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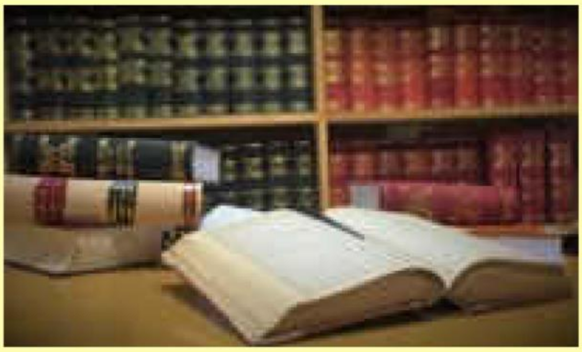

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INSIGHTS

I. Hope in the New Year To Construction Workers

Arguably the most active authorities under the Real Estate (Regulation and Development) Act, 2016 ("**RERA**") in India, the Maharashtra Real Estate Regulatory Authority ("**MahaRERA**") recently introduced an initiative to train construction workers, so as to improve the quality of construction and also to increase the safety aspects of constructing buildings. This skill initiative taken up by MahaRERA to skill the construction workers would be implemented in two phases:

- Phase 1: Development of expert trainers i.e. Training of Expert Trainers (TOET); and
- Phase 2: Train the construction workmen at RERA registered projects, wherein almost 12-15 lakh unskilled labourers would undergo training in Maharashtra.

The MahaRERA and the Maharashtra Building and Other Construction Workers Welfare Board ("**MBOCWWB**") have signed an Memorandum of Understanding in this regard, wherein, the funds of the MBOCWWB will be utilised for the purposes of training the expert trainers and the expert trainers training the unskilled/semi-skilled labourers. The MahaRERA has engaged three training partners being Rustomjee Academy of Global Career (RAGC) in Thane, KUSHAL in Pune and SBSS in Nagpur ('**Training Partner/s**') to implement the training process.

Unskilled and semiskilled construction workers such as masons, carpenters, bar-benders, plumbers, electricians, painters, daily wagers etc, will immensely benefit from the training programme. Each construction Project Site has been declared to be a 'vocational training centre'. The employer or builder is required to register the Project Site with MBOCWWB as an 'establishment' and the Training Partner is required to enable registration of the construction worker with the MBOCWWB. The said Training Partner will also enable uploading of the information relating to the construction worker, such as his bio data, Aadhar authentication etc, with the Maharashtra Skill Development Society, Government of Maharashtra. This data will in turn be shared with Construction Skill Development Council of India, for certification of the trained construction workmen, after the training and assessment.

Apart from skilling the unskilled and ensuring quality construction, the above detailed initiative by MahaRERA also enables achievement of another vastly neglected aspect, being the registering the construction sites and the construction workmen working at these sites, with the MBOCWWB. The MBOCWWB is established as a body corporate under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 **("BOCW Act").** The main objective of the BOCW Act is to ***inter-alia*** provide to the construction workers:

- Safe drinking water, proper accommodation and latrines, canteens, creches and the like at the construction site;
- Skilling of the construction workers;
- Assistance in providing housing loans;
- Education for the children of the workers;
- Pension provisions;
- Assistance funeral expenses;
- Medical assistance; and
- Assistance for the marriage expenses.

The BOCW Act enables the establishment of a 'Construction Worker's Welfare Fund', which must be utilized for achieving the aforesaid objectives. Also, the Building and Other Construction Workers' Welfare Cess Act, 1996, enables the levy of 'Cess' between 1% to 2% of the construction cost, which amount is contributed into the Construction Workers Welfare Fund under the BOCWC Act, for utilization to fulfil the objectives of the said enactment.

It is well known that the Construction Workers' Welfare Boards set up under the BOCW Act by various State Governments have not been able to fruitfully achieve the objectives of the said enactment. It is estimated that there are about 4.85 Crore construction workmen engaged at various project sites, across the country. After agriculture sector, the construction sector is the largest employer of the labour workforce in India. However, such a large workforce has been grossly neglected and continue to be deprived of the social security and welfare benefits, that they truly deserve.

The Supreme Court has time and again clarified that the 'right to life' enshrined under the Fundamental Rights, includes the right to live with dignity for the construction workmen. This implies basic facilities and welfare measures for a dignified livelihood. However, the state of working and living conditions of the construction workers, is far from being dignified. They lack basic amenities at their living quarters, they do not have any social security in the form of pension or medical insurance and many a times they are denied the minimum wages. The Supreme Court in its order dated March 18, 2018 in the matter of National Campaign Committee for Central Legislation on Construction Labour v/s Union of India [Conmt. Pet. (C) No. 52/2013 in W.P. (C) No. 318/2006], has lamented upon the fact that the Government has failed to implement the BOCW Act. In the said matter, the Supreme Court has upheld the constitutional validity of the BOCW Act, justified the levy of Cess and has held that the right to a dignified life with social security is the constitutional right of the construction workmen. The Court has then proceeded to issue directions to the Ministry of Labour and to the State Governments to effectively implement the said enactment.

Apart from the BOCW Act, the Supreme Court has also noted that the construction workmen must be entitled to avail the benefits under the Maternity Benefit Act, 1961, The Minimum Wages Act, 1948, The Employees' State Insurance Act, 1948, The Employees' Provident Funds and Miscellaneous Provisions Act, 1952, as well. It is however ironical that the Supreme Court has recently in the matter of Builders Association of India v. The Employees State Insurance Corporation & Ors [Special Leave to Appeal (C) No. 13351/2018] stayed the applicability of the Employees' State Insurance Act, 1948 to construction workmen. The silver lining though is the fact that the Employees Provident Fund Organisation under the Ministry of Labour and Employment, has been fairly successful in implementing the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 to construction workmen. This notwithstanding, the various other benefits to which the construction worker should have been entitled to, have largely remained unavailable, including in construction projects which are implemented by the Central and State Governments and by the National Highway Authority.

