



CLASIS LAW

Newsletter

August 2018

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

Welcome to the August Edition of the Clasis Law Newsletter

This edition brings to our readers a featured article titled "Blockchain – A New Technological Genie".

This article emphasizes on the evolving blockchain technology and the role it could play in transforming several industry verticals. The article explores uses of blockchain technology and highlights the legal challenges which could arise with the usage of blockchain in the current legal landscape. The article also briefly discusses Indian outlook on blockchains and mentions instances where blockchain technology has already been used in India.

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 Intellectual Property.

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

"Clasis Law's Managing Partner & Head of Corporate Practice, Vineet Aneja is recognized as one of India's Most Trusted Corporate Lawyers by ICCA, 2017"

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3. Smart contracts

Smart contracts are blockchain based contracts which are executed by computer network that uses consensus protocols to agree upon the sequence of actions resulting from the contractor's code. With a shared database running a blockchain protocol, smart contracts auto-execute and all parties validate the outcome instantly and without need of a third party intermediary⁹.

The moot question to consider in relation to smart contracts is whether it would be able to capture elements of a traditional contract which are drafted on a case-to-case basis considering the requirements of the parties and of relevant jurisdiction. Further, specifically in case of public blockchains, how will the governing law and dispute resolution mechanism be determined? In the absence of a process for smart contract adjudication, it is recommended that the parties also retain a natural language version of the contract supplementing the digital contract and having an overriding effect until the legal system provides some clarity on smart contract adjudication.

4. Litigation and dispute resolution

As discussed above, since determining the jurisdiction and dispute resolution mechanism would be challenging, it would be difficult to resolve a dispute. Further, considering that transactions executed on blockchain are immutable and irreversible, it would be challenging for courts to grant a remedy in case of any participant of blockchain conducting a fraudulent transaction as such fraudulent transactions could not be reversed. It would also be difficult for a court to track the participant at fault.

5. Liability

The manner in which blockchain technology operates, the allocation and attribution of risk and liability in relation to a malfunctioning blockchain (particularly public blockchain) may not be established easily as it is difficult to control and stop its functioning. In case of a private blockchain, the lack of control on the functioning of the platform does not apply but whether or not this would be sufficient to trigger a liability of the company managing the platform has not yet been tested.¹⁰

Indian outlook on blockchains

The blockchain is an emerging technology and India, being a technology hub, is aggressively exploring business opportunities in the blockchain network. However, in the absence of any legal framework governing blockchains in India and considering the conservative approach adopted by Indian regulators, resident Indians are incorporating companies in countries like Singapore, Estonia, the UK, Switzerland and Japan which realise the importance and want to take a lead in the blockchain ecosystem.¹¹

Conclusion

Blockchain has the potential to become part of businesses and a radical change is expected in in the coming years due to use of this technology. However, as this technology is complex, one should consider the risks and legal challenges before realizing the potential benefits of blockchain. Further, the Indian regulators should also adopt a practical and liberal approach and make required changes in law from time to time to promote the blockchain ecosystem.

For any clarification or further information, please contact

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⁹ <http://www.idrft.ac.in/assets/publications/Best%20Practices/BCT.pdf>

¹⁰ <https://www.dlapiper.com/en/denmark/insights/publications/2017/06/blockchain-background-challenges-legal-issues/>

¹¹ <https://factordaily.com/india-blockchain-ico-companies-migrate-estonia/>



Legal Alerts

Advocates Can File Petition On Behalf Of The Financial Creditors Before The National Company Law Tribunal

The Hon'ble Supreme Court of India ("Supreme Court") in its recent judgment dated August 3, 2018 passed in ***Sunrise 14 A/S Denmark vs Ravi Mahajan C.A. No. 21794 – 21795 of 2017*** has clarified that Advocates can file Petition under section 7 of the Insolvency and Bankruptcy Code, 2016 ("Insolvency Code") on behalf of the Financial Creditor.

