

## GUEST POST

### Levy of Success Fee By Resolution Professional

By

*Aakriti Gupta, Army Institute of Law*

Success fees is a payment arrangement based on the contingency on the positive outcome of an event. The National Company Law Appellate Tribunal ("NCLAT") in the recent case of **Mr. Jayesh N. Sanghrajka v. The Monitoring Agency nominated by the Committee of Creditors of Ariisto Developers Pvt Ltd<sup>1</sup>** held that success fees cannot be levied by a Resolution Professional on acceptance of a Resolution Plan. The aim of this article is to analyze the decision of the NCLAT.

*To read more, visit this link*

<https://www.jusip.in/levy-of-success-fee-by-the-resolution-professional/>



1. Company Appeal (AT) (Insolvency) No. 392 of 2021

# TRIVIA

The table outlines the basics and fundamentals of the concept of Success Fee.

## What is Success Fee?

In finance, a success fee is a commission paid to an advisor (typically an investment bank) for successfully completing a transaction. The fee is contingent on successfully helping the client achieve their goal, and thus aligns the interests of the client and the advisor.

## Benefits of a Success Fee Structure

- Alignment of interests between the client and advisor.
- Potential savings, or cost expenditure efficiency, since there is no fee paid if there is no successful outcome.
- Incentivizes the advisor to get the best possible deal (since a better, more lucrative deal translates to a bigger commission check.)
- The success fee structure is easy to understand.

## Drawbacks of a Success Fee Structure

- If the probability of success is low, the advisor may make little effort toward working on the deal since they doubt they will be able to earn a commission.
- If the fee structure is for a flat fee, a fee that is the same regardless of the value of the deal, then the advisor may be incentivized to close the deal as quickly as possible rather than spend time trying to get a better deal that will not make them any additional money. In such a circumstance, the best interests of the client and the advisor may not be sufficiently aligned..
- The advisor is exposed to a lot of risk if they are working on a deal with the possibility that – if they are unable to put a deal together – they may earn nothing at all for their efforts. (Because of this possibility, many contingent fee arrangements provide for the advisor to receive some nominal compensation for their time and efforts even if they are ultimately unsuccessful in helping the client set up a deal.)
- A potential drawback for the client is that a success fee may be more expensive than a work fee or fixed charge.

## Status of Success Fee in Indian Litigation

The rules made by the BCI expressly bar advocates from stipulating a fee contingent on the results of the litigation or from agreeing to share the proceeds thereof. These rules have been made pursuant to the powers bestowed upon the BCI under the Advocates Act, 1961.

## Is Success Fee for Resolution Professionals part of Insolvency and Bankruptcy Code?

The Principal Bench of the NCLAT has held that where the 'success fees' is more in the nature of contingency and speculative, it cannot be said to be a part of the provisions of the Code and the same is not chargeable.<sup>2</sup>

2. Mr. Jayesh N. Sanghrajka v. The Monitoring Agency nominated by the Committee of Creditors of Ariisto Developers Pvt Ltd, Company Appeal (AT) (Insolvency) No. 392 of 2021.

# INTELLECTUAL PROPERTY RIGHTS



## **Bombay High Court: An idea cannot be subject to copyright but can be subject to breach of confidentiality.**

In the case of *Tarun-Wadhwa v. Saregama India Ltd and Anr, IA(L) No. 4371 of 2021 in Commercial IP Suit (L) No. 4366 of 2021*, it was held by the Bombay High court, while deciding on the issue of copyright infringement, that an idea cannot be subject to copyright but can be subject to breach of confidentiality.

The film in question was "Zombivli". According to the plaintiff, he had shared the synopsis of his movie by the name of 'Haila! Zombie' with Saregama's divisions, Yoodle Films. Thereafter, the plaintiff shared a fully developed and complete screen play with the

respondents. However, later, the Respondents refused to collaborate with the plaintiff. In July 2020, the defendant announced the release of its film "Zombivli", which was allegedly very similar to the idea of his movie 'Haila! Zombie'. The plaintiff sought the screenplay of the same which was refused.

The Bombay High Court held that there is no copyright in an idea but only in an expression of an idea. Having rejected the contention of copyright infringement, the Court proceeded to determine breach of confidentiality by the Defendants. The High Court held that in order to claim breach of confidentiality the plaintiff must clearly prove precision, originality and completeness of disclosure in the plaint itself.

Any confidential information by definition must be outside the public domain. All these elements must co-exist. However, the plaintiff in the present case failed to satisfy the High Court regarding the breach of confidentiality. Hence, the application was dismissed.

