international organisation only if the controller or processor has provided appropriate safeguards (Article 46). In terms of the above, the ability of an Indian company to refuse flow-down of contractual obligations has been impacted.



### **Guarantee of an adequate level of protection of data**

The bedrock of GDPR, in terms of Article 45, is the stipulation of ‘adequacy requirements’ which curbs the transfer of personal data to any third country or international organisation that does not “guarantee an adequate level of protection.” In doing so, the European Commission considers whether the legal framework prevalent in the country to which the personal data is sought to be transferred, affords adequate protection to data subjects in respect of privacy and protection of their data.

In India, the current legal framework pertaining to data privacy and protection is governed by the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, which is far from being adequate. The recent landmark judgment of the Hon’ble Supreme Court in the case of **Justice K.S. Puttaswamy (Retd.) & Anr. Vs. Union of India & Ors<sup>1</sup>**, declaring the right to privacy as a fundamental right has provided the much-needed impetus to introducing a long-awaited, all-encompassing data protection legislation in India. It will be interesting to see how the forthcoming legislation shapes up and whether it will fulfil and satisfy the criteria lay down under GDPR.

### **The way forward**

When it comes to designing data protection for businesses in India, the stakes are high, emphasizing the need for businesses, organizations and governments to implement comprehensive data protection practices at all stratum. This can be ensured through the below mentioned means:

- Assess gaps between your current compliance programme and the requirements of GDPR;
- A risk-based approach to data privacy can significantly reduce the potential of non-compliance violations or a breach;
- Adoption of smart cost-efficient ways to address cyber security;
- End-to-end encryption to ensure compliance;
- Ensure proper document processing activities and data flows;
- Review third-party contracts, if any;
- Create processes for privacy by design and privacy impact and risk assessments;
- Incorporate clear rules regarding portability of customer data- what can or cannot be shared with or without consent; and
- Impact professional training (by way of seminars or webinars) for employees to acquire specific skill sets to develop a robust data protection regime in compliance with the legal requirements.

GDPR is an excellent opportunity for India to update its regulatory practices and effectively implement the fundamental right to privacy. Indian companies, should use this as a stepping stone to move up the value chain by strengthening its automation portfolio and make the industry more competitive in the global market.

### **For any clarification or further information, please contact**

**Priyanka Anand**  
Associate Partner  
E: priyanka.anand@clasislaw.com

**Vasudha Luniya**  
Associate  
E: vasudha.luniya@clasislaw.com

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<sup>1</sup>Writ Petition (Civil) 494 of 2012



## Legal Alerts

### Foreign Financial Creditor Initiates Insolvency proceedings Against Guarantor basis A Foreign Decree

On an application filed by a foreign financial creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 (the "Code"), the National Company Law Tribunal, Chennai (the "NCLT") has admitted the petition and initiated corporate insolvency resolution process against an Indian guarantor, Rajkumar Impex Private Limited (the "guarantor").

The foreign financial creditor, Stanbic Bank Ghana Limited ("Stanbic Bank"), approached the NCLT upon a default by Rajkumar Impex Ghana Limited (the "principal borrower"), based in Ghana. The foreign creditor had initiated proceedings at a Ghana Court against the principal borrower and had simultaneously obtained a decree from an English Court against the guarantor, which is a company based in India.

Stanbic Bank had entered into loan agreements with the principal borrower, a wholly owned subsidiary of the guarantor. The said loan agreements conferred exclusive jurisdiction upon the English Courts. Pursuant to the loan agreements, Stanbic Bank entered into an "on demand" deed of guarantee with the guarantor. The said deed of guarantee also provided for an indemnity issued by the guarantor in favour of Stanbic Bank. Though, the said deed conferred the exclusive jurisdiction upon the English Courts, it also provided Stanbic Bank a right to initiate legal proceedings against the guarantor in any other court of competent jurisdiction and further provided the right to Stanbic Bank to initiate legal proceedings simultaneously against the guarantor in competent jurisdictions. It is pertinent to note that the said guarantee was one of the security provided under the loan agreements.