What really then, is the reason for failure to fully implement the objectives of the BOCW Act? Is it the lack of funds? It appears that in this case at least, availability of funds are not an issue. Of the Rs. 38,685.23 Crores collected since 1996 as welfare cess, only Rs 9,967.61 Crores or 25.8% has actually been spent, according to the 38th report of the Standing Committee on Labour, presented in Parliament in July 2018. The national average of cess distributed through all the schemes is just Rs. 499/- per worker, per year. More than half, or 19 of the 36 States and Union Territories, spent less than 25% of their collected funds. Apart from the Building and Other Construction Worker's Welfare Board, about Rs. 27,000 Crores have remained unspent under the various State Labour Welfare Funds as well (under the State specific Labour Welfare Fund enactments). The Supreme Court has noted with surprise in the aforesaid matter that the construction and labour welfare funds are not subject to audit by the Comptroller Auditor General and that there is lack of clarity on the utilization of funds.

Given that funds should not be an issue for effective implementation of the construction worker welfare schemes, the real culprit seems to be the following:

(i) Ineffective mechanism to register the construction workers with Building and Other Construction Worker's Welfare Board;
(ii) Ineffective mechanism to register the establishments which ought to be registered with the said Board;
(iii) Inappropriate schemes which cannot be practically implemented to give effect to the objectives of the BOCW Act;
(iv) Lack of awareness amongst the beneficiaries (the construction workers) of their rights and entitlements under the BOCW Act and other labour welfare enactments;
(v) Independent governing bodies under each labour welfare enactment, which brings about lack of co-ordination in implementation of wholesome welfare schemes.

In furtherance to the directive of the Supreme Court in the above detailed matter, the Ministry of Labour and Employment has issued the 'Model Welfare Scheme for Building and other Construction Workers and Action Plan for Strengthening Implementation Machinery' ("**Model Scheme**"). The said Model Scheme sets out the guideline to the State Governments and Union Territories to address each of the above detailed lacunae in effective implementation of the BOCWC Act. The skilling initiative by MBOCWWB is in furtherance to the said Model Scheme. It appears that not many States have reported compliance to the said Model Scheme by December 31, 2018 (the deadline to provide proof of compliance).

It is in this background that the skilling initiative by the MahaRERA with MBOCWWB is a step in the right direction, although the present process is limited to skilling the unskilled and semi-skilled. However, in this process, two critical objectives are also achieved, one is the registration of the Construction Workers at the RERA registered Project Sites with MBOCWWB and the other is the registration of the employer of such Project Site with the MBOCWWB. By this process, the data of the beneficiary Construction Workmen at all Project Sites and the details of Project Sites are available with the MBOCWWB through the Training Partners. A herculean task otherwise, this process is achieved by partnering with the MahaRERA and Training Partners. It would now be open to the MBOCWWB to effectively utilize the data made available and implement the Model Scheme promulgated by the Ministry of Labour and Employment. In fact, the MBOCWWB may require the MahaRERA to insist on registration of the Project Site by the promoter / employer with the MBOCWWB, as a pre-requisite for the registration of the said Project site with MahaRERA.

The partnership between the MahaRERA and MBOCWWB is illustrative of the progressive manner in which the State RERA Authorities could be the nodal points for effective implementation of the various construction worker beneficiary schemes and for collection of the construction workmen and labour welfare fund related cess. By this partnership, the construction workmen welfare boards at the State level could utilize the Project Sites (being vocational training centres) for educating the construction workmen of their entitlements and benefits, including in relation to their living and working conditions. The Training Partners may as well be educated in this regard and they can help in implementation of the BOCW Act, so that the percolation of the information on rights and entitlements of construction workmen, their registration with the welfare board and inspection of the Project sites for compliance to the said enactment and other applicable laws, can be given effect seamlessly.

We trust that this new initiative by MahaRERA will bring some much deserved cheer to the construction workers.

The construction workers in other States must wish and pray for quick inclusion in a similar way, this New Year.

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UPDATES

I. RBI, FEMA & FDI

i. The Foreign Exchange Management (Non-debt Instruments) Rules, 2019, issued on October 17, 2019, which was subsequently amended by the Foreign Exchange Management (Non-debt Instruments) (Amendment) Rules, 2019

The Finance Act, 2015 had proposed certain amendments to Section 6 (which deals with capital account transactions), Section 46 (which provides the power to Central Government to make rules) and Section 47 (which provides the power to the Reserve Bank of India ("**RBI**") to make regulations) of the Foreign Exchange and Management Act, 1999 ("**FEMA**"), which amendments were notified on October 15, 2019.

Pursuant to the amendments, the RBI is empowered to regulate capital account transactions involving debt instruments and the Central Government regulates capital account transactions involving non-debt instruments.

The Ministry of Finance, Government of India has notified the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 on October 17, 2019, which were subsequently amended by the Foreign Exchange Management (Non-debt Instruments) (Amendment) Rules, 2019 by way of notification dated December 5, 2019 (collectively the "**FDI Rules**"), while the RBI notified on October 17, 2019, the Foreign Exchange Management (Debt Instruments) Regulations, 2019 ("**Debt Regulations**").

The FDI Rules and the Debt Regulations supersede the earlier regulations governing foreign investment, being the Foreign Exchange Management (Transfer of Issue of Security by a Person Resident outside India) Regulations, 2017 ("**TISPRO**") and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 both issued by the RBI.

