

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

**This edition brings to our readers a featured article titled "Understanding the Personal Data Protection Bill, 2018 and Bracing for Impact".**

The Srikrishna Committee drafted and thereafter submitted the draft Bill to the Ministry of Electronics and Information Technology on July 27, 2018. The Government is hopeful of introducing the draft Personal Data Protection Bill, 2018 in the current winter session of Parliament. Once the PDP Bill becomes law, it will have far-reaching consequences and companies will have to have proper security systems and safeguards in place to give effect to the provisions of the PDP Bill.

We continue to highlight certain key judgements passed by the Hon'ble Court as well as changes in Corporate and Commercial laws.

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

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"Clasis Law's Managing Partner Vineet Aneja has been included in IBLJ's A-List of the top 100 lawyers for the year 2018 and recognised as amongst India's Most Trusted Corporate Lawyers by ICCA, 2017"

## Understanding the Personal Data Protection Bill, 2018 and Bracing for Impact

*“We do not have to make a trade-off between ensuring personal data protection and the manner in which we do business. Law and technology gives us the ability to have both”*

The Personal Data Protection Bill, 2018 (“**PDP Bill**”) is aimed at securing the rights of data subjects and overhauling completely the present data privacy and protection regime in India or rather the lack of it. The Government of India, constituted a committee of experts to study various issues relating to data protection in India and make specific suggestions on principles to be considered for data protection in India and draft legislation. The committee, formed with the idea to create a powerful data protection law in India, submitted the draft PDP Bill to the Ministry of Electronics and Information Technology on July 27, 2018. The PDP Bill is yet to be passed by the Parliament and is expected to be tabled in the current winter session of the parliament.

The proposed PDP Bill is said to have been modeled along the lines of General Data Protection Regulation (GDPR), which is one of the most complicated and far-reaching pieces of legislation to have emerged from EU Parliament.

Presently, the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (“**IT Rules**”), govern protection of personal data in India and are applicable to all body corporates. The PDP Bill is much more than an extension of it as it seeks to address the lacunae's under the IT Rules. The PDP Bill prescribes in detail the manner in which the personal data shall be, amongst other things, collected, processed, used, disclosed, stored and transferred.

It is pertinent to note that, the PDP Bill applies to both government and private entities. The applicability of this law will extend to data controllers/ fiduciaries or data processors not present within the territory of India, if they carry out processing of personal data in connection with:

- Any business carried in India,
- Systematic offering of good and services to data principals (also generally referred to as data subject) in India,
- Any activity which involves profiling of data principals within the territory of India.

Further the term in connection with 'any business carried in India', in relation to exercise of jurisdiction over any data fiduciary or data processor not located within India, is vague in nature and lacks specificity. This implies that the PDP Bill has an extra-territorial application and imposes additional compliance requirements for foreign data fiduciaries and data processors. As it currently stands, the PDP Bill may even be applicable to foreign data fiduciaries

and data processors which have insignificant commercial relationships in India.

### Key Concepts Important definitions

The concept of '*data principal*' and '*data fiduciary*' has been introduced. The natural person whose personal data is collected is referred to as the '*data principal*' and the entity that determines the purpose or means of processing this data is referred to as the '*data fiduciary*'. Data fiduciaries include the State, corporate entities and individuals.

The definition of '*sensitive personal data*' has been widened vis-à-vis the IT Rules to include intersex status, caste, tribe and religious beliefs. In fact, it is wider than the ambit of sensitive personal data under the IT Rules. Therefore, organisations processing sensitive personal data will be subject to additional compliance requirements once the PDP Bill is enacted.

### Requirement to give notice and take consent for processing data

The data fiduciary is required to give notice to the data principal before collecting, processing and/or using the personal data of a data principal.

The notice shall, *inter-alia*, include the purposes for which the personal data is to be processed; the categories of personal data being collected; the details of the data protection officer; the right of the data principal to withdraw such consent, and the procedure for such withdrawal.

Personal data may be processed on the basis of the consent of the data principal. For the consent of the data principal to be valid, it must be free, informed, specific, clear and capable of being withdrawn. Processing of sensitive personal data is based on explicit consent from the data principal.