The brief facts of the case are that Danish Company (Sunrise 14 A/S Denmark) ("Financial Creditor") filed a Petition under Section 7 of the Insolvency Code before the National Company Law Tribunal, Chandigarh ("Adjudicating Authority") against one Ravi Mahajan ("Corporate Debtor"). The Adjudicating Authority, vide its order dated July 28, 2017, admitted the petition after considering the ample evidence of default in the debt by the Corporate Debtor.

An appeal was preferred before the National Company Law Appellate Tribunal ("NCLAT") against the aforementioned order passed by the Adjudication Authority. By its order dated December 06, 2017, the NCLAT set aside the order on the following grounds that;

- a) The mandatory requirement of Section 7(3) (a) of the Insolvency Code, which includes the filling up of a statutory form not having been done, and
- b) The Petition was made by an advocate and not by the party in person. Therefore, the appeal was allowed.

Section 7 (3) (a) of the Insolvency Code states that;

(3) The financial creditor shall, along with the application furnish-

- a) *record of the default recorded with the information utility or such other record or evidence of default as may be specified;*
- b) *the name of the resolution professional proposed to act as an interim resolution professional; and*
- c) *any other information as may be specified by the Board....."*

The Financial Creditor preferred an appeal before the Supreme Court against the order passed by the NCLAT. The Supreme Court observed that in the case of ***Macquarie Bank Limited vs. Shilpi Cable Technologies Limited (2018) 2 SCC 674***, it has been held that in the case of Operational Creditors, the petition filed by a foreign company need not observe such requirements of a statute which are impossible of compliance, namely, of getting a certificate from Indian financial institutions evidencing default in repayment of debt and that the Petition/Notice filed by an advocate would be maintainable. In conclusion, the Supreme Court held that the judgment of ***Macquarie Bank (supra)*** is also applicable to the case of Financial Creditors and the petition filed by an advocate on behalf of Financial Creditor would be maintainable. Accordingly, the Supreme Court allowed the appeals and set aside the judgment passed by the NCLAT and restored the judgment passed by the Adjudicating Authority.



Corporate and Commercial

The Companies (Accounts) Rules, 2014

On July 31, 2018, the Ministry of Corporate Affairs issued a notification amending the Companies (Accounts) Rules, 2014. The amendments include:

- a) In rule 8 (matters to be included in the Board Report) these three rules have been added – (i) a disclosure as to whether maintenance of cost records as specified by the Central Government under section 148(1) of the Companies Act, 2013 is required by the company and accordingly such accounts and records are made and maintained ; (ii) a statement that the company has complied with the provisions relating to the constitution of the Internal Complaints Committee under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013; (iii) these rules mentioned in rule 8 shall not apply to a one person company.
- b) A new rule 8A is inserted to specify the Matters to be included in Board's Report for One Person Company and Small Company. In terms of this rule, the Board's Report of One Person Company and Small Company shall be prepared based on the stand alone financial statement of the company, which shall be in abridged form and contain the following:
 - the web address , if any, where annual return referred to in section 92(3) has been placed;
 - number of meetings of the Board;
 - Directors' Responsibility Statement as referred to in section 134(5);
 - details in respect of frauds reported by auditors under 143(12) other than those which are reportable to the Central Government;
 - explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report;
 - the state of the company's affairs;
 - the financial summary or highlights;
 - material changes from the date of closure of the financial year in the nature of business and their effect on the financial position of the company;
 - the details of directors who were appointed or have resigned during the year;
 - the details or significant and material orders passed by the regulators or courts or tribunals impacting the going concern status and company's operations in future.
- c) Further the Report of the Board shall contain the particulars of contracts or arrangements with related parties referred to in section 188(1) in the Form AOC-2.