Upon a default, Stanbic Bank initiated proceedings against the principal borrower in the Ghana Court and parallel proceedings against the guarantor in the English Court. While the proceedings before the Ghana Court are still pending, the English Court passed a reasoned ex-parte order against the guarantor establishing the liability of the guarantor requiring it to pay the principal amount plus interest. The said order is a proof of default by the guarantor. Basis, the said order, the present petition has been filed before the NCLT.

The guarantor objected to the present petition on the following grounds:

- The financial creditor not being an Indian company under the Companies Act, 2013 cannot invoke the provisions of the Code, and as such cannot initiate the insolvency proceedings against the guarantor;
- A constituted attorney/agent of the financial creditor is not entitled to verify the pleadings under the Code;
- Having failed to recover the outstanding amount from the principal borrower, the financial creditor cannot enforce the claim against the guarantor;

- The decree passed by the English Court is not conclusive and has not been passed on merits as provided under Section 13 of the Code of Civil Procedure, 1908;
- Under Foreign Exchange Management (Guarantee) Regulations, 2000 (the "FEMA Regulations"), permission is required by the Reserve Bank of India (the "RBI") before execution of the guarantee. Since, no approval was sought by the RBI, the guarantee executed is not valid.
- Considering a civil proceeding against the principal borrower is pending before the Ghana Court, the present petition under the Code is not maintainable.
- The alleged liability of the principal borrower is secured by the fixed assets and the financial creditor has already invoked the provisions of the Ghana Lenders and Borrowers Act and taken possession of the principal borrower's immovable properties;

Stanbic Bank in support of its petition submitted the following:

- The ex-parte decree is conclusive and has been passed on merits after appreciation of evidence on record;
- It is a settled law that the liability of the guarantor is co-extensive with that of the principal borrower;
- Creditor need not necessarily exhaust the liability against the principal borrower before legally proceeding against the guarantor;
- The guarantor's right is protected by virtue of the right of subrogation;
- The guarantor is not only liable as a guarantor but as a principal obligator;
- The authorized representative as provided under the NCLT Rules include an authorized agent, as appointed by way of a power of attorney;
- FEMA Regulations 2000 is not applicable to the present case, as it is applicable if the principal borrower is an Indian;

After hearing the parties, the NCLT observed that the foreign ex-parte decree passed by the English Court is conclusive and has been passed on merits. Stanbic Bank has made out a prima facie case under the Code, and has proved that there is a debt due and payable by the principal borrower and that there is a decree drawn up against the guarantor. It further observed that although the NCLT does not have the jurisdiction to enforce the decree, it can certainly take cognizance of the said decree. It further rejected the objections raised by the guarantor. Accordingly, the NCLT admitted the petition, appointed interim resolution professional, ordered for commencement of corporate insolvency resolution process and declared the moratorium in accordance with the provisions of the Code.



## Corporate and Commercial

### **Master Direction on Establishment of BO/ LO/ PO or any other place of business in India by foreign entities**

On May 10, 2018, RBI updated the Master Direction on establishment of Branch Office (BO)/ Liaison Office (LO)/ Project Office (PO) or any other place of business in India by foreign entities. These directions lay down the modalities as to how the foreign exchange business has to be conducted by the Authorised Persons with their customers/constituents with a view to implementing the regulations framed.

This Master Direction consolidates the existing instructions on the subject of "Establishment of BO/ LO/ PO or any other place of business in India by foreign entities" at one place. Reporting instructions can be found in Master Direction on reporting (Master Direction No. 18 dated January 1, 2016).

### **Master Direction on External Commercial Borrowings**

On May 9, 2018, RBI updated the Master Direction on External Commercial Borrowings ("ECB") and Trade Credit. These regulations are amended from time to time to incorporate the changes in the regulatory framework and published through amendment notifications. Within the contours of the regulations, RBI also issues directions to 'Authorised Persons' under Section 11 of the Foreign Exchange Management Act (FEMA), 1999. These directions lay down the modalities as to how the foreign exchange business has to be conducted by the Authorised Persons with their customers/constituents with a view to implementing the regulations framed. Instructions issued in respect of aforesaid borrowing transactions have been compiled in these regulations. These regulations also contain the terms and conditions related to borrowing and lending in foreign currency by authorised dealer and by persons other than authorised dealer.

