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OVERHAUL OF DATA PROTECTION AND PRIVACY REGIME VIS-A-VIS EU GENERAL DATA PROTECTION REGULATIONS

INTRODUCTION

Coming into effect from May 25, 2018, the General Data Protection Regulation ("**GDPR**") is a regulatory framework aimed at protection of privacy rights of individuals residing in the European Union ("**EU**"). The GDPR has been formulated to focus on averting privacy and data breaches in our data-driven world which is vastly different from the era of Directive 95/46/EC[1] wherein social media, cloud storage and the vast pervasiveness of internet were not a reality.

KEY FEATURES

The GDPR envisages measures to protect personal data of natural persons (*the regulation does not cover protection of data concerning undertakings established as legal persons/ entities*). This includes any information relating to an individual that can, directly or indirectly, be utilized to identify such an individual, e.g., a name, an address, location data, an online identifier. GDPR also regulates the processing of such data, whether automated or non-automated which includes its collection, organisation, storage, alteration, destruction etc.

Contrary to the erstwhile Directive 95/46/EC, the aspect of territorial scope lends the maximum gravitas to the GDPR, by extending its territorial jurisdiction to any entity (whether established and/ or operating in the EU or not) processing personal data of individuals in the EU for (i) offering goods and services to such individuals (regardless of payment being made or not); or (ii) monitoring the behaviour of such individuals within the EU. Consequently, this provision implies the degree to which Indian entities that have a business-related presence in the EU by means of engaging with EU customers or clients, or targeting prospects in the EU would be affected in terms of compliance with GDPR.

In addition to its extended territorial scope, the GDPR introduces certain key players which have to undertake obligations corresponding to their relevant role in processing of personal data of individuals (or 'data subjects') in the EU being 'data controller' and the 'data processor', with the former being the person who assumes responsibility for determining the purposes, conditions and means of processing of personal data, while the latter undertakes the actual processing of the personal data on behalf of the controller.

Entities, acting in their capacity as data controller or data processor are obliged to ensure adherence to certain key principles being ("**GDPR Principles**"):

(a) Lawful, fair and transparent processing of data;
(b) Limiting processing of data for the purpose for which it was collected;
(c) Limiting collection of data to the extent it is required for the business purpose;
(d) Ensuring accuracy of the data collected and stored;
(e) Integrity and confidentiality;
(f) Limitation of storage of data once it is no longer required to fulfil the business purpose:

The concept of consent has undergone considerable strengthening and has been widened to ensure that consent given by the data subject is free, specific, informed and unambiguous and can be withdrawn with ease, at any time. Entities desirous of processing personal data of data subject can no longer use complex or illegible legalese for requests of consent and must use clear, plain, easily accessible and intelligible language.

[1] *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.*

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Rights of data subjects, with respect to the manner in which their personal data is processed and dealt with, is another facet regarding data protection and privacy, which has undergone overarching revision under the GDPR which includes the following ("**GDPR Rights**"):

(a) Right to have access to the personal data being processed by a controller;
(b) Right to rectify any inaccuracy in relation to personal data
(c) Right not to be subject to a decision based solely on automated processing, including profiling
(d) Right to deletion of personal data provided such personal data is no longer required by the controller for the purposes for which it was collected
(e) Right to restrict the controller from processing of personal data under certain conditions;
(f) Right to receive personal data in a machine-readable format and transmit the same to another controller (data portability); and
(g) Right to object, at any time, to processing of personal data by the controller on certain grounds.

In an effort to give adequate teeth to the regulation, the magnitude of penalty has set a new benchmark, and the said penalty provision[2] can be classified into two tiers:

(a) First tier, which provides for fine up to a maximum of 2% of total worldwide annual turnover of the defaulting entity or €10 million, whichever is higher, for infringement of the GDPR Principles.
(b) Second tier, which provides for fine up to a maximum of 4% of total worldwide annual turnover of the entity or €20 million, whichever is higher, for infringement of GDPR Rights.