The Criminal Law (Amendment) Bill, 2018

On August 6, 2018, the Indian Parliament passed the Criminal Law (Amendment) Bill, 2018 ("Bill") and approved a legislation further to amend the Indian Penal Code, 1860 ("IPC") Indian Evidence Act, 1872, the Code of Criminal Procedure, 1973 and the Protection of Children from Sexual Offences Act, 2012. The highlights of the Bill are as follows:

- a) The Bill amends the IPC, 1860 to increase the minimum punishment for rape of women from seven years to ten years.
- b) Rape and gang rape of girls below the age of twelve years will carry minimum imprisonment of twenty years and is extendable to life imprisonment or death.
- c) Rape of girls below the age of sixteen years is punishable with imprisonment of twenty years or life imprisonment.
- d) The Bill amends the IPC, 1860 to increase the punishment for rape of girls. However, punishment for rape of boys has remained unchanged. This has resulted in greater difference in the quantum of punishment for rape of minor boys and girls.
- e) The Bill imposes death penalty for rape of girls below the age of twelve years. There are differing views on death penalty for rape. Some argue that death penalty has a deterrence effect on the crime and therefore helps prevent it. Others argue that death penalty would be disproportionate punishment for rape.

Amendment to SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 mandating transfer of securities in dematerialized form with a depository

On August 10, 2018, SEBI amended Regulation 40 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 wherein it was intimated that transfer of securities shall not be processed unless the securities are held in the dematerialized form with a depository with effect from December 5, 2018.

Pursuant to the amendment, several initiatives were taken by SEBI to spread awareness about the proposed change. In view of the applicability of the amendment, the following is hereby clarified:

- a) The amendment does not prohibit the investor from holding the shares in physical form, investor has the option of holding shares in physical form even after December 5, 2018.
- b) The amendment is not applicable for transmission (i.e. transfer of title of shares by way of inheritance / succession) and transposition (i.e. re arrangement / interchanging of the order of name of shareholders) cases.
- c) Any investor who is desirous of transferring shares (which are held in physical form) after December 5, 2018 can do so only after the shares are dematerialized.



IP Updates

Two identical trademarks can coexist in same class dealing in different kind of goods

Supreme Court passed an order dated 26th July, 2018 in a landmark case allowing two identical trade marks to coexist in the same class. M/s. Nandhini Deluxe (the “Appellant”) aggrieved with the decisions of Intellectual Property Appellate Board (“IPAB”) and High Court for refusing to allow the Appellant to use the mark “Nandhini” under classe 29 of the Trade Marks Rules, 2009, have filed this appeal against Karnataka Co-operative Milk Producers Federation Limited (the “Respondent”). The Respondent’s claim was that the mark “Nandhini” belongs to it by way of its long and sustained use and has acquired a distinctive character and the public associate “Nandhini” only with the Respondent. This contention led the Respondent to file an appeal in the IPAB against the order of the Deputy Registrar who granted registration of “Nandhini” in favour of the Appellant by rejecting the opposition filed by the Respondent. The IPAB allowed the appeal and the writ petition filed by the Appellant in the High Court was dismissed thereby confirming the order of the IPAB.

The Appellant’s contention was that it had honestly conceived and adopted the mark in Kannada, with artistic work design and get up, for running an Andhra style restaurant. It has six branches all over Bangalore and it has been in the business by using the trademark “Nandhini” since 1989. The stylised mark “Nandhini” is different from the stylised mark “Nandini” adopted by the Respondent and therefore the Appellant stated that there was no question of any confusion arising in the mind of people as regards the usage of the trademark “Nandhini” by the Appellant. Further, the Appellant also claimed that the customers of both the trademarks are entirely different. The Appellant submitted that as per Section 9 of the Trademarks Act, 1999 (“Act”), generic words cannot be registered as a trademark unless they have acquired distinctiveness and are associated with the person using the said mark. The Appellant stated that its trademark “Nandhini” is a distinctive mark. The Appellant also stated that the word “Nandhini” is not an invented word and the word “Nandhini” represents the name of a goddess and a cow in Hindu mythology. It was observed by the Court that the mark “Nandini” adopted by the Respondent is for dairy product such as milk and milk products, however, the goods for which the registration was sought by the Appellant was different even though the goods under both the marks fall in the same class i.e. class 29. As the Respondent’s goods are of milk and milk products which fall in class 29, the Appellant agreed to delete the words milk and milk products from the specification of goods in its application as per the directions of the Deputy Registrar and had filed necessary applications in this regard. The Court examined the facts of the case including various case laws and relied on the principle applied in National Sewing Thread Co. Limited Vs. James