### **SEBI (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2018**

On May 9, 2018, the Securities and Exchange Board of India ("SEBI") issued the SEBI (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2018 to further amend the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. These amended regulations shall come into force with effect from April 1, 2019.

### **Companies (Share Capital and Debentures) Amendment Rules, 2018**

On May 7, 2018, the MCA issued the Companies (Share Capital and Debentures) Amendment Rules, 2018 by way of

which amendment has been made to Rule 5(3) of the Companies (Share Capital and Debentures) Amendment Rules, 2018. The amendment states as follows:

Every certificate shall specify the shares to which it relates and the amount paid-up thereon and shall be signed by two directors or by a director and the company secretary, wherever the company has appointed company secretary: Provided that in case the company has a common seal it shall be affixed in the presence of persons required to sign the certificate.

Explanation - For the purposes of this sub-rule, it is hereby clarified that,-

a) in case of an One Person Company, it shall be sufficient if the certificate is signed by a director and the company secretary or any other person authorised by the Board for the purpose.

b) a director shall be deemed to have signed the share certificate if his signature is printed thereon as facsimile signature by means of any machine, equipment or other mechanical means such as engraving in metal or lithography or digitally signed, but not by means of rubber stamp, provided that the director shall be personally responsible for permitting the affixation of his signature thus and the safe custody of any machine, equipment or other material used for the purpose.

### **MCA issued the Companies (Meetings of Board and its Powers) Amendment Rules, 2018**

On May 7, 2018, the MCA issued the Companies (Meetings of Board and its Powers) Amendment Rules, 2018 amending the Companies (Meetings of Board and its Powers) Rules, 2014. The amendment provides -

a) in Rule 4 of the Rules the following proviso shall be added – "where there is quorum presence in a meeting through physical of directors, any other director may participate through video conferencing or other audio visual means".

b) Substitution of Rule 13 to the following rule - A resolution passed at a general meeting in terms of (3) of section 186 to give any loan or guarantee or investment or providing any security or the acquisition under sub-section 2 of section 186 shall specify the total amount upto which the Board of Directors are authorized to give such loan or guarantee, to provide such security or make such acquisition provided that the company shall disclose to the members in the financial statement the full particulars in accordance with sub-section (4) of section 186.



### **Rationalisation and Liberalisation of External Commercial Borrowings Policy**

On April 27, 2018, the RBI, in consultation with the Government of India, has decided to further rationalise and liberalize the External Commercial Borrowings (“ECB”) policy as under:

a) Rationalisation of all-in-cost for ECB under all tracks and Rupee denominated bonds (RDBs): With a view to harmonising the extant provisions of Foreign Currency and Rupee ECBs and RDBs, it has been decided to stipulate a uniform all-in-cost ceiling of 450 basis points over the benchmark rate. The benchmark rate will be 6 month USD LIBOR (or applicable benchmark for respective currency) for Track I and Track II, while it will be prevailing yield of the Government of India securities of corresponding maturity for Track III (Rupee ECBs) and RDBs.

b) Revisiting ECB Liability to Equity Ratio provisions: It has been decided to increase the ECB Liability to Equity Ratio for ECB raised from direct foreign equity holder under the automatic route to 7:1. This ratio will not be applicable if total of all ECBs raised by an entity is up to USD 5 million or equivalent.

c) Expansion of Eligible Borrowers’ list for the purpose of ECB: It has been decided to permit: (i) Housing Finance Companies, regulated by the National Housing Bank, as eligible borrowers to avail of ECBs under all tracks. Such entities shall have a board approved risk management policy and shall keep their ECB exposure hedged 100 per cent at all times for ECBs raised under Track I. (ii) Port Trusts constituted under the Major Port Trusts Act, 1963 or Indian Ports Act, 1908 to avail of ECBs under all tracks. Such entities shall have a board approved risk management policy and shall keep their ECB exposure hedged 100 per cent at all times for ECBs raised under Track I. (iii) Companies engaged in the business of Maintenance, Repair and Overhaul and freight forwarding to raise ECBs denominated in INR only.

d) Rationalisation of end-use provisions for ECBs: Currently, a positive end-use list is prescribed for Track I and specified category of borrowers, while negative end-use list is prescribed for Track II and III. It has now been decided to have only a negative list for all tracks.