POTENTIAL IMPACT ON INDIAN ENTITIES

It is important to note that while the GDPR permits cross-border transfer of personal data of EU residents to countries outside of the EU for processing, India has not been designated as a qualifying country which can provide adequate level of data protection mechanism.

India's legislative attempts at formulating a data protection and privacy regime has been restricted to the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ("**SPDI Rules**") under the Information Technology Act, 2000 to address issues on dealing with sensitive personal information of individuals. However, the approach taken by the SPDI Rules lack the comprehensiveness with which the GDPR addresses the data protection obligations of establishments and rights of data subject over their personal data.

Considering that Indian entities are affected with the territorial extension of the scope of GDPR, the first step for Indian entities dealing with the personal data of EU residents, amongst many, to ensure compliance with the GDPR would be to revise and implement policies and processes (including but not limited to privacy statements, disclaimers, terms and conditions of use, etc) and update agreements with third parties (which have been contracted for the purposes of data collection and processing and further transmission or use on behalf of the concerned controller entity). Further, entities will need to assess the appropriate risk mitigation mechanism to avert personal data breaches.

Entities can also avail cyber-insurance to fulfil their contractual obligations and to cover their exposures with respect to internet security including GDPR. It is important that the above assessments are executed after determining the role of the Indian entity- whether the entity is a 'data controller' or a 'data processor'.

[2] *Article 83 and 84 of the GDPR*

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In light of this, Indian legislators have taken a step forward by constituting the 'Committee of Experts on a Data Protection Framework for India', chaired by Justice B. N. Srikrishna, to draft a law for data protection in India.

Such a legislative step is particularly important in the context of laws in force India, which may conflict with the obligations imposed by the GDPR.

In an effort to ensure that instances of conflict between the GDPR and local laws do not result in ambiguity and consequent 'failure to comply' with respect to data protection and privacy obligations by Indian entities and their contracted third parties (Indian or foreign), it is incumbent on the aforementioned committee to draft a law that is in congruence with and circumvents any clashes with the provisions of the GDPR, which has globally been accepted to pave the way as the 'golden mean' in terms of data protection and privacy.

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SUMMARY OF ADMIRALTY (JURISDICTION AND SETTLEMENT OF MARITIME CLAIMS) ACT, 2017

The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 (hereinafter referred to as **"Admiralty Act" or "Act")** came into force from 1st April 2018. Section 17 of the said Act seeks to repeal the prior laws relating to the Admiralty Jurisdiction of the Indian High Courts passed by the British in the 1800s such as Admiralty Court Act 1840, the Admiralty Court Act 1861, the Colonial Courts of Admiralty Act 1890, the Colonial Courts of Admiralty (India) Act 1891, and the provisions of the Letters Patent, 1865.

SALIENT FEATURES OF THE ADMIRALTY ACT

- Establish a legal framework replacing the archaic laws which were hindering efficient governance and to consolidate the laws relating to Admiralty Jurisdiction of Courts, Admiralty proceedings on maritime claims, arrest of vessels and related issues.
- Expand the ambit of the term "vessel", defining it under Section 2(1) (*l*) of the Admiralty Act, *includes any ship, boat, sailing vessel or other description of vessel used or constructed for use in navigation by water, whether it is propelled or not, and includes a barge, lighter or other floating vessel, a hovercraft, an off-shore industry mobile unit, a vessel that has sunk or is stranded or abandoned and the remains of such a vessel."* However, a vessel which is broken up to such an extent that it cannot be put into use for navigation shall not be considered a vessel under the Admiralty Act.
- Provide prioritization of maritime claims and maritime liens while providing protection to owners, charterers, operators, crew members and seafarers at the same time.
- The provisions of the Code of Civil Procedure, 1908 shall apply in all the proceedings before the High Court in so far as they are not inconsistent with or contrary to the provisions of this Act or the rules made there under.[3]

APPLICABILITY OF THE ADMIRALTY ACT

According to Section 1(2), the Act applies to all vessels, irrespective of the place of residence or domicile of the owner. The Act shall not apply to an

[3] *Section 12 of the Admiralty Act*

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inland vessel[4] or a vessel under construction that has not been launched unless notified by Government to be a vessel under this Act; a warship, naval auxiliary or other vessel owned or operated by the Central or a State Government and used for any non-commercial purpose and a foreign vessel which is used for any non-commercial purpose as may be notified by the Central Government.