The PDP Bill focusses largely on compliances and once this law is enacted, in its current form, it may prove to be cumbersome for data fiduciaries. Further, certain obligations such as the requirement of giving notice, obtaining consent, etc., may pose practical and logistical issues for organisations and compliance with the same

would mean additional administrative burden and costs. Providing consent in multiple languages may prove to be a major practical challenge for social media platforms, e-commerce companies, etc., which have a wide base of users across locations.

Additionally, in terms of the PDP Bill, exemption to obtaining consent of the data principal for processing their data has been granted for certain employment related matters. However, this ground for processing of personal data can only be invoked if processing of personal data on the basis of consent is not appropriate giving regard to the employer-employee relationship between the data fiduciary and the data principal or would involve a disproportionate effort on the part of the data fiduciary due to the nature of the processing activities.

This requirement of taking consent for processing data is enshrined in the IT Rules, albeit, not in such detail.

### **Retention of data and audits**

The data fiduciary shall retain personal data only as long as may be reasonably necessary to satisfy the purpose for which it is processed, unless required to be retained for a longer period of time, if such retention is explicitly mandated by law. The data fiduciary shall have necessary policies in place and conduct annual compliance audits by an independent data auditor. The data fiduciary shall maintain accurate and up-to-date records.

Similar provisions are encapsulated in the IT Rules as well. The IT Rules prescribe that the body corporate or a person on its behalf who have implemented either IS/ISO/IEC 27001 standard or the codes of best practices for data protection as approved and notified by the Central Government shall be deemed to have complied with reasonable security practices and procedures provided that such standard or the codes of best practices have been certified or audited on an annual basis by entities through independent auditor, duly approved by the Central Government.

### **Data Protection Officer and the Data Protection Authority**

The Data Protection Officer (“DPO”) is to be appointed by the data fiduciary. The DPO’s eligibility and qualification requirements shall be specified at a later date. The DPO is required to resolve the grievance in an expeditious manner and no later than 30 days from the date of receipt of grievance from a data principal.

Further, the PDP Bill creates a central regulatory and adjudicatory body called the Data Protection Authority (“DPA”) to administer and enforce the provisions of the PDP Bill. The DPA also has the power to set standards for the implementation of the provisions of the PDP Bill. The

powers granted to the DPA appear to be very wide and discretionary. The DPA is proposed to function as a supervisory body, enforcement agency and an adjudicatory body. Significantly, the DPA has extensive powers including the power to suspend the business or activity of a data fiduciary or a data processor which is in breach of the provisions of the PDP Bill, conducting search and seizures or suspending or discontinuing cross border flow of personal data.

The IT Rules does not provide for a DPO or DPA, however, it provides for appointment of a ‘grievance officer’ by the body corporate dealing in personal data. Further the body corporate is required to publish the name and contact details of the grievance officer on its website. The prescribed timeline for redressal of grievance by the grievance officer is a maximum of one month from the date of receipt of grievance.

### **Significant Data Fiduciary**

The PDP Bill recognises a class of data controllers called significant data fiduciaries. These data fiduciaries are subject to a registration requirement and certain additional compliances than a data fiduciary. Significant data fiduciaries will be notified by the DPA based on factors such as sensitivity of data, volume of data processed, annual turnover, risk of harm from such processing etc. However, the thresholds for such factors have not been provided in the PDP Bill leaving this concept vague and ambiguous. This concept is absent from the presently operating IT Rules.

### **Data localisation and cross border transfer of data**

The PDP Bill requires data fiduciaries to ensure the storage, on a server or data centre located in India, of at least one copy of personal data to which it applies. It also specifies the conditions under which data transfers outside the territory of India may take place.

Data localisation requirements would entail additional time and cost for setting up/ leasing local servers in India, which may become a cost centre for businesses. This would have to be complied with even when an organisation does not have a presence in India but where the provisions of the PDP Bill are applicable to such foreign entities (which do not have a physical presence in India). With the exception of certain exempted categories of processing under the PDP Bill, all entities irrespective of size or scale of processing, would still need to comply with measures such as privacy by design, security standards encryption and de-identification, breach notifications and transparency obligations.