### **Lending to Micro, Small & Medium Enterprises (MSME) Sector Directions, 2017**

On April 25, 2018, the RBI issued the Lending to Micro, Small & Medium Enterprises (MSME) Sector Directions, 2017. In the past, RBI has issued a number of guidelines /

instructions / circulars / directives to banks in the matters relating to lending to Micro, Small & Medium Enterprises Sector. This Direction incorporates the updated guidelines / instructions / circulars on the subject. The Directions mention, amongst other things, the Definition of Micro, Small and Medium Enterprises, the targets / sub-targets for lending to Micro, Small and Medium Enterprises (MSME) sector by domestic commercial Banks and foreign Banks operating in India, the common guidelines / instructions for lending to MSME sector, institutional arrangements.

### **Guidelines for issuance of debt securities by Real Estate Investment Trusts and Infrastructure Investment Trusts**

On April 13, 2018, SEBI issued a circular stating that the SEBI (Real Estate Investment Trusts) Regulations, 2014 (“REIT Regulations”) and SEBI (Infrastructure Investment Trusts) Regulations, 2014 (“InvIT Regulations”) were amended vide notifications dated December 15, 2017. The said amendments, inter-alia, clarified that REITs and InvITs can issue debt securities. The guidelines address various factors relating to issuance of debt securities by REITs/InvITs such as (i) for the issuance of debt securities REITs/InvITs shall appoint one or more debenture trustee registered with SEBI under Securities and Exchange Board of India (Debenture Trustees) Regulations, 1993. Provided that a trustee to the REIT/InvIT shall not be eligible to be appointed as debenture trustee to such issue of debt securities; (ii) any secured debt securities issued by REITs/InvITs shall be secured by the creation of a charge on the assets of the REIT/InvIT or holdco or SPV, having a value which is sufficient for the repayment of the amount of such debt securities and interest thereon; (iii) in addition to the disclosures and compliances prescribed under circulars dated December 29, 2016 and November 29, 2016, as applicable, REITs/InvITs which have issued debt securities shall be required to comply with certain other continuous disclosure requirements.

### **Environment Ministry Notifies Plastic Waste Management (Amendment) Rules**

On April 16, 2018, the Ministry of Environment & Forest issued a press release notifying the Plastic Waste Management (Amendment) Rules 2018 (“Rules”). The amended Rules lay down that the phasing out of Multilayered Plastic (“MLP”) is now applicable to MLP, which are “non-recyclable, or non-energy recoverable, or with no alternate use.”



## Projects, Energy and Natural Resources

### Indian Railway set to Revamp 68 Stations

The Indian Railways has taken up the decision to re-engineer and revamp 68 stations under its own EPC( Engineering, Procurement and Construction) model after having received a mild response from private investors.

The Rail Ministry has conveyed to all its zones to start the work immediately and complete the project within a year. Major stations such as Pune, Bengaluru, Delhi, Shimla and Chennai are supposed to be revamped under this plan among others and would receive latest and state of the art amenities such as elevators, shopping complexes, announcement systems, platforms, etc. There is a projected budget of Rs 3000 - Rs 4000 crore which is yet to be calculated and rectified by the Rail Ministry , investments by private bodies are no longer being entertained due to the ordered commencement of the plan.

Apart from the aforementioned stations, the NBCC (National Building Construction Corporation) is undertaking redevelopment of 10 stations including Lucknow on its own. The corporation is funding the project by leasing out space in station complex to private companies.

### Krishnapatnam Port to Augment Capacity to Meet High Traffic

Krishnapatnam Port Company, India's second-largest private port that reported strong growth in cargo and containers business last fiscal year, is augmenting infrastructure to meet traffic from expanding intra-Asia trade.

The port has planned a total investment of \$3 billion, of which \$1.23 billion has already been invested for development till date with the second phase of expansion underway, which is nearing completion. The port will build three-four more berths for Ro-Ro (roll-on, roll-off ships that transport automobiles), liquid cargo and LNG/LPG over the next year or two, adding to the existing 11.