ADMIRALTY JURISDICTION AND POWERS OF THE HIGH COURT

The Act seeks to empower the jurisdiction of the High Court in respect of all maritime claims exercisable over the waters up to and including the territorial waters (shall extend only on being notified by the Government) of their respective jurisdictions under this Act. The maritime claims may include a claim against any vessel arising out of any dispute regarding possession, ownership of a vessel, dispute between the co-owners of a vessel, mortgage or loss or damage caused due to nature or operation of a vessel, loss of life or personal injury, loss or damage to any goods, agreement relating to the carriage of goods or passengers, use or hire of the vessel, etc. As per Section 5 of the Act, the High Court is also vested with the power to order arrest of any vessel which is within its jurisdiction for the purpose of providing security against a maritime claim and may also order arrest of any other vessel provided the dispute is not regarding possessions or ownership of a vessel. The High Court is also vested with the power to exercise Admiralty Jurisdiction by Action *in personam* in respect of any maritime claim referred to in Section 4(1) (a) to (w). However, this power is subject to Section 7 which restricts the power of the High Court to exercise claims arising in respect of a damage or loss of life or personal injury.

MARITIME LIENS

A maritime lien[5] is a special type of maritime claim that continues to exist on a vessel irrespective of any change in ownership or registration of a flag and shall be extinguished after expiry of a period of 1 (one) year unless, prior to the expiry of such period, the vessel has been arrested or seized and such arrest or seizure has led to a forced sale by the High Court. The Admiralty Act under Section 9(1) lists down claims which shall result in a maritime lien over a vessel and describes the order of priority to be given to maritime claims where multiple such claims are made limited to a period of 1 (one) year. However, a maritime lien shall commence for claims for wages and other sums due to the master, officers and other members only upon the claimant's discharge from the vessel and in other cases when the claim arises and shall run continuously without any suspension or interruption excluding the period of arrest or seizure. The period is limited to 2 (two) years in this case. The applicability of a maritime lien is limited to the extent that it shall not attach to a vessel arising out of damage in connection with the carriage of oil or other hazardous or noxious substances by sea or with the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste.

[4] *Section 2(1)(a) of the Inland Vessels Act, 1917 defines "inland vessel" or "inland mechanically propelled vessel" means a mechanically propelled vessel, which ordinarily plies on inland water, but does not include fishing vessel and a ship registered under the Merchant Shipping Act, 1958 (44 of 1958).*

[5] *Section 2(g):- "maritime lien" means a maritime claim against the owner, demise charterer, manager or operator of the vessel referred to in clauses (a) to (e) of sub-Section (1) of Section 9, which shall continue to exist under sub-Section (2) of that Section.*

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CONCLUSION

The Admiralty Act gains much commercial importance because it seeks to unify two major aspects of statue. The Act expands the jurisdiction of High Courts to regulate the maritime claims, liens, procedure, etc., thus repealing the out-dated Admiralty Laws- a much needed change. The Courts with Admiralty Jurisdiction shall now exercise their authority over both vessels within their territorial waters (*Jurisdiction in rem*) and persons within their territory (*Jurisdiction in personam*). The Admiralty Act specifies the circumstances in which Courts can exercise both these types of Jurisdiction. This gives us hope that practice and growth of this law will clarify the ambiguity of the major issues under this area of law and shall remove the chaos to an extent as possible. In light of the Act, it would be prudent to revisit the shipping documents including bills of lading, service contracts, charter party agreements, contracts of affreightment, documents related to the provision of services at various ports, etc. to ensure that these are in conformity with the new law.

