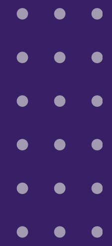
NEWSLETTER

JANUARY, 2025



Monthly Bulletin

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CLASIS LAW

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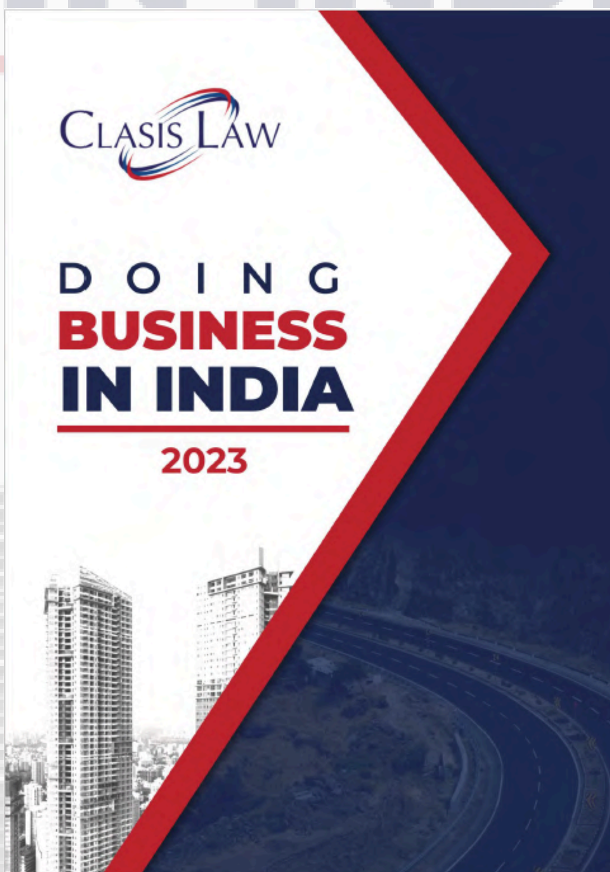
DOING BUSINESS IN INDIA

We are pleased to share our e-book titled ***"Doing Business in India"***.

The book intends to give the reader an overview of the various aspects of doing business in India including but not limited to the applicable legislations, compliances and processes.



Please scan the QR code above or Click Here t0 download the e-book. Alternatively, you may write to us at info@clasislaw.com for the copy.

Indian Legal Position on Retention of Title Clauses

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Retention of Title (**"ROT"**) clauses, although still not commonly used in India, are a well-established measure in various international jurisdictions to secure the interests of sellers in commercial transactions. An ROT clause allows a seller to retain ownership or title to the goods supplied until a specified condition, usually payment in full, is met by the buyer. With the growing prevalence of deferred payments, credit facilities, financial uncertainty and the increasing number of defaults in payments in business transactions, ROT clauses have gained significance, particularly in cases of buyer's insolvency.

Under ordinary circumstances, in case of buyer's insolvency, the seller entitled to the payment for the goods supplied would be classified as an unsecured operational creditor, thereby making his chances of recovery of the sale price extremely difficult. However, in practice, an ROT clause ensures that the seller retains the title in the goods supplied, until the buyer fulfills its payment obligations and therefore instead of the seller being classified as an unsecured operational creditor in case of buyer's insolvency, the seller may claim his rights over the goods itself. Accordingly, an ROT clause may have the effect of shielding the seller and providing a degree of stability and security, even when the goods are possession of the buyer.

The enforceability and procedural requirements pertaining to ROT clauses varies from jurisdiction to jurisdiction and India's legal approach to ROT clauses closely mirrors the English laws. In India, sale and purchase of goods is governed by the Sales of Goods Act, 1930 (**"Sales Act"**) and Section 19(1) of the Sales Act provides that where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Further, Section 4(3) of the Sales Act provides that where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. Accordingly, the Sales Act recognises that the transfer of title to the goods from the seller to the buyer may be deferred until the fulfilment of a future condition (such as full payment) and therefore to this extent, ROT clauses may be included in sales contracts in India.

Similarly, a constructive interpretation of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**) and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**"SARFAESI Act"**) also indicates recognition of ROT clauses by the Indian legal system.