The port has 80 million tonnes of cargo capacity. Last fiscal year, it handled 45 million tonnes and this year, it expects the business to reach 55 million tonnes. The container terminal capacity will soon reach 1.5 million TEUs and the port hopes to report business of around 7 lakh TEUs this fiscal year.

### Construction of Jewar International Airport to begin in 2019

The construction for the Jewar International Airport in Greater Noida will begin before the 2019 general elections with the Uttar Pradesh government having approved the setting up of a joint venture company to acquire 1,441 hectare of land for the project at a cost of nearly Rs 4,000 crore.

Further, an order issued by the UP government recently , a joint venture company will be empowered to obtain the said land by either of the two procedures as required -- by land acquisition through the provisions of the Land Acquisition Act, or directly by mutual agreements with the land owners.

The latter procedure is quicker but the government has to pay more. The JV company will have 37.5% shareholding of the UP government, a similar shareholding of the Noida Development Authority and 12.5% each for the for Greater Noida Development Authority and the Yamuna Expressway Industrial Development Authority.

The Rs 4,000 crore cost of land acquisition will therefore have to be borne in the same ratio of roughly Rs 1,500 crore each by the first two entities, and Rs 500 crore each by the two latter ones. The entire project has been divided into four stages of completion.

### Private Defence Projects Get MHA Approval

The home ministry has given speedy security clearances to 48 private investments in the defence sector. The increase in the clearance follows streamlining of the security clearance mechanism in May 2015. Approval for small and medium-scale arms production was among the ones that received MHA clearances last year to boost overall domestic manufacturing .

Though big-ticket military hardware investments are cleared by the defence ministry, corporates that received clearance include Reliance and Kalyani groups, which entered into strategic partnership with BAE Systems for production of air defence guns at the just-concluded Def-Expo. The government expects domestic private share in defence budget to go up by 20% in the next four years from the present 5%.

### Low-cost Housing Project in Pune Metropolitan Region

The Pune Metropolitan Region Development Authority (PMRDA) has announced that it will construct 6,415 houses under the affordable housing scheme on a public-private-partnership (PPP) basis in the first phase of the low cost housing project.

Seven private players have been selected to execute the first phase, which is also the state's first PPP model in affordable housing, said authorities from PMRDA. The deadline to complete all the schemes undertaken by PMRDA is 2020. PMRDA's target is to construct 50,000 houses by 2020.

The government's new initiative will see municipalities or authorities tying up with developers to take forward the project where the authorities will help in quicker sanctions and set up a single window system for sanctions and grant of NOCs.



## IP Updates

### Supreme Court-Section 70 of the IT Act to be read in conjunction with relevant provisions of the Copyright Act

This is an appeal filed by B.N. Firos, (“Appellant”) against the dismissal of a writ petition by the Kerala High Court challenging a notification dated 27th December, 2002 (the “Notification”), issued under Section 70 (1) of the Information Technology Act, 2000 (“IT Act”) declaring the computer, computer system and computer network specified in the schedule of the Notification to be “protected systems” under the IT Act. The writ petition also challenged the vires of Section 70 of the IT Act. The dismissal by the Single Judge was also affirmed by the Division Bench and the review filed by the Appellant was also dismissed.

The Appellant is the proprietor of Comtech IT Solutions, Thiruvananthapuram an information technology entity which is a member of Microsoft Developer Forum, a professional group of developers technically supported by Microsoft Corporation (India) Private Limited (“Microsoft”). In 1999, the State of Kerala (“1st Respondent”) through the Centre for Development of Imaging Technology (C-DIT), Thiruvananthapuram, a total solution provider (“4th Respondent”) had conceptualised a single window multiple agency bill collection software which was abbreviated as FRIENDS. As the Appellant was the member of Microsoft’s Developer Forum, the Appellant was instructed by Microsoft to carry out the system study and to develop the pilot project for the FRIENDS project.