Chadwick and Bros which states as follows: *The principles of law applicable to such cases are well settled. The burden of proving that the trademark which a person seeks to register is not likely to deceive or to cause confusion is upon the applicant. It is for him to satisfy the Registrar that his trademark does not fall within the prohibition of Section 8 and therefore it should be registered. Moreover, in deciding whether a particular trademark is likely to deceive or cause confusion that duty is not discharged by arriving at the result by merely comparing it with the trademark which is already registered and whose proprietor is offering opposition to the registration of the mark. The real question to decide in such cases is to see as to how a purchaser, who must be looked upon as an average man of ordinary intelligence, would react to a particular trademark, what association would he form by looking at the trademark, and in what respect he would connect the trademark with the goods which he would be purchasing.* While applying the aforesaid principle to the present case, the Court observed that the mark “Nandini” and “Nandhini” are not only different in visual appearance but also relate to different products. The court also observed that it is difficult to imagine that an average man of ordinary intelligence would associate the goods of the Appellant as that of the Respondent due to the different trade channels of both the parties. The court also discussed Section 12 of the Act, which prohibits registration of identical or similar trademarks in respect of goods which are similar to the trademark already registered. The court noted that under Section 12(3) of the Act, honest concurrent use and/or in other special circumstances, same and deceptively similar trademarks may be permitted to be registered by the Registrar subject to such conditions as the Registrar may deem fit. The Court while discussing various case laws noted that the proprietor of a trademark cannot enjoy monopoly over the entire class of goods when he is not using the said trademark in respect of certain goods falling under the same class. The Court held that the Appellant has not adopted the trademark to take unfair advantage of the trademark of the Respondent, and the use of the mark “Nandhini” by the Appellant in respect of different goods would not be detrimental to the Respondent. The court also noted that the Appellant has adopted the trademark in respect of its restaurant business in the year 1989, soon after the Respondent started using the mark “Nandini”. The Respondent could not produce any evidence to substantiate the claim that by the year 1989 it had acquired distinctiveness in respect of its trademark. The IPAB and High Court orders were set aside by the Court and the Court restored the order of the Deputy Registrar granting registration in favour of the Appellant subject to deletion of milk and milk products from the description of the goods pertaining to the mark “Nandhini”.