Admiralty law i.e. the jurisdiction of the High Courts and the maritime claims arising out of inter party disputes, into one consolidated and comprehensive

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LEX REVISORS

Foreign investment in India to be reported in Single Master Form

The Reserve Bank of India vide its notification dated 7th June, 2018 issued a circular introducing a single master form (the "SMF") (as compared to requirement of multiple forms prior to the notification) to integrate the existing reporting norms for various types of foreign investment in India. SMF would subsume the several forms for reporting of foreign investment including Form FC-GPR (*Issue of capital instruments by an Indian company to a person resident outside India*) and Form FC-TRS (*Transfer of capital instruments between a person resident outside India and a person resident in India*).Further, Indian entities already having foreign investment are required to file Entity Master Form (in a specified format) with the RBI from June 28, 2018 before July 12, 2018. Indian entities not complying with this pre-requisite will not be able to receive foreign investment (including indirect foreign investment) and will be non-compliant with Foreign Exchange Management Act, 1999 and regulations made thereunder.

Fast Track Insolvency Resolution Process for Corporate Persons, Regulations, 2017

The Ministry of Corporate Affairs (MCA) has notified sections 55 to 58 of the Insolvency and Bankruptcy Code, 2016 pertaining to the Fast Track Process which shall apply to a small company as defined under section 2(85) of the Companies Act, 2013, a Startup (other than the partnership firm), as defined in the notification dated 23rd May, 2017 of the Ministry of Commerce and Industry; or an unlisted company with total assets, as reported in the financial statement of the immediately preceding financial year not exceeding Rs. 1 crore. The new regulations provide that the process from initiation of insolvency resolution of eligible corporate debtors till its conclusion with approval of the resolution plan by the Adjudicating Authority, be completed within a period of 90 (Ninety) days (extendable to further 45 (Forty Five) days if required) as against 180 (Hundred and Eighty) days in other cases. **MCA to conduct KYC for directors before 31st August, 2018**

The Ministry of Corporate Affairs (MCA) would be conducting KYC for all Directors of all companies annually through a new e-form viz-a-viz DIR-3 KYC. Accordingly, every Director who has been allotted DIN on or before 31st March, 2018 and whose DIN is in 'Approved' status would be mandatorily required to file form DIR-3 KYC on or before 31st August, 2018. The form should be filed by every Director using his/her own DSC and should be duly certified by a practicing professional (CA/CS/CMA). Filing of DIR-3 KYC would be mandatory for Disqualified Directors also.

Permanent Account Number made mandatory

The Finance Act, 2018 has amended sub-section 1 of section 139A of the Income Tax Act, 1961, with effect from April 1, 2018 states that any managing director, director, partner, trustee, author, founder, karta, chief executive officer, principal officer or office bearer of the every person, not being an individual, which enters into a financial transaction of an amount aggregating to Rs. 2,50,000/- (Rupees Two Lakh Fifty Thousand) or more are required to obtain a Permanent Account Number (PAN). This would mean that even a foreign national who is a Director of an Indian company with the above mentioned criteria would need to obtain a PAN.

Reduction in pecuniary limits for adjudicating the disputes by Commercial Courts

The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018, seeks to amend the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 enabling the creation of commercial divisions in High Courts, and Commercial Courts at the district level, to adjudicate commercial disputes such as those related to construction contracts and contracts for provision of goods and services, with a value of at least Rs. 3,00,000/- (Rupees Three Lakh) as compared to Rs. 1,00,00,000/- (Rupees One Crore) prior to the amendment.

Sections of Companies (Amendment) Act, 2017 notified

Effective from 13th June, 2018, The Ministry of Corporate Affairs (MCA) has recently notified certain amendment brought in by Companies (Amendment) Act, 2013, simplifying certain procedural rules to facilitate the ease of doing business viz-a-viz removing practical differences faced by corporate while doing so. These changes include registering significant beneficial owner in a company, filing of returns with registrar in case of promoters stake changes, mandate for unlisted company to hold annual general meeting in India, power to beneficial owner to investigate and report matters relating to the company etc.

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