After completion of the preliminary work by the Appellant, Microsoft placed orders which were handed over to the 4th Respondent and the software was implemented as a pilot project at the FRIENDS centre. Due to the success the project was further extended to 13 district centres. The 4th Respondent informed the Appellant, through a communication, that as the FRIENDS project was successful, the Government had decided to establish FRIENDS Integrated Citizens Service Centres in all the other 13 districts and the 4th Respondent would like to associate with the Appellant for customisation of the FRIENDS application software. Thereafter the Appellant and the 4th Respondent entered into an Agreement cum Memorandum of Understanding dated 19th February, 2001 (“Agreement”). The Appellant contended that the 4th Respondent was in the process to transfer some essentials of the FRIENDS application software to another entity namely M/s. Stanhop Technology (“Stanhop”) and therefore the Appellant instituted a criminal proceeding against Stanhop. Further, the Appellant filed an application for registration of his copyright

in the FRIENDS application software before the Registrar of Copyrights, New Delhi.

The 4th Respondent filed a suit before the District Court, Thiruvananthapuram, seeking a declaration that the 4th Respondent is the exclusive owner of the copyright and the sole owner of the intellectual property rights of the FRIENDS application software. Due to the suit filed by the 4th Respondent, the Registrar of Copyright rejected the Appellant’s application for registration of the copyright in the FRIENDS software. Further, the 4th Respondent also instituted a criminal case against the Appellant for infringement of the application software. During the pendency of these proceedings, the State Government issued the Notification which led to the filing of the writ petitions wherein the impugned orders were passed by the High Court.

The Appellant before the High Court contended that the Appellant has the copyright in the FRIENDS software by virtue of Section 17 of the Copyright Act, 1957 (“Copyright Act”) and that the Notification was an infringement of his copyright. Further, the challenge to the vires of Section 70 of the IT Act was based on the argument of excessive delegation of the legislative power. The High Court was of the view that the provisions of Section 2(k) of the Copyright Act which defines “Government Work”, Section 17(d) of the Copyright Act and Section 70 of the IT Act should be read harmoniously. The High Court further stated that if the said provisions are to be read and construed harmoniously the power of declaration of a “protected system” would be only in respect of “Government work”, the copyright in which of the Government is acknowledged by Section 17 (d) of the Copyright Act. On this basis the Appellants contention with respect to the invalidity of Section 70 of the IT Act was dismissed.

With respect to the challenge to the Notification based on a claim of a copyright, the High Court held that the registration of copyright sought by the Appellant was refused by the Registrar of Copyright and that the civil suit in this respect was pending. The High Court further stated that if the Appellant was the first owner of the copyright, the Appellant could file a suit for infringement under Section 60 and 61 of the Copyright Act or take recourse through arbitration in accordance with the Agreement.



The High Court further referred to Clause 10 of the Memorandum of Understanding between Total Solution Providers for E-Governance and Government of Kerala (“MoU”) which stated that all intellectual property rights of the system developed by the Total Solution Providers and Departments would vest with the Government of Kerala. As the 4th Respondent was a government agency created by the Government for developing the software, the 4th Respondent was bound by clause 10 and the Appellant would also be bound by that clause by virtue of the Agreement with the 4th Respondent. The High Court held that there is no specific clause in the Agreement under which the intellectual property rights in the FRIENDS software has been assigned to the Appellant by the 4th Respondent and therefore the Government held the copyright in the FRIENDS software and was entitled to declare it as “protected system” under Section 70 of the IT Act.

The counsel for the Appellant referred to the amendments made to Section 70 of the IT Act which states that power to declare any computer resource as “protected system” would be possible only if it directly or indirectly affects the facility of Critical Information Infrastructure. Critical Information Infrastructure means: the computer resource, the incapacitation or destruction of which, shall have debilitating impact on national security, economy, public health or safety. The counsel further stated that the amendment further reinforced the contention of the Appellant regarding the constitutionality of Section 70 of the IT Act.

The Appellant’s argument was further on the point that the computer programs, tables, compilations including computer databases have been included in the definition of “literary work” under Section 2(o) of the Copyright Act with effect from 10th May, 1995 and that the Appellant must be acknowledged as the first owner of the copyright in accordance with the Copyright Act.