Some of the key changes brought about by the FDI Rules are as summarized below:

Key Changes in the Foreign Direct Investment Regulations:

Definition of 'Equity Instrument':

This is a new definition, which is similar in scope to the definition of 'Capital Instrument', used earlier under TISPRO, and means equity shares, compulsorily and mandatorily convertible debentures, compulsory and mandatorily convertible preference shares and share warrants issued by an Indian company.

Definition of 'Non-Debt Instrument':

Non-Debt Instruments have been defined under the FDI Rules to mean the following instruments:

- All investments in ‘Equity Instruments’ incorporated entities (i.e. in public, private, listed and unlisted entities);
- Capital participation in LLP;
- all instruments of investment as recognized in the FDI policy, as notified from time to time;
- units of Alternative Investment Funds (AIFs) and Real Estate Investment Trusts (REITS) and Infrastructure Investment Trusts (InvIts);
- units of mutual funds and Exchange-Traded Funds (ETFs), which invest more than 50% (fifty per cent) in equity;
- the junior-most layer (i.e., equity tranche) of a securitization structure;
- acquisition, sale or dealing directly in immovable property;
- contribution to trusts; and
- depository receipts issued against equity instruments.

It may be noted that currently, the FDI Rules only define ‘Non-Debt Instrument’ but does not specifically use the said term in the FDI Rules (apart from the definition).

Definition of ‘Debt Instrument’:

As provided in Section 6(7) of the FEMA, the Central Government has vide Notification No. SO 3722(E) dated October 16, 2019 determined the following instruments as ‘debt instruments’:

(i) Government bonds;
(ii) corporate bonds;
(iii) all tranches of securitisation structure which are not equity tranche;
(iv) borrowings by Indian firms through loans;
(iv) depository receipts whose underlying securities are debt securities.

All other instruments which are not specified as ‘Non-Debt Instrument’ or ‘Debt Instrument’ are deemed to be debt instruments.

Introduction of ‘Hybrid Securities’:

The FDI Rules have introduced a new concept of ‘Hybrid Securities’. Hybrid Securities have been defined to include, within its scope, optionally or partially convertible preference shares or debentures and other such instruments as specified by the Central Government, from time to time. Currently, the FDI Rules however do not as of now contain any specific provisions in relation to ‘Hybrid Securities’.

Definition of Investment Vehicle:

Apart from REITS, InvIts and AIF, any entity registered and regulated by the SEBI or any other designated authority, have now been included under the definition of an “investment vehicle”.

Requirement of Consultation with the Central Government:

Under the FDI Rules:

(i) any investment in India by a person resident outside India; or

(ii) any investment to be received by an entity or an investment vehicle or a venture capital fund or a firm or an association of persons or a proprietary concern, in India from a person resident outside India;

which are not in accordance with the Foreign Exchange Management Act, 1999, the FDI Rules or regulations made thereunder would require the approval of the RBI, which approval may be granted by the RBI (for sufficient reasons and subject to such conditions as may be deemed necessary) in consultation with the Central Government, upon an application being made to it in this regard.

Transfer of Shares held on a non-repatriation basis:

A clarification has been introduced in the FDI Rules to provide that in case of a transfer of equity instruments, held on a non-repatriation basis, to someone who intends to hold it on a repatriation basis, the transferee will have to comply with the other requirements of pricing, and sectoral caps, among others, similar to any other non-resident investor holding shares on a non-repatriation basis.

*Investment by Foreign Venture Capital Investors (“**FVCI’s**”) in Startup’s:*

FVCIs can invest in equity, equity linked instruments or debt instruments of Indian start-ups (irrespective of the sector in which the start-up is engaged in). However, if the investment is being made in an equity instrument of a start-up, then the FVCI must comply with the sectoral caps, entry routes and other specified conditions. Under TISPRO, FVCI was permitted to invest in ‘securities’ issued by a start-up and the term ‘securities’ was not specifically elaborated.

Pre-incorporation / pre-operative expenses:

A wholly owned Indian subsidiary of a foreign entity is permitted to issue shares to non-resident holding company against any amount invested as pre-incorporation expenses by such holding company.

In this regard, requirement of procuring a statutory auditor certificate provided under TISPRO it seems has been dispensed with under the FDI Rules:

“A certificate issued by the statutory auditor of the Indian company that the amount of pre-incorporation/ preoperative expenses against which capital instruments have been issued has been utilized for the purpose for which it was received should be submitted with the Form FC-GPR. Explanation: Pre-incorporation/ preoperative expenses shall include amounts remitted to Investee Company’s account, to the investor’s account in India if it exists, to any consultant, attorney or to any other material/ service provider for expenditure relating to incorporation or necessary for commencement of operations.”

*Investment by Foreign Portfolio Investors (“**FPIs**”):*

Under TISPRO, the limit of investment by FPIs was 10% (ten percent) on an individual basis, and 24% (twenty four percent) on an aggregate basis of the paid-up value of each series of debentures or preference shares or share warrants issued by an Indian company. The FDI Rules now provide that effective from April 1, 2020, the aggregate limit would be the sectoral caps applicable to the Indian company, as set out in Schedule I of FDI Rules. The aggregate limit, as provided above, may be decreased by the Indian company (prior to 31 March 2020) or increased with the approval of its board of directors and its shareholders by a special resolution. However, once increased, the limits cannot be reduced to a lower threshold. The aggregate limit with respect to an Indian company in a sector where FDI is prohibited would be 24% (twenty four percent). In case the FPI investment thresholds are exceeded, such FPI entity would have 5 (five) trading days to divest its excess holding, failing which, the investment would be categorized as FDI. The FPI, through its designated custodian, must bring the same to the notice of the depositories, as well as the concerned company, for effecting the necessary changes in their records, within 7 (seven) trading days from the date of settlement of the trades causing the breach. FPIs have been permitted to invest in Category III AIFs, and offshore funds for which a no-objection certificate has been issued under Securities and Exchange Board of India (Mutual Funds) Regulations, 1996, and which in turn invest more than 50% (fifty percent) in equity instruments, or in units of REITS and InvITs, all on a repatriation basis.