Relief for Louboutin against trademark infringement and passing off

Christian Louboutin SAS (the “Plaintiff”) was successful in obtaining an order in its favour against the infringers Ashish Bansal & Anr. (the “Defendant”) for violating its world famous ‘Red Sole’ trademark by the Defendant. The Plaintiff has presence in more than 60 countries in the world including in India. It is also the registered proprietor of the “Red Sole” trademark in India. The Plaintiff has used a specific tone of red colour to the outsole of the shoe which has made it unique and it has become the signature of the Plaintiff. The Indian consumers have access to the website of the Plaintiff which has made the Indian customers aware of the various luxury products offered by the Plaintiff including the shoes and the “RED SOLE” trademark. The Plaintiff found that the Defendant has been dealing in counterfeit shoes bearing “Red Sole” trade mark of the Plaintiff. In the court, the Plaintiff relied on the worldwide reputation of its well-known brand “Red Sole” including in India and submitted various documents, such as, print outs of official website, print outs of international magazines, print outs of the orders passed in its favour etc. to substantiate its claim. The Plaintiff contended that consumers at large can identify a shoe with red colour sole only with the Plaintiff which is well known for its high end luxury products. The Court relied upon the case of Kaviraj Pandit Durga Dutt Sharma vs. Navarattana Pharmaceutical Lab which stated that if a defendant’s mark is closely, visually, phonetically similar, then no further proof is necessary. The Court noted that the essential features of rival marks are to be considered in determining infringement. The Court held that the Plaintiff has proved that the Defendant’s adoption and using of the counterfeit registered trademark, trade dress, deceptively similar domain name amounts to infringement of the Plaintiff’s domain name, trademark trade dress, etc and amounts to passing off without the authorisation of the Plaintiff and therefore the Plaintiff is entitled to relief. The Delhi High Court vide its order dated 31st July, 2018 disposed the suit by passing a decree in favour of the Plaintiff and against the Defendants with costs. The Delhi High Court in addition to granting compensatory damages also awarded punitive damages due to the loss of goodwill and reputation suffered by the Plaintiff considering the mala fide conduct of the Defendants.



Recent Events

Conference on Insolvency and Bankruptcy Code: Learnings, Challenges and Way Forward 18th August 2018, Mumbai

Aniketh Nair, Senior Associate, Clasis Law attended a conference organized by Confederation of Indian Industry on Learnings, Challenges and Way Forward of the Insolvency and Bankruptcy Code at Hotel Taj Mahal, Colaba on August 18, 2018. The conference focused on the change of the business landscape in current times, the effects of the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2018, the recommendations of the Committee on bad loans resolution, lending standards, allocation of capital, valuation, time management and global experiences; litigation in latest cases and learnings from successful cases under IBC.

World Photography Day

August 19 marks the World Photography Day to celebrate the passion of photography worldwide since 2010. Photography is an amazing art of holding on to something forever. A photograph is a way to feel the emotion and context of that exact moment. Here we bring you some interesting known facts for you to know if you also love to take photographs.



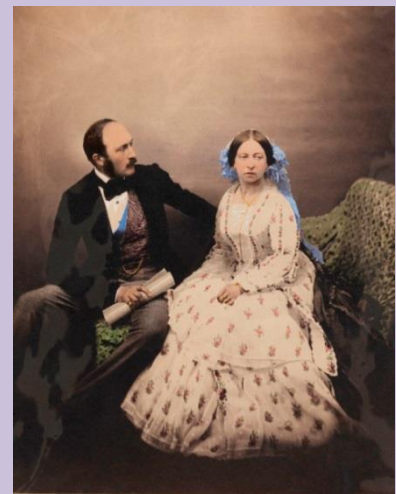
- ❖ The date celebrates August 19, 1839, when the French government bought the patent for the daguerreotype and released it "free to the world".
- ❖ Daguerreotype, invented in 1837 by Louis Jacques Mandé Daguerre, was the first practical photographic process



- ❖ The earliest known permanent photographic image, however, was created by a more complex process called heliography invented by Joseph Nicéphore Niépce in 1826.
- ❖ The minimum exposure time required to create a photograph was approximately eight hours
- ❖ The world's first color picture was a photograph of a tartan ribbon produced by photographing it three times through red, blue, and yellow filters, then recombining the images into one color composite.



- ❖ The first ever photo of the Moon was taken in 1851 and the first photo of its dark side was taken in 1959
- ❖ Astronomer Sir John Herschel made the earliest known use of the word 'photograph' in 1839
- ❖ The earliest known use of the abbreviation 'photo' was by Queen Victoria in a letter in 1860
- ❖ Queen Victoria and Prince Albert had a darkroom installed at Windsor Castle to indulge their passion for photography.



- ❖ Thanks to digital cameras on mobile phones, more than 350 billion photos are now taken worldwide every year.



- ❖ Around 250 billion photographs have been uploaded to Facebook.

And, this is how photography was born.....

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This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to herein. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions.

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