## **'Squid Game' creators seek widespread trademark protection for smash hit**

Netflix has submitted trademark applications for "Squid Game" in over two dozen countries, including Argentina, Canada, the European Union, Malaysia, Peru, the Philippines, the Republic of Korea, and the United States. If the applications are approved, Netflix will have exclusive

rights to the trademark in that location, including for the type of merchandising that has long been a key component of any blockbuster's release. This application has been submitted for a wide range of commodities, from oven mitts to mouse pads, a method utilised by many makers of shows or movies. This allows a corporation to offer a diverse choice of merchandise to its followers while also preventing copycats from using the show's popularity to sell counterfeit goods.

The creators have sought protection in multiple jurisdictions vide the Madrid

Protocol, governed by the World Intellectual Property Organisation, which allows a person to register in as many of the over 200 member nations as they choose using an one application, rather than filing each application separately.

### **Popular Indian product used for body art granted GI label**

"*Sojat Mehndi*", a product from Rajasthan in northern India that is used for body art in several Asian nations, has been granted a geographical indication (GI) label. A GI tag ensures that "Sojat mehndi" cannot be

sold by anyone else and also serves as a seal of authenticity. The leaves of the henna plant are processed and filtered into powder or paste, which is then used for body decoration or body art. It also refers to the form of body art. The paste made from mehndi leaves cultivated in the city of Sojat is known as Sojat mehndi. Sojat mehndi is distinguished by its intense burnt red colour. This is due to the area's soil and precipitation conditions, as well as the fact that Sojat's mehndi leaves contain more lawsone than those cultivated elsewhere.

## INSOLVENCY & BANKRUPTCY



**NCLAT rejects application filed to initiate CIRP proceedings subsequent to decision by the NCLT agreeing that dispute was in existence prior to receipt of demand notice.**

The NCLAT, in the case of *Hukum Singh v. Adaab Hotels Ltd., Company Appeal (AT) (Insolvency) No. 905 of 2021*, upheld NCLT's decision rejecting an application filed by the Appel-

lant under Section 9 of the Insolvency and Bankruptcy Code, 2016 to initiate Corporate Insolvency Resolution Process (CIRP) proceedings against the Corporate Debtor. A notice

under Section 8 of the IBC was issued by the Applicant claiming dues for the total amount, which was replied by the Corporate Debtor referring to a Resolution deciding that till the situation improves no Director would be paid any salary and interest on deposits and that due to actions of the Appellant he was removed from the directorship; several other allegations regarding withdrawal of money from accounts and misappropriation were made in the reply as well. Noticing the details of the case and placing reliance on *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353*, the NCLAT rejected the prayer to initiate CIRP proceedings under IBC against the Corporate Debtor.

**NCLT cannot exercise residuary jurisdiction under Section 60(5)(c) of the IBC to adjudicate upon the contractual dispute between the parties.**

In the case of *TATA Consultancy Services Limited v. Vishal Ghisulal Jain, Resolution Professional, SK Wheels Private Limited, CA 3045 of 2020*, wherein the Corporate Debtor instituted a miscellaneous application before NCLT for quashing of a contract termination notice, the NCLT observed that the contract was terminated without serving the requisite notice of thirty days and dismissed the appeal against ad-interim order. The Hon'ble Supreme Court allowed the appeal filed against the same and noted that the NCLT does not have any

residuary jurisdiction to entertain the contractual dispute which has arisen outside the scope of insolvency of the Corporate Debtor. In the absence of jurisdiction over the dispute, the NCLT could not have imposed an ad-interim stay on the termination notice. Further, it was held that NCLT and NCLAT shouldn't interfere with a party's contractual right to terminate a contract even if the contractual dispute arises in relation to the insolvency, a party can be restrained from terminating the contract only if it is central to the success of the CIRP. And the exception provided by the Court in *Gujarat UrjaVikas v. Amit Gupta & Ors.*, (2021) 7 SCC 209, must be considered by the Tribunals while examining prayers for interim relief.

## COMPETITION LAW

**FedEx India acquires minority stake-buy in Delhivery Pvt. Limited.**

The Competition Commission of India has approved FedEx India's acquisition of minority stake in Delhivery Pvt. Limited, i.e., two entities engaged in providing logistics solutions. It has also given nod to acquisition of certain operating assets of FedEx India and TNT India,

which is part of the FedEx group, by Delhivery. Additionally, Delhivery will acquire certain operating assets pertaining to domestic business of FedEx Express Transportation and Supply Chain Services (India) Pvt Ltd. Further, after acquiring reasonable consent, a number of customers and employees of FedEx India shall be transferred to Delhivery. TNT

India's role is limited to transfer to Delhivery of certain operating leases and associated assets, and employees, subject to their consent. More importantly, the notice added that, the proposed combination won't have any impact on the competitive landscape in potentially relevant market in India, in any manner.