Cross border transfer of personal data is permitted in certain instances, such as: (i) transfer is made subject to

Execution of standard contractual clauses or intra-group schemes approved by the DPA, (ii) where the Central Government in consultation with the Authority, has prescribed that transfer of personal data is permissible to a country, or to a sector within a country or to international organisations (where the personal data is adequately protected), and (iii) the DPA may also approve transfer due to a situation of necessity.

Amongst the various conditions for cross border transfer of personal data, it appears that mostly personal data will be transferred under standard contractual clauses. More so, as there are very few countries in the world that have a robust data protection regime, it appears that personal data would be impeded by non-adequacy of robust data protection laws.

The presently applicable IT Rules do not specifically define cross border transfer of data and data localization. However, it prescribes that a body corporate or any person on its behalf may transfer sensitive personal data, to any other body corporate or a person in India, or located in any other country, that ensures the same level of data protection that is adhered to by the body corporate as provided for under the IT Rules. Further, the transfer may be allowed only if it is necessary for the performance of the lawful contract between the body corporate or any person on its behalf and provider of information or where such person has consented to data transfer.

### Stringent penalties

Depending on the nature of contravention, the penalties differ. Penalties are as high as INR 5 Crore to INR 15 Crore, or 2 per cent to 4 per cent of an entity's total worldwide turnover in the preceding financial year, whichever is higher.

The penalties prescribed under the PDP Bill are quite stringent and notably more stringent than the penalties prescribed in the IT Rules. Further, compensation can be sought by a data principal against a data fiduciary and/or a data processor, which will be over and above any penalties imposed.

### Key Implications

Once the PDP Bill becomes law, it will have far-reaching consequences and corporates will have to have proper security systems and safeguards in place to comply with the provisions of the PDP Bill. Some key implications and action points will be:

- Practicing a culture of 'privacy by design' in the organisation, focusing on the complete data life cycle, developing internal controls and systems for data mapping, from collection at all data touchpoints, storage, access and use to destruction of personal data.
- Preparing comprehensive privacy policies in line with legal requirements, including formulating data collection, storage, access, retention, data disposal policies and procedures,

- Providing data access i.e. notice to the data principal for collection and use of personal data and obtain consent letters for data collection,
- Appointing a DPO to handle grievances,
- Storing personal data collected in a manner and form compliant with the PDP Bill, ensuring storage in a local server,
- carrying out annual audits by an independent data auditor,
- sensitization of the employer and employee in terms of what rights are available to the employee (like withdrawal of consent) and what are the obligations in terms of the PDP Bill,
- Implementing security measures to protect digital, as well as, physical data; and
- Data minimization, i.e. limiting storage of personal data for legitimate purpose.

While the legalese and nuances should be left to the lawyers, the corporates need to be aware of their obligations and potential liabilities under the PDP Bill. Lack of awareness, often leads to inadvertent non-compliances, which could sooner or later result in unforeseen and severe consequences.

### Conclusion

The PDP Bill is heavy on compliance and proposes a stringent penalty scheme to act as a deterrent for non-compliance. To balance this approach with economic and trade interests, the Government of India must also be mindful that the final law should meet the adequacy standards as prescribed by similar legislations of other countries, to enable mutual cross border transfer of data.

Considering that certain provisions of the PDP Bill will only take effect after a period of time, it will allow data fiduciaries to prepare their systems and processes to ensure compliance. The PDP Bill is the most prominent step towards a comprehensive law on personal data protection in India. However, some elements in the PDP Bill should ideally be further clarified and discussed with various stakeholders for effective implementation.

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

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## Legal Alerts

### Insolvency Application Maintainable Jointly Against Two Corporate Debtors

In its recent judgment dated November 30, 2018, the Hon'ble National Company Law Appellate Tribunal, New Delhi ("NCLAT") in **Mrs. Mamatha vs. AMB Infrabuild Pvt. Ltd & Ors., Company Appeal (AT) (Insolvency) No.155 of 2018**, dealt with issue with respect to whether an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 is maintainable against two Corporate Debtors.