The IBC was introduced and implemented in the Indian legal system in order to provide an opportunity for speedy and effective rehabilitation of the corporate debtor. Section 18 (Duties of Interim Resolution Professional) of the IBC, inter-alia, provides that the Interim Resolution Professional shall take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets. The explana-

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tion to the said Section specifies that for the purposes of this section, the term “assets” shall not[2] include the assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment. Therefore, Section 18 of the IBC explicitly excludes/restrains the Interim Resolution Professional from taking over the assets that are owned by a third party but in possession of the corporate debtor held under trust or under contractual arrangements. Accordingly, the said Section of the IBC recognizes the concept of ROT. Additionally, the fact that an ROT clause has been recognized under the IBC is further bolstered by the fact that while filing of the insolvency petition/claim before the adjudicating authority, the IBC has a specific provision enabling the petitioner to set out the details of the ROT arrangements in relation to the goods to which the operational debt refers.

In 2016, the SARFAESI Act was amended wherein the definition of “security interest” was widened in its ambit to include title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset. Accordingly, the widened definition explicitly indicates that the SARFAESI Act also now recognizes the concept of ROT. Under the SARFAESI Act, such security interest may be enforced by secured creditors pursuant to registration with the Central Registry set up under the SARFAESI Act. It is important to highlight that the enforcement of security interests under the SARFAESI Act is available to entities which fall within the definition of “secured creditors” which includes entities in the nature of banks, financial institutions, debenture trustees and asset reconstruction companies etc.

While ROT clauses have legal recognition under the Indian legal system as may be noted from the above analysis, an important aspect for determination is whether the interest created by ROT clauses would qualify as an ownership interest or as a charge requiring any registration with appropriate authorities to be enforceable in India (except in case of security interests under the SARFAESI Act which have limited applicability). In this regard, the Companies Act, 2013 provides that it is the duty of every company creating a charge on its property or assets to register the particulars of the charge in the prescribed manner with the Registrar of Companies. Under the Companies Act, a ‘charge’ has been defined as an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage. Considering that in case of an ROT clause, the title in the goods is retained with the seller, there is no question of any charge being registered by the buyer (who is not the owner of the goods) with the Registrar of Companies. This view has also been laid down in certain Indian judicial precedents which further corroborates the legal position.

Basis the above analysis, it may be concluded that sellers of goods in India may include an ROT clause in their sale contracts without the requirement of any registration for enforcement purposes, except in the case of secured creditors under the SARFAESI Act. However, it is preferable during any enforcement proceedings that the goods must remain in the possession of the buyer and should be clearly identifiable and unaltered. In such a scenario, during any liquidation of the buyer, the seller would have reasonable grounds to seek return of the goods rather than being classified as an unsecured creditor.

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NO OFFENCE UNDER SECTION 138 OF THE NEGOTIABLE INSTRUMENT ACT MADE OUT AGAINST AN INDIVIDUAL IF CHEQUE HAS BEEN DRAWN ON COMPANIES ACCOUNT WHICH HAS NOT BEEN ARRAYED AS AN ACCUSED IN THE COMPLAINT

Introduction :

In a recent judgment[1], the Supreme Court of India (**"Supreme Court"**) delves into a significant legal issue concerning the dishonour of cheques as governed by Section 138 of the Negotiable Instruments Act, 1881 (**"NI Act"**). The primary legal question before the Court was determining whether an accused can be prosecuted in his individual capacity, when he signed (in the capacity of a director) a cheque drawn on account maintained by Company. The Supreme Court held that under the NI Act without the Company being arraigned as an accused, prosecution for the commission of an offence under Section 138 of the NI Act could not have been proceeded against the accused. The case explores the interplay between individual and corporate liability under Sections 138 and 141 of the NI Act, alongside fundamental principles of corporate law such as the doctrine of separate legal personality.

Facts of the Case :

The Appellant (Complainant before the Trial Court), alleged that he lent a total sum of INR 8,45,000 to the Respondent (Accused before the Trial Court). To discharge the said debt, the Respondent issued a cheque, drawn on the account of Shilabati Hospital Pvt. Ltd.("**Company**"), where he served as a director. The cheque bore the stamp of the Company and the designation of the Respondent as the director. However, the cheque was dishonoured due to insufficient funds, prompting the Appellant to issue a statutory notice under Section 138 of the NI Act, and despite receipt of the notice, the Respondent failed to repay the amount. The Appellant subsequently filed a private complaint, leading to the conviction of the Respondent by the Trial Court. The Sessions Court upheld this conviction.
The order of the Sessions Court was challenged before the High Court, which eventually quashed the conviction, on the grounds that the liability under Section 138 could not be fastened on the Respondent personally without making the Company, a party to the case. The High Court relied on precedents emphasizing the requirement for the Company's inclusion in cases involving vicarious liability under Section 141 of the NI Act, and the High Court concluded that the liability under Section 138 could not be imposed on the Respondent in the absence of the Company being arraigned as an accused. Being aggrieved by this decision, the Appellant filed an appeal before the Supreme Court of India, challenging the decision of the High Court of Calcutta.