## ARBITRATION, MEDIATION AND CONCILIATION



**Supreme Court: High Court is not empowered to decree the claim of parties under an application of setting aside of Arbitral Award under the Arbitration and Conciliation Act, 1996.**

The Supreme Court in the case of *Punjab State Civil Supplies Corporation Ltd. v. Ramesh Kumar and Company*, Civil Appeal No. 6832 of 2021, held that the High Court is not empowered to decreeing the claim of parties under an application of setting aside of Arbitral Award under the Arbitration and Conciliation Act, 1996. The arbitrator in the present case rejected the claims of the respondents and upheld the action of the appellants for forfeiting the security deposit. An application to set aside the award was filed before the District Court, Chandigarh, which was rejected. Thereafter, an appeal was filed in the Punjab and Haryana High Court. The High Court

set aside the award holding it to be arbitrary, erroneous and devoid of any reason. It also awarded claim of the respondent together with interest. The Supreme Court held that the High Court had exceeded its jurisdiction by reversing the judgement of the District Judge and decreeing the claim in its entirety.

**Supreme Court: No *pendente lite* and future interest can be awarded on damages for the breach of contract as the damages also come within the meaning of amount payable under the contract.**

The Supreme Court in the case of *Union of India v. Manraj Enterprises*, Civil Appeal No. 6592 of 2021, held that no *pendente lite* and future interest can be awarded on damages for the breach of contract as the damages also come within the meaning of amount payable under the contract. The appellant and

the respondent entered in a works contract. A dispute arose between the parties and they went into arbitration. The sole arbitrator passed an award in favour of the respondent *pendente lite* and future interest on entire award except the earnest money and security deposit. Aggrieved by the award the appellant filed an application to set aside the award. The said application was dismissed by the High Court of Delhi and therefore, the present appeal was filed. The appellant contended that an interest was not payable on any amount payable under a contract in the absence of any clause in the contract itself.

Relying on the contract between the parties, the Supreme Court observed that no interest was payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract. It held

that though damages become payable on account of breach of conditions of the agreement, they would nevertheless constitute amount payable under the contract. Thus, the award given by the arbitrator for award of future and pendente lite interest was set aside.

**Delhi High Court: No petition under Article 227 of the Constitution of India would be maintainable against an order allowing arbitration under Section 8 of the Arbitration and Conciliation Act, 1996**

The Delhi High Court in the case of *Arun Srivastava v. Larsen & Toubro Ltd., CM(M) 1520/ 2018*, held that no petition under Article 227 of the Constitution of India would be maintainable against an order allowing arbitration under Section 8 of the Arbitration and Conciliation Act, 1996. The

petitioner in the present matter was aggrieved by the non-payment of an amount of 12,24,181/- by the respondent for the payment of supply, installation and commissioning of electric works in Gurgaon. This led to a recovery suit in 2017. The respondent filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 for the initiation of an arbitration proceeding between the parties in reference to the arbitration clause contained in the letter of intent. The application under Section 8 Arbitration and Conciliation Act, 1996 of the was allowed. The petitioner had admitted to the existence of such a clause in the letter of intent. However, aggrieved by the order of allowing arbitration, the petitioner filed the present petition under Article 227 of the Constitution of India, 1950.

The High Court held that Article 227 is a constitutional remedy and is not barred by a prohibition contained in statute. However, generally, the High Courts would not exercise a jurisdiction under Article 227 if the order is final in nature. In this regard, it was noted that no remedy has been provided against an order allowing a Section 8 application under the Arbitration and Conciliation Act, 1996 and therefore, it gains finality. The intent of the Act is that existence and validity of the arbitration agreement can be raised by a party before the Arbitral Tribunal and therefore, finality has been given to the orders passed by the court allowing application under Section 8 of the Act. Thus, in the cases where the arbitration clause in the agreement is admitted, no remedy would lie under Article 227 against an order allowing arbitration.

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**JusIP**  
Legal is Simple

**Corporate Office:**

Chamber No. 2 & 3, Hotel Shivalikview  
Sector 17-E, Chandigarh 160 017

Ph.: +91 172 4015405  
Mob: +91 70874 21063

[info@jusip.in](mailto:info@jusip.in)  
[www.jusip.in](http://www.jusip.in)

New Delhi | Mumbai | Bengaluru | Chennai