The brief facts of the case are that Corporate Debtor No.1 (AMB Infrabuild Pvt. Ltd.) was the Owner of the land and the Corporate Debtor No.2 (Earth Galleria Pvt. Ltd.) was the Developer of the land. The two Corporate Debtors had entered into a Collaboration Agreement dated May 3, 2012 for development of commercial complex on the piece of land. In terms of Collaboration Agreement, Corporate Debtors had further agreed that to advertise the project and for marketing the developed property as a 'Joint Venture Project'. Subsequently, a Memorandum of Understanding dated June 20, 2014 was entered between the Financial Creditor (Allottee) and the Corporate Debtor No.2, for booking one CINEPLEX.

Thereafter, another Memorandum of Understanding dated February 6, 2016 was reached between the two Corporate Debtors vide which they have referred to themselves jointly as a "Company". Since the Financial Creditor was unable to recover her invested amounts in the project to be developed by the Corporate Debtors as a Joint Venture an application under section 7 of the Code for initiation of Corporate Insolvency Resolution Process ("CIRP") jointly against the two Corporate Debtors before the National Company Law tribunal (NCLT), New Delhi ("Adjudicating Authority").

The Adjudicating Authority, after considering the various provisions of the Code, rejected the application, inter-alia, on the ground that insolvency application cannot be filed jointly against the two Corporate Debtors. It observed that there is no provision under the Code where a petition for Insolvency Resolution Process can be initiated against

two Corporate Debtors who have collaborated for a Joint Venture.

The Financial Creditor preferred an appeal before the NCLAT against the order passed by the Adjudicating Authority. The NCLAT, examined all the agreements which were placed on record by the Financial Creditor and concluded that the Adjudicating Authority erred in holding that Corporate Insolvency Resolution Process cannot be initiated against two 'Corporate Debtors'. The NCLAT further held that;

- (a) if the two 'Corporate Debtors' collaborated and form an independent corporate entity for developing the land and allotting the premises to its allottee, the application Under Section 7 of the will be maintainable against both of them jointly and not individually, and;
- (b) if, both, the Developer and the land owner are a corporate, they should be jointly treated to be one for the purpose of the initiation of the CIRP against them.

Accordingly, the NCLAT allowed the appeal and set aside the order dated March 12, 2018. The matter was remanded to Adjudicating Authority for admission of the case. The NCLAT noted that it will be open for Corporate Debtors to settle the matter before admission of the case.

## Corporate and Commercial

### Disclosure of significant beneficial ownership in the shareholding pattern

On December 7, 2018, SEBI has decided that, in the interest of transparency to the investors in the securities market, the following requirements pertaining to disclosures regarding 'significant beneficial owners' have been specified:

- All listed entities shall disclose details pertaining to significant beneficial owners in the format prescribed at Annexure to this circular.
- The format specified in the Annexure to the aforementioned circular shall be Table V (relating to Statement showing details of significant beneficial owners) under clause 5 of the format of holding of specified securities specified in the circular No. CIR/CFD/CMD/13/2015 dated November 30, 2015. The circular No. CIR/CFD/CMD/13/2015 dated November 30, 2015 shall stand modified to that extent.
- All the terms specified in this circular shall have the same meaning as specified in Companies (Significant Beneficial Owners) Rules, 2018.

Pursuant to this circular the Stock Exchanges are advised to bring the provisions of this circular to the notice of listed entities and also to disseminate the same on its website. The contents of this circular shall come into force with effect from the quarter ended March 31, 2019.

### Listing of equity shares of companies incorporated in India on foreign stock exchanges and vice versa

Due to the ongoing evolution and internationalization of capital markets across the globe, the Securities and Exchange Board of India ("SEBI") constituted an Expert Committee ("Committee") on June 12, 2018 to help formulate a framework for 'listing of equity shares of companies incorporated in India on foreign stock exchanges and of companies incorporated outside India on Indian stock exchanges'.

The Committee on December 4, 2018 issued a framework suggesting the direct listing of Indian companies overseas and vice versa. However, it has recommended that SEBI should allow listing only on specified stock exchanges in "permissible jurisdictions". Further, the relevant Indian laws like Companies Act, 2013 would continue to apply to such companies. A permissible jurisdiction includes a jurisdiction which has treaty obligations to share information and cooperate with Indian authorities in the event of any investigation. Further, it has been suggested that the KYC (know your client) and AML (anti-money laundering) framework which exists in permissible jurisdictions should be taken as acceptable standards for compliance.