The 1st Respondent’s contention was that as the Appellant had developed the software for Microsoft, which provided the software to the 1st Respondent through the 4th Respondent free of cost and the Appellant was paid consideration by Microsoft, Microsoft could be considered as the first owner of the copyright and by virtue of clause 10 of the MoU, the intellectual property rights vest with the Government, and therefore the claim of the Appellant does not subsist. Pursuant to hearing both the parties, the Hon’ble Supreme Court stated that the High Court had rightly held that Section 70 of the IT Act and Section 2(k) and Section 17 of the Copyright Act are to be read conjointly to give effect to the related provisions of the two different enactments. The Supreme Court further held that Section 70 of the IT Act as in

force at the relevant time and even after the amendment bars access to a person from a system declared as “protected system”. The Supreme Court further held that the amendment to Section 70 of the IT Act, made the power of declaration of a protected system even more stringent and is an attempt to circumscribe the power even further than what was prevailing under the pre amended law by narrowing down the ambit of “government work” related to the facility of Critical Information Infrastructure.

The Supreme Court held that the Appellant was entrusted the work by Microsoft and was paid consideration by Microsoft. Therefore, by the Appellant’s own pleadings it would not be entitled to copyright in the FRIENDS application software under Section 17(a) of the Copyright Act. The Supreme Court dismissing the appeal held that the copyright claim of the Appellant being the first author of the software is unfounded both on basis of provisions of Section 17(a) of the Copyright Act and Clause 10 of the MoU.





## Recent Events

### **IFCCI HR Committee May 4, 2018, New Delhi**

Clasis Law's Associate Partner, Ms. Priyanka Anand joins Indo French Chamber of Commerce's HR Committee for the year 2018-19 as a member.



# When Hunger Strikes!.....at 4!

It's about 4 in the evening, most of us are hungry but have had our lunch some 2 hours back and there is good 4-5 hours to go for dinner. So what do you do? To satiate those hunger pangs our first instinct may be to get a caffeine fix, accompanied invariably by some junk or a deep fried snack or a sugar laden treat or horror of horrors, all of them!

The health food champions in our firm came up with some interesting and viable options which are healthier being high on fiber and protein, as an alternative to snacking on junk and greasy food. So here we go:

### Sprouts and chickpea Salad/ Corn Salad

This special combination is considered both filling and nutritious because it is rich in fiber, vitamin K, C and other essential minerals. This salad not only keep you full but also helps in maintaining healthy weight, controls hypertension and maintains healthy cardiovascular system.



### Lentil Pancakes

Lentil pancakes are not just a delicious treat to have in the evening but are also packed with protein, herbs, fibre and are also rich in other important vitamins and minerals to rescue from hunger.

### Peanuts

Peanut kernels are a good source of dietary protein. They are beneficial in reducing heart risks. Peanuts are rich in antioxidants and monounsaturated fats.



### Egg Sandwich

Eggs contain vitamin D, A, B2, B6, B12 and minerals such as iron, potassium, phosphorus and calcium. You can add vegetables of your choice to make it healthier.

### Fruit Platter

Have seasonal fresh fruits, and berries to your heart's delight to keep you satisfied until your next meal. But stick to the fruits that are not too high in sugar.



### Fox Nuts

These are a healthy and wise option to switch from unhealthy snacks, and they are delicious as well. Fox nuts have a high protein content, which helps to burn fat. It is also high in fiber at the same time, and keeps one full between meals.

### Sprouts Sandwich

Combining together of Sprouts and sandwiches makes a great snack. Add your choice of fresh veggies, too! Combine sliced green peppers, onion and avocado with sprouts and sandwich between 2 slices of multigrain bread.



**New Delhi**

14<sup>th</sup> Floor

Dr. Gopal Das Bhawan

28, Barakhamba Road

New Delhi 110 001

T: +91 11 4213 0000

F: +91 11 4213 0099

**Mumbai**

1<sup>st</sup> Floor, Bajaj Bhawan

226, Nariman Point

Mumbai 400 021

T: +91 22 49100000

F: +91 22 49100099

[info@clasislaw.com](mailto:info@clasislaw.com)

[www.clasislaw.com](http://www.clasislaw.com)

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**New Delhi | Mumbai**