E-commerce:

E-commerce business can now only be undertaken by a company incorporated or existing under the Companies Act, 2013, or the Companies Act 1956. The definition of an 'e-commerce entity' no longer includes a foreign company covered under section 2(42) of the Companies Act, 2013 or an office, branch or agency in India owned or controlled by a person resident outside India and conducting the e-commerce business.

The full text of the FDI Rules can be accessed here. Further, the full text of the amendment to the FDI Rules can be accessed here.

ii. The Foreign Exchange Management (Debt Instruments) Regulations, 2019

The Reserve Bank of India ("**RBI**") has, by way of a Notification (FEMA 396/2019-RB; G.S.R. 796(E)) dated October 17, 2019, introduced the Foreign Exchange Management (Debt Instruments) Regulations, 2019 ("**Debt Regulations**"), which supersede the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 ("**TISPRO**").

The Debt Regulations have brought under its ambit, the provisions of investments in debt instruments by Foreign Portfolio Investors, Non Resident Indians, Overseas Citizens of India, foreign banks and multilateral development bank. The Debt Regulations to that extent supersede the TISPRO.

The Debt Regulations do not expressly supersede the regulations governing external commercial borrowing in India (i.e. Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 and the Foreign Exchange Management (Guarantees) Regulations, 2000), implying that all external commercial borrowing in India must comply with the Debt Regulations as well as the applicable provisions of the Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 and the Foreign Exchange Management (Guarantees) Regulations, 2000.

The full text of the Debt Regulations can be accessed here.

iii. Use of Special Non-Resident Rupee Account

The Reserve Bank of India ("**RBI**") has, by way of Notification No. FEMA 14(R)/(1)/2019-RB, dated November 13, 2019, amended the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016. The RBI has also, by way of Notification FEMA 5 (R)/(3)/2019-RB dated November 13, 2019, amended the Foreign Exchange Management (Deposit) Regulations, 2016.

Pursuant to the above amendments, the RBI has expanded the purpose for which a non-resident can use the 'Special Non-Resident Rupee Account' ("**SNRR**"). As per the amendments, the SNRR account can also be used for making payments in Indian Rupees to a person resident in India, if such payment is in compliance with the

Foreign Exchange Management Act, 1999. This would include transactions in relation to investments under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 and the Foreign Exchange Management (Debt Instruments) Regulations, 2019.

The full text of the Amendment Regulations can be accessed [here]() and [here]().

iv. The Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019

Pursuant to the Foreign Exchange Management (Non-debt Instruments) Rules, 2019, the Reserve Bank of India has, by Notification No. FEMA. 395/2019-RB dated October 17, 2019 notified the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 ("**Reporting Regulations**"). The Reporting Regulations provides for the mode of payment and remittance of sale proceeds in respect of sale and purchase of non-debt instruments by non- residents.

The full text of the Reporting Regulations can be accessed [here]().

II. CORPORATE

i. The Companies Act, 2013: Corporate Social Responsibility – Amended

The Ministry of Corporate Affairs has, by way of Notification No. G.S.R. 776 (E), dated October 11, 2019, brought into force from the date of publication of the same in the Official Gazette, an amendment to Schedule VII of the Companies Act, 2013, which sets out a list of activities which may be included by companies in their corporate social responsibility policies.

The amendment substitutes clause (ix) of Schedule VII and expands the earlier provision to now include contributions to incubators funded by the Central Government or State Government, or any agency or Public Sector Undertaking of the Central Government or State Government, and contributions to public funded universities, Indian Institute of Technology, National Laboratories and Autonomous Bodies (established under the auspices of Indian Council of Agricultural Research, Indian Council of Medical Research, Council of Scientific and Industrial Research, Department of Atomic Energy, Defence Research and Development Organisation, Department of Science and Technology, Ministry of Electronics and Information Technology) engaged in conducting research in science, technology, engineering and medicine aimed at promoting sustainable development goals.

The full text of the Amendment can be accessed [here]().

ii. The Companies (Incorporation) Rules, 2014 – Amended

The Ministry of Corporate Affairs has, by way of Notification No. G.S.R. 793 (E), dated October 16, 2019, brought into force, with effect from the date of publication of the same in the Official Gazette, the Companies (Incorporation) Eighth Amendment Rules, 2019 ("**Amendment Rules**"), which has the effect of amending the Companies (Incorporation) Rules, 2014 ("**Incorporation Rules**").

The Amendment Rules amend Rule 8A of the Incorporation Rules which lists out the situations in which names proposed to be used in relation to companies are considered 'undesirable'. One such situation is where the proposed name of a company includes trademarks that are registered in terms of the applicable laws. The exception to the aforesaid was however that the said name could be used as long as the consent of the owner thereof, or the 'applicant' for the registration of the trademark is obtained. The amendment has now restricted the consent requirement to only from the owner of the trademark, and not from the applicant for registration of a trademark.

The Amendment Rules also amend Rule 25A of the Incorporation Rules which is in relation to active companies having to file e-form ACTIVE, in accordance with the conditions specified. A non-filing of e-Form ACTIVE results in consequences, whereby acts/ actions of the companies which are required to be registered by way of filing of certain forms, in compliance with the Companies Act, 2013, including Form DIR-12, would not be accepted by the Registrar of Companies. The Amendment Rules now makes an exception to the filing of Form DIR-12 and specifies that in certain circumstances, such as the cessation of a director, etc., though the company has not filed e-form ACTIVE, the Registrar of Companies will accept Form DIR-12 and record the required changes.

Further, in relation to the shifting of the registered office of a company, within the same state, the Amendment Rules amend Rule 28 of the Incorporation Rules. An application made to the Regional Director for the purpose of shifting the registered office within a state, being in Form INC-23, may be put up for orders, by the Regional Director, without a hearing. The order, either approving or rejecting the application, should be passed within 15 (fifteen) days of the receipt of the application which is complete in all respects. The Amendment Rules also provides that the certified copy of order of the Regional Director, must be filed in Form No. INC-28, along with the fee, with the concerned Registrar of the state, within 30 (thirty) days from the date of receipt of the certified copy of the order.

The full text of the Amendment Rules can be accessed here.

iii. The Companies (Creation and Maintenance of Databank of Independent Directors) Rules, 2019 – Introduced

The Ministry of Corporate Affairs has, by way of Notification No. G.S.R. 805 (E), dated October 22, 2019, introduced the Companies (Creation and Maintenance of Databank of Independent Directors) Rules, 2019 ("**Independent Director Rules**"). The Independent Director Rules have come into effect from December 1, 2019, except in relation to Rule 2 and Rule 5, which have been in effect from the date of publication of the Rules, in the Official Gazette, i.e., on and from October 22, 2019.

The Independent Director Rules has notified the Indian Institute of Corporate Affairs, as an institute to create and maintain a data bank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors, for the use of companies seeking to appoint such directors. In addition, the Independent Director Rules also place certain obligations and duties on the institute, which *inter alia* include: (i) conducting tests to ensure proficiency of the independent directors; (ii) preparing study material to take online proficiency exams; and (iii) providing an option for individuals to take advanced tests.

The full text of the Independent Director Rules can be accessed here.

iv. The Companies (Appointment and Qualification of Directors) Rules, 2014 - Amended

The Ministry of Corporate Affairs has by way of Notification No. G.S.R. 804 (E), dated October 22, 2019, brought into force, with effect from December 1, 2019, the Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2019 ("**Amendment Rules**"), which has the effect of amending the Companies (Appointment and Qualification of Directors) Rules, 2014.

The Amendment Rules have substituted Rule 6, which now requires every individual: (i) who is an independent director, as on December 1, 2019; or (ii) who intends to be appointed as an independent director, on or after December 1, 2019, to comply with certain requirements, as set out in Rule 6 which *inter-alia* is in relation to making the required applications to the Indian Institute of Corporate Affairs, for the inclusion of his/ her name in the database of independent directors and submitting the required declarations for ensuring the requisite compliances.

The full text of the Amendment Rules can be accessed here.

v. The Companies (Accounts) Rules, 2014 – Amended

The Ministry of Corporate Affairs has, by way of Notification No. G.S.R. 803 (E), dated October 22, 2019, brought into force, with effect from December 1, 2019, the Companies (Accounts) Amendment Rules, 2019 (**"Amendment Rules"**), which has the effect of amending the Companies (Accounts) Rules, 2014.

The Amendment Rules require an additional statement to be included in the report of the Board of Directors, regarding the opinion of the Board on the integrity, expertise and experience (*including the proficiency*) of the independent directors appointed during the year. The Amendment Rules also explain the meaning of 'proficiency', to be the proficiency of the independent director as ascertained from the online proficiency self-assessment test, conducted by the institute notified under sub-section (1) of Section 150 of the Companies Act, 2013, i.e., the Indian Institute of Corporate Affairs.

The full text of the Amendment Rules can be accessed here.

vi. The Companies (Meetings of Board and its Powers) Rules, 2014 – Amended

The Ministry of Corporate Affairs has, by way of Notification No. G.S.R. 857 (E), dated November 18, 2019, brought into force from its date of publication in the Official Gazette, the Companies (Meetings of Board and its Powers) Second Amendment Rules, 2019 ("**Amendment Rules**"), which has the effect of amending the Companies (Meetings of Board and its Powers) Rules, 2014 ("**Board Meeting Rules**").

The Amendment Rules have amended Rule 15 of the Board Meeting Rules, which is in relation to companies entering into contracts or arrangements with related parties. Rule 15(3) of the Board Meeting Rules has been specifically amended, and this rule lists out those matters which a company can undertake or act on, only if it receives both an approval of the board, through a board meeting, and the approval of the shareholders, through a shareholders meeting. The amendments relate to the specific sums in relation to the turnover/ net worth of a company, that are the criteria to ascertain as to whether the shareholders' approval is required for a particular matter or not.

The full text of the Amendment Rules can be accessed here.

III. INSOLVENCY AND BANKRUPTCY – REGULATORY

i. The Insolvency and Bankruptcy Code, 2016: Provisions related to Personal Guarantors to Corporate Debtors – Notified

The Ministry of Corporate Affairs ("**MCA**") has, by way of Notification No. S.O. 4126(E) dated November 15, 2019, brought into force, with effect from December 1, 2019, various provisions of Part III of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), *(except for the provisions dealing with the 'Fresh Start Process' mainly set out in Chapter III*), dealing with the insolvency and bankruptcy of individuals and partnership firms, so far as they relate to personal guarantors to Corporate Debtors ("**CD**").

In pursuance to the abovementioned Notification, the MCA has also enacted the following rules and regulations applicable to the insolvency and bankruptcy of personal guarantors, with effect from December 1, 2019:

- The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Regulations, 2019;
- The Insolvency and Bankruptcy Board of India (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019;
- Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 ("**Insolvency Rules**"); and
- The Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Rules, 2019.

Some of the key terms of the relevant provisions are as provided below:

- The definition of "guarantor" is limited to those guarantors who are personal guarantors to a CD and in respect of whom the guarantee has been invoked by the creditor and remains unpaid in full or part.

- The insolvency process may be initiated: (i) by the Guarantor (i.e., the debtor); (ii) by creditor (personally or collectively); or (iii) either the debtor or creditor through a resolution professional ("**RP**").

- The insolvency process for guarantor provides for an "interim moratorium" in relation to any debts of the Guarantor as soon as the application for insolvency is filed before the Adjudicating Authority ("**AA**"), in addition to a moratorium which comes into effect only upon admission. An interim moratorium shall immediately apply preventing the enforcement of any debts of the Guarantor and staying any ongoing legal proceedings in relation thereto, regardless of whether the application against a Guarantor is admitted by the AA or not.

- In an insolvency application pertaining to a personal guarantor, the RP is required to examine the application for insolvency and thereafter submit a report ("**Report**") to the AA with recommendation whether to admit or reject the application.

- The AA may, within 14 days of receipt of the report of the RP either accept or reject the insolvency application based on the Report. If the insolvency application is rejected on the grounds that it was filed with the intent to defraud the creditors or the RP, then such order for rejection of application should also state that the creditors shall have a right to file for a bankruptcy order.

- On admission of the application for insolvency, a moratorium shall automatically come into effect, which shall cease to have effect on expiry of 180 (one hundred and eight) days' timeline, unless an order is passed by the AA relating to repayment plan where moratorium shall end on such date.

- The Guarantor shall, in consultation with the RP, prepare a Repayment Plan ("**Plan**") which shall *inter alia* provide for restructuring of the debts or affairs of the Guarantor and a justification for preparation of the Plan and reasons on the basis of which the creditors may agree upon the Plan. The RP shall, within 21 (twenty one) days of receipt of the last claim of any creditor, submit the Plan to the AA along with a report of the plan along with request for or not to hold a meeting of the creditors ("**MoC**").

- A notice to constitute the MoC is required to be sent to all the creditors along with a copy of the Plan. During the MoC the creditors may approve, reject or modify the Plan and their voting share shall be in proportion to the debt owed to them. If the creditors require to modify the Plan, then in order to absolute such modification the consent of the Guarantor shall be taken.

- Any secured creditor of the Guarantor is entitled to participate and vote at the MoC, however, such secured creditor is required to forfeit his right to enforce his security during the period of the Plan and in accordance with the Plan.

- Thereafter, a report and the decision of the MoC approving, modifying, or rejecting the proposed Plan will be submitted by the RP to the AA. On submission of the Plan, the AA shall either accept or reject the Plan on the basis of the report submitted by the RP. If the AA requires any modification in the Plan, then the same will be sent back to the MoC for reconsideration. Thereafter the AA shall by order, either approve or reject the Plan and such order shall be final and binding on the creditors as well as the Guarantor. In the event that the AA rejects the Plan, the creditors and/or the debtor may file an application for bankruptcy of the Guarantor.

- The Plan may provide for an early discharge or a discharge upon the completion of the repayment of debts. Thus, the RP may apply to the AA for passing an order in relation to the Plan and upon the successful implementation of the Plan, the AA shall pass a discharge order for releasing the bankrupt from the bankruptcy debt. Such discharge order shall only be applicable to debts that have been successfully discharged in terms of the Plan and shall not discharge any other person from any liability in respect of his debt.

- In the event, an application for bankruptcy is filed, an "interim moratorium" in relation all properties of Guarantor shall come into effect. A bankruptcy trustee may be appointed and thereafter a bankruptcy order may be passed which shall continue to have effect till the discharge.

The full text of the Notification can be accessed here.

ii. Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 - Notified

The Ministry of Corporate Affairs ("**MCA**") has, by way of the Notification No. G.S.R. 852(E), dated November 15, 2019, notified the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 ("**FSP Rules**"), which have come into effect on November 15, 2019.

The FSP Rules apply to such financial service providers or categories of financial service providers as the Central Government may notify under Section 227 of the IBC. *Vide* notification dated November 18, 2019 bearing S.O. 4139(E), the Central Government has notified the FSP Rules to be applicable to the category of Non-Banking Finance Companies (which include housing finance companies) with asset size of Rs. 500 crore or more, as per the last audited balance sheet. Additionally, the Reserve Bank of India has been notified to act as an appropriate regulator for such non-banking finance companies.

The FSP Rules provide that the provisions of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") relating to the corporate insolvency resolution process ("**CIRP**"), liquidation process and voluntary liquidation process for a corporate debtor shall, *mutatis mutandis*, apply to a process for an FSP, subject to modifications provided in the FSP Rules including - the term (i) 'corporate debtor' shall mean 'financial service provider' ("**FSP**"); and (ii) "insolvency professional", "interim resolution professional", "resolution professional" or "liquidator" shall mean "administrator".

Some of the key terms of the FSP Rules are listed herein below:

- The CIRP of an FSP shall be initiated on an application by the appropriate regulator.

- On admission of the CIRP application, the Adjudicating Authority ("**AA**") shall appoint the individual, proposed by the appropriate regulator to act as the administrator (having the same powers and functions as of the insolvency professional, interim resolution professional and resolution professional) and an interim moratorium shall commence from the date of filing the application for initiation of the CIRP.

- If deemed necessary the appropriate regulator shall constitute an advisory committee consisting of at least 3 (three) members, who shall advise the administrator in operations of the FSP during CIRP.

- The interim-moratorium or moratorium shall not apply to any third-party assets or properties in custody or possession of the FSP *inter alia* any funds, securities and other assets required to be held in trust for the benefit of third parties. The administrator shall take control and custody of third-party assets or properties in custody or possession of the FSP and deal with them in the manner, to be notified by the Central Government.

- A resolution plan of the resolution applicant shall provide a statement on how the resolution applicant intends to satisfy the requirements of engaging in the business of FSP. On approval of the resolution plan by the committee of creditors ("**CoC**"), the administrator shall seek a 'no objection' from the appropriate regulator to the effect that it has no objection to the persons, who would be in control or management of FSP after approval of the resolution plan.

- For initiation of the liquidation process against the FSP, the license or registration that enables an FSP to engage in or carry on its business should not be suspended or cancelled during liquidation process, unless opportunity of being heard has been provided to the liquidator.

- The FSP shall obtain prior permission of the appropriate regulator for initiating voluntary liquidation proceedings.

- The AA is required to provide the appropriate regulator an opportunity of being heard before passing an order for liquidation and dissolution of FSP under the liquidation or voluntary liquidation process.

The full text of the FSP Rules can be accessed here.

iii. Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 – Amended

The Insolvency and Bankruptcy Board of India has, by way of Notification No. IBBI/2019-20/GN/REG052 dated November 27, 2019 titled the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2019 amended the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**Insolvency Regulations**").

Some of the key amendments to the Insolvency Regulations are listed herein below:

- Regulation 25A has been inserted which allows an authorised representative of the financial creditor to cast his vote with respect to each financial creditor or on behalf of all financial creditors that he represents as the case may be.

- Regulation 37(ba) has been inserted to permit a resolution plan to provide for measures to restructure a corporate debtor by way of a merger, amalgamation and demerger.

- Regulation 38 has been substituted to state that: (a) the amounts payable under a resolution plan to operational creditors shall be paid in priority over the financial creditors; and (b) the financial creditor (who had a right to vote and did not vote in favour of the resolution plan), shall be paid in priority over the financial creditors who did vote in favour of the plan.

- Regulation 40B has been inserted with a tabular chart of forms to be filed by the insolvency professional, interim resolution professional or resolution professional within the stipulated timelines of each form, on an electronic platform of the Board.

The full text of the Amendment can be accessed here.

IV. INSOLVENCY AND BANKRUPTCY – JUDICIAL PRONOUNCEMENTS

i. Committee of Creditors of Essar Steel India Limited through Authorized Signatory v. Satish Kumar Gupta and Ors.
[Civil Appeal No. 8766-67 of 2019 decided on November 15, 2019]

The Hon'ble Supreme Court ("**Hon'ble SC**") has, while setting aside the judgment dated July 4, 2019, passed by the National Company Law Appellate Tribunal, upheld the constitutional validity of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, and has *inter alia* settled the following issues:

- It has reiterated that the role of the Resolution Professional ("**RP**") is administrative, rather than adjudicatory in nature, and thus the RP is responsible for managing the affairs of the Corporate Debtor ("**CD**"), as a going concern, during the corporate insolvency resolution process ("**CIRP**"), hold meetings of the committee of creditors, and examine, assemble and admit the claims submitted by the creditors.

- The prospective resolution applicant ("**RA**") has a right to receive the information regarding the debts owed by CD, information contained in the information memorandum and evaluation matrix and activities of the CD, before the commencement of CIRP.

- The powers of the Committee of Creditors ("**CoC**") are administrative in nature, and cannot be delegated as such, and the power to approve the resolution plan cannot be delegated to any other body. However, the CoC may appoint sub-committees for negotiating with the RA's or for other administrative acts, provided that its activities are approved and ratified by the CoC.

- The adjudicating authority, i.e., the National Company Law Tribunal ("**NCLT**") has been entrusted with the power of judicial review. However, the NCLT cannot encroach upon the majority decisions of the CoC, especially regarding payments, provided the CoC maximizes the value of the assets and balances the interest of all the stakeholders of the CD, while ensuring that the CD continues to operate as a going concern during CIRP.

- In exceptional cases, only if the delay is attributable to the NCLT, the time for completion of the CIRP may be extended beyond 330 (three hundred and thirty) days, post which the CD will be driven into liquidation.

- Section 30(2)(b) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), is a beneficial provision for the operations creditors ("**OCs**") and the dissenting financial creditors ("**FCs**"), as they will now be paid a certain minimum amount. Prior to the amendment, secured FCs could cramdown the unsecured FCs who were dissenting, but post the amendment, such FCs are to be paid a minimum amount, as specified in Section 30(2) of the IBC. The order of priority of payment of the creditors, as mentioned in Section 53 of the IBC, has not been engrafted in the amended Section 30(2)(b) of the IBC. Section 53 of the IBC is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. The NCLT or the NCLAT has no residual equity jurisdiction to interfere in the merits of a majority business decision taken by the CoC, provided that such decision conforms to the provisions and regulations of the IBC.

- The appellate proceedings are a continuation of the original proceedings, and therefore a change in the law can apply to the original or the appellate proceedings. For this, Explanation 2 to Section 30(2)(b) of the IBC is constitutionally valid, and has no retrospective operation, as that could impair the vested rights.

ii. Karan Goel v. Pashupati Jewellers
[Company Appeal No. 1021 of 2019 decided on October 1, 2019]

The Hon'ble National Company Law Appellate Tribunal has held that the mere pendency of a suit filed by the corporate debtor against a financial creditor cannot be a ground for rejecting an application for initiation of corporate insolvency resolution proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2016. It has further held that while a pre–existing dispute may be relevant to a proceeding filed by an operational creditor, it cannot be a subject matter of an insolvency petition filed by a financial creditor.

iii. R.G. Steels v. Berrys Auto Ancillaries (P) Ltd.
[Company Petition No. IB-722/ND/2019 decided on September 23, 2019]

The Hon'ble National Company Law Tribunal, Delhi, has held that an application for initiation of corporate insolvency resolution process cannot be filed by a sole proprietary concern on its own, as the definition of

'Person' in Section 3(23) of the Insolvency and Bankruptcy Code, 2016, includes an 'Individual', but it does not include a sole proprietary concern.

iv. Union of India v. Oriental Bank of Commerce
[Company Appeal (AT) (Insolvency) No. 1417 of 2019, Order dated December 10, 2019]

The Hon'ble National Company Law Appellate Tribunal, while issuing notice on an appeal filed by the Union of India against the order of the Hon'ble National Company Law Tribunal, Principal Bench, New Delhi, dated November 22, 2019, in Oriental Bank of Commerce v. Sikka Papers Ltd. and Ors [Company Petition No.(IB)-939(PB) of 2018], has stayed the direction of the Hon'ble National Company Law Tribunal to implead the Union of India and the Ministry of Corporate Affairs as a party in all petitions before all the benches of the National Company Law Tribunal across the country.

In Oriental Bank of Commerce v. Sikka Papers Ltd. and Ors [Company Petition No.(IB)-939(PB) of 2018], the Hon'ble National Company Law Tribunal, Principal Bench, New Delhi, had observed, in relation to companies under corporate insolvency resolution, that the Registrar of Companies has failed to update the master data, and also in many cases has not permitted the resolution professional to update data on the web portal of Ministry of Corporate Affairs. The Hon'ble National Company Law Tribunal had therefore directed that in all the cases under the Insolvency and Bankruptcy Code, 2016, before all the benches of the National Company Law Tribunals, the Union of India and the Ministry of Corporate Affairs (through its Secretary) must be impleaded, as a respondent party, to ensure that authentic records are made available to the officers of the Ministry of Corporate Affairs for proper appreciation of the matters.

V. COMPETITION

i. National Company Law Appellate Tribunal (NCLAT) upholds landmark decision of the Competition Commission of India (CCI) against South Asia LPG Co. Private Limited for abuse of dominance

The NCLAT has, by its order dated December 18, 2019, upheld the order dated July 11, 2018, passed by the CCI, penalizing South Asia LPG Co. Private Limited ("**SALPG**") for abusing its dominant position in upstream terminalling services for LPG import at the Vizag port. The case was filed in 2011 by East India Petroleum Private Limited ("**EIPL**"), a competitor of SALPG, alleging a denial of the use of the LPG blending facility by SALPG.

EIPL alleged that SALPG has been insisting on the mandatory use of cavern for the blended LPG (butane + propane) imported and blended at the Vizag port. This resulted in OMCs (Indian Oil and Bharat Petroleum, amongst others) paying significantly higher terminalling charges to SALPG. The OMCs were thus unable to use the services of EIPL and were constrained to avail the terminalling services offered by SALPG only.

To address this situation, EIPL first proposed to use the blender of SALPG and thereafter, take the output directly to the cross-country pipeline, bypassing the cavern. Since this was not agreeable to SALPG, EIPL proposed to install its own blender, and sought a tap-out and tap-in from the propane and butane lines to discharge blended LPG, bypassing the cavern. This was also not acceptable to SALPG. Another proposal seeking tap-out from the propane and butane lines at the jetty to EIPL's own blender and construction of its own infrastructure between the blender and storage facility, was also refused by SALPG. EIPL alleged that this was abuse of dominant position by SALPG.

After detailed investigation and multiple rounds of litigation spread over 7 (seven) years, the CCI had held that the denial of facilities to EIPL amounted to abuse of dominance by SALPG. The CCI had imposed a fine at the rate of 10% (ten percent) of the average annual relevant turnover of the preceding 3 (three) years on SALPG. The quantum of the fine is INR 19,20,00,000 (Rupees nineteen crores twenty lakh only) on SALPG. The maximum fine imposable by the CCI is 10% (ten percent) of the average annual turnover, and the said percentage fine is the highest ever imposed by the CCI in any abuse of dominance matter. The CCI had also imposed behavioural remedies directing SALPG to, inter alia, grant access to its terminalling infrastructure to EIPL and any other existing or potential competitor in the Vizag port.

The NCLAT, whilst dismissing the appeals, held as follows:

> "*We, therefore, hold that bypass restriction imposed by SALPG is primary with a view to protect its commercial interest at a cost competition and the plea taken before the Commission was an after-thought. The Commission rightly held that 'SALPG' requiring users to necessarily use the cavern and pay higher charges is an unfair imposition in provision of terminalling services; and is likely to discourage imports and restrict the services otherwise offered by the Informant. The impugned restriction on bypass of the cavern facility are in contravention of Section 4(1) read with Section 4(2)(a)(i), Section 4(2)(a)(ii) and Section 4(2)(b)(i) of the Act. The bypass restrictions restricted the business of 'EIPL' was unreasonable which denied the Informant market access, in contravention of Section 4(2)(c) of the Act.*"

The NCLAT has directed the appellants to comply with the order passed by the CCI immediately. Interestingly, the NCLAT has specifically noted that it is open to EIPL to claim the loss suffered by it from SALPG.

Dua Associates represented EIPL in the matter before the NCLAT. The team was led by Kunal Mehra, Partner and Danish Khan, Senior Associate.

A copy of the Order can be accessed here.

ii. Competition Commission of India (CCI) orders investigations against MakeMyTrip and OYO Stays

The CCI has ordered investigations against MakeMyTrip India