The existing legal framework in India does not permit the direct listing of equity shares of companies incorporated in India on foreign stock exchanges. Similarly, companies incorporated outside India cannot directly list their equity shares on Indian stock exchanges. The only available routes for companies incorporated in India to access the equity capital markets of foreign jurisdictions are through the American Depository Receipts (ADR) and Global Depository Receipts (GDR) regime. On the other hand, companies incorporated outside India can access the Indian capital markets only through the Indian Depository Receipts (IDR) framework. Moreover Indian companies can list their debt securities directly on international exchanges through a security instrument known as 'Masala Bonds'.

The Committee has given a host of recommendations for (a) listing of equity shares of companies incorporated in India on foreign stock exchanges; and (b) listing of equity shares of companies incorporated outside India on Indian Stock Exchanges.

SEBI has sought comments from the public on the recommendations of the Committee till December 24, 2018.

### **Deadline extension for transfer of securities only in dematerialised form**

On December 3, 2018, SEBI issued a press release stating that the Board had previously (on March 28, 2018) decided that except in case of transmission or transposition of securities, requests for effecting transfer of securities shall not be processed unless the securities are held in the dematerialized form with a depository. This measure was to come into effect from December 5, 2018. Subsequently, SEBI has extended this deadline to April 1, 2019.

### **Cyber Security & Cyber Resilience framework for Stock Brokers / Depository Participants**

On December 3, 2018, SEBI issued the Cyber Security & Cyber Resilience framework for Stock Brokers / Depository Participants. Rapid technological developments in securities market have highlighted the need for maintaining robust cyber security and cyber resilience framework to protect the integrity of data and guard against breaches of privacy. Since stock brokers and depository participants perform significant functions in providing services to holders of securities, it is desirable that these entities have robust cyber security and cyber resilience framework in order to provide essential facilities and perform systemically critical functions relating to securities market. Accordingly, after discussions with Exchanges, Depositories and Stock Brokers' and Depository Participants' associations, a framework on cyber security and cyber resilience has been designed, and issued. The framework would be required to be complied by all Stock Brokers and Depository Participants registered with SEBI. The framework guidelines shall be effective from April 1, 2019. Pursuant to this, SEBI, on December 7, 2018 issued the Cyber Security and Cyber Resilience framework of Stock Exchanges, Clearing Corporations and Depositories, wherein it has been decided that Market Infrastructure Institutions (MIIs) shall have a Cyber Security Operation Center (C-SOC) that would be a 24x7x365 set-up manned by dedicated security analysts to identify, respond, respond, recover and protect from cyber security incidents.

### **Securities and Exchange Board of India (Settlement Proceedings) Regulations, 2018**

On December 3, 2018, SEBI issued the Securities and Exchange Board of India (Settlement Proceedings) Regulations, 2018. These regulations, amongst other things, specify:

- (a) the manner in which settlement application is to be made of all the proceedings that have been initiated or may be initiated in respect of the same cause of action,
- (b) the limitation period such as an application in respect of any specified proceeding pending before the Board shall not be considered if it is made after sixty (60) days from the date of service of the notice to show cause or supplementary notice(s) to show cause, whichever is later,
- (c) the scope of settlement proceedings,
- (d) the manner of rejecting the settlement application, terms of settlement which may include a settlement amount and/or non-monetary terms, in accordance with the guidelines specified in Schedule-II of these regulations,
- (e) procedure of settlement and summary settlement procedure.

These regulations come into effect from April 1, 2019.

### **Operating Guidelines for Alternative Investment Funds in International Financial Services Centres**

On November 26, 2018, SEBI decided to put in place 'Operating Guidelines for Alternatives Investment Funds in International Financial Services Centre ("IFSC")'. SEBI had earlier issued SEBI (International Financial Services Centre) Guidelines, 2015 ("IFSC Guidelines") on March 27, 2015 for facilitating and regulating financial services relating to securities market in an IFSC set up under section 18(1) of Special Economic Zones Act, 2005. The IFSC Guidelines provide for broad framework for setting up of Alternatives Investment Funds ("AIF") in IFSC. Based on the deliberations in Alternative Investment Policy Advisory Committee (AIPAC) and in consultation with other stakeholders these guidelines have been put in place. This guideline, amongst other things, provides the registration process, compliance requirements, conditions and restrictions for AIF's operating in IFSC.