Observations of the Court :

The Supreme Court analysed Section 138, which penalizes the dishonour of cheques for insufficient funds if issued to discharge legally enforceable debts or liabilities. The Court emphasized that only the drawer of the cheque, i.e. the account holder, can be held liable under this provision. The term "drawer" applies strictly to the entity maintaining the bank account from which the cheque was issued. The Court further held that Section 141 extends vicarious liability to individuals associated with a Company only if the company, as the principal offender, is prosecuted and convicted. The Court reaffirmed the doctrine of separate corporate personality, noting that the Respondent acted as a signatory on behalf of the company, making the Company the actual drawer of the cheque.

Subsequently, the Court found no evidence that the Respondent issued the cheque in his personal capacity, as the stamp and signature on the cheque indicated his role as the Company's director, and held that the prosecution's failure to include Company, as an accused in the case rendered the Respondent's conviction unsustainable. By not prosecuting the Company, the principal offender, the requisite conditions under Section 141 for imposing vicarious liability on the Respondent were not met. The Supreme Court held that without arraigning the Company as an accused, the prosecution's case against the Respondent was deemed unsustainable.

Conclusion :

Upholding the High Court's judgment, the Supreme Court dismissed the Appellant's appeal. It reiterated the necessity of prosecuting the Company in cases involving cheques issued by corporate entities, and not the individual in his capacity as the director of the company.
The decision highlights the importance of adhering to procedural requirements and statutory safeguards under the NI Act, thereby ensuring fairness in the prosecution of financial offenses. Further, it underscores the importance of adhering to statutory requirements under the NI Act, particularly in distinguishing individual liability from corporate liability. It affirms that directors or authorized signatories of a company can only be held accountable in cases of dishonoured cheques when the corporate entity, as the primary account holder, is made a party to the proceedings.

[1] BIJOY KUMAR MONI V. PARESH MANNA & ANR. [2024 INSC 1024]

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1. SEBI issued a Securities and Exchange Board of India (Depositories and Participants) (Third Amendment) Regulations, 2024

On December 4, 2024, the Securities and Exchange Board of India (**"SEBI"**) notified the *"SEBI (Depositories and Participants) (Third Amendment) Regulations, 2024"*. The amendment introduces a new regulation, 60A, concerning "Nomination". This regulation requires participants to offer beneficial owners the option to designate a nominee to inherit their securities in the event of their death. Additionally, owners can nominate an authorized person to manage transactions on their behalf if they become incapacitated. For jointly owned securities, co-owners can collectively assign a nominee to inherit the securities if all joint owners pass away. The regulation also clarifies that depositories and participants will not be held accountable for actions taken based on the nominations made by beneficial owners.

2. SEBI permits the issuance of ESG Debt Securities

On December 11, 2024, SEBI notified the *"Securities and Exchange Board of India (Issue and Listing of Non-Convertible Securities) (Third Amendment) Regulations, 2024"*, further amending the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021. Under the amendment, SEBI has permitted the issuance of Environment, Social, and Governance Debt Securities ("**ESG Debt Securities**"). The ESG Debt Securities include green debt securities, social bonds, sustainability bonds, and sustainability-linked bonds. Previously, only green debt securities could be issued under the regulations. Additionally, paragraphs 3.3.31 and 3.3.32 of Schedule I to the regulations, concerning the appointment of debenture trustees, have been amended.

3. SEBI introduces LODR Third Amendment Regulations, 2024 effective December 12, 2024

On December 12, SEBI notified the "Securities and Exchange Board of India (Listing Obligations andDisclosure Requirements) (Third Amendment) Regulations, 2024" to further amend the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('**LODR Regulations**'). The changes made in the LODR Regulations are pertaining to the related party transactions, disclosure requirements, promoter-reclassification, advertisement in newspaper, changes in schedule of the LODR Regulations, secretarial audits, and more.

Notable updates include the introduction of exemptions to related party transactions (RPT), such as retail purchases by directors and employees without establishing a business relationship under uniform terms, and the acceptance of deposits by banks in compliance with regulatory directions. A new definition for "SR equity shares" has also been introduced. Other significant amendments include revised requirements for the role and appointment of Compliance Officers, mandatory secretarial audits for listed entities and material subsidiaries by Peer-Reviewed Company Secretaries, and the removal of certain compliance and reporting obligations, such as proxy forms for electronic meetings and specific certificate filings. Disclosures must now be submitted in XBRL format, and listed entities must ensure a minimum gap of five days between record dates.

4. SEBI modifies the requirements related to ODIs and FPIs with segregated portfolios

On December 17, 2024, SEBI issued a circular introducing the measures to address regulatory arbitrage with respect to Offshore Derivative Instruments ("**ODIs**") and Foreign Portfolio Investors ("**FPIs**") with segregated portfolios vis-à-vis FPIs. SEBI has revised certain rules regarding ODIs and FPIs with segregated portfolios. According to the circular, the conditions for issuing ODIs are as follows:

- FPIs in the Indian capital market are no longer

permitted to issue ODIs with derivatives as underlying assets.

- FPIs are prohibited from hedging their ODIs through derivative positions on Indian stock exchanges.
- FPIs can issue ODIs only through a separate and dedicated FPI registration that does not involve proprietary investments.

5. DGCA Issues Civil Aviation Requirement ("CAR") on Criteria for Wet/Damp Leasing of Aircraft by Indian Operators

The Directorate General of Civil Aviation ("**DGCA**") issued "*CAR Section 3, Series C, Part I (Issue V) – Criteria for Wet/Damp Leasing of Aircraft by Indian Operators*", on December 24, 2024. The revised CAR restricts wet/damp leases to countries with a reliable safety oversight system and standardizes DGCA surveillance for such operations.

Aircraft can now be wet-leased only from International Civil Aviation Organization (ICAO) contracting states with an average Effective Implementation (EI) score of 80% or higher, with a minimum of 70% in each area of personnel licensing, airworthiness, and operations. Additionally, the duration of wet/damp lease (in) has been extended from 3 months to 6 months, with the possibility of a further 6-month extension. Other updates include provisions for reporting safety occurrences and submitting flight data and other requisite safety information to DGCA.

6. IFSCA issues revised guidelines for setting up and operation of ITFS in GIFT City

The International Financial Services Centres Authority ("**IFSCA**") via press release on December 25, 2024 issued the guidelines to regulate the establishment and operation of International Trade Finance Service Platform ("**ITFS**"), 2024. The said guidelines outline the roles of ITFS operators, financiers, and participants, defining the ITFS platform as a digital system facilitating trade finance activities like factoring and trade receivable/payable financing. Entities seeking ITFS registration must meet eligibility criteria, including incorporation under the Companies Act, 2013, financial adequacy, and technological expertise.
Registered ITFS operators must commence operations within six months, maintain robust infrastructure, and ensure compliance with real-time data sharing and business continuity standards. Provisional registration is granted initially, subject to further evaluation, and operators must adhere to regulatory norms, including notification of material changes.

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Republic Day 2025: Celebrating India's Democratic Spirit

India's Republic Day, observed annually on **26th January**, marks a defining moment in the nation's history—the adoption of the **Constitution of India** in 1950. This day celebrates the democratic framework that empowers every citizen and embodies the ideals of justice, liberty, and equality. In 2025, the Republic Day festivities take on special significance as they reflect on **76 years of India's constitutional journey**, a testament to the nation's resilience and unity.

This year's Republic Day theme, **"Swarnim Bharat: Virasat aur Vikas"** (Golden India: Heritage and Development), highlights the nation's remarkable journey of progress while honouring its rich cultural legacy.

Historical Insights

India became a republic on 26th January 1950, a date chosen to honour the Purna Swaraj Declaration of 1930, which called for complete independence from British rule. The Indian Constitution, the world's longest written constitution, was drafted by the Constituent Assembly under the leadership of Dr. B.R. Ambedkar, reflecting the nation's diversity and commitment to democracy. On the first Republic Day, Dr. Rajendra Prasad was sworn in as India's first President, marking the birth of the Indian Republic.

Celebrations and Traditions

- Republic Day in New Delhi is celebrated with grandeur, featuring a spectacular parade at Kartavya Path (previously Rajpath), presided over by the President of India.

- The event includes a military display showcasing India's defence capabilities, cultural pageantry with vibrant tableaux representing India's states and union territories, and awards honouring brave individuals with Gallantry and Padma Awards. Armed forces personnel march in an elaborate display of military might, while the parade, starting from Raisina Hill near Rashtrapati Bhavan, passes through iconic landmarks like India Gate and ends at the historic Red Fort. The celebration symbolizes India's unity in diversity and rich cultural heritage.

- Republic Day also includes an international dimension, with a chief guest from a friendly nation each year, reflecting India's commitment to global diplomacy. For 2025, Indonesian President Prabowo Subianto will be the chief guest.

Republic Day is more than a celebration; it's a reaffirmation of India's democratic values and a call to honour the principles enshrined in its Constitution.

Notable Recognitions & Accolades