## ***Recent Events***

### **Legal Helpline Session for Startups 14 December 2018, New Delhi**

Clasis Law along with TiE-Delhi organised the final session of its three Legal Helpline Sessions for Startups and Entrepreneurs at its Delhi office on December 14, 2018.



### **National Conference on MNCs & India: Creating Mutual Value 13 December 2018, New Delhi**

Gaurav Wahie, Partner and Lovejeet Singh, Senior Associate attended the “National Conference on MNCs and India: Creating Mutual Value” organized by Confederation of Indian Industry (CII) held at Taj Mahal Hotel, New Delhi on December 13, 2018.

The conference, which was attended by Government officials such as Secretary, Department of Industrial Policy and Promotion as well as representatives of several large multinational companies present in India, focused on the policy and regulatory challenges being faced by multinationals as well as the required reforms.

### **TiE Global Summit III Entrepreneurship: Driving Employment, Driving Growth 29-30 November 2018, New Delhi**

Vineet Aneja, Managing Partner, Gaurav Wahie, Partner and Priyanka Anand, Associate Partner attended the third TiE Global Summit organised at the Taj Palace, New Delhi, on 29 and 30 November 2018. The TiE global summit is an annual event which brings together entrepreneurs from across the world and provides entrepreneurs a platform to present their ideas to potential investors.

# Offbeat

## World's best places to celebrate Christmas

Cities all over the world celebrate Christmas in unique and memorable ways. We're all for snow days and cuddling up with loved ones by the fire, but the month of December is also prime time for traveling mainly to see how the rest of the world celebrates Christmas.

### Copenhagen, Denmark

Copenhagen is Scandinavia's most vibrant and affordable capital. The city's Copenhagen is transformed annually by half a million lights and thousands of Christmas trees and form a magnificent centerpiece to your festive meandering.



### Dublin, Ireland

The city's streets are imbued with an irrepressible sense of festive cheer, and from the lights to the ice rinks and the carols at St Patrick's Cathedral, Christmas is celebrated with gusto and glee. The most eyebrow-raising is a morning swim on the 25th at the Forty-Foot sea-water pool.

### Prague, Czech Republic

Prague is well-known for its magnificent gothic architecture and unique folkloric traditions, and at Christmas, it's truly unlike any other city of earth. Straddling the winding River Vltava, with a steep wooded hill to one side, the city retains much of its medieval layout, is a spellbinding experience.



### Sydney, Australia

If the cold gets to you, enjoy the ultimate season in Sydney Australia. Bondi is the antithesis of northern-hemisphere Christmas cliches: sun, sand and surf replace snow and fairy lights. For festive experience at Bondi beach, light up a Barbecue and enjoy fish, shrimps, and green salads.

## New Year Resolution

### Be Smart

I was going to quit all my bad habits for the new year, but then I remembered that nobody likes a quitter.

### Weight management

My New Year's resolution is to help all my friends gain ten pounds so I look skinnier.



### Hi-tech

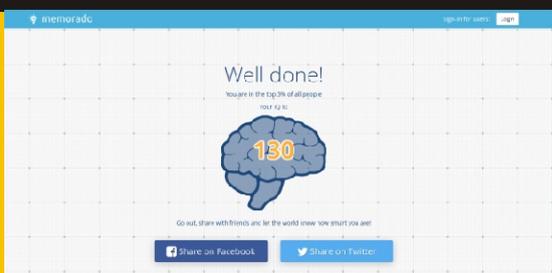
My resolution was to read more so I put the subtitles on my tv.

### Be optimistic

My New Year's resolution is to be more optimistic by keeping my cup half-full with either rum, vodka, or whiskey.

### Be Positive

To kick start my New Year: I took an IQ test and the results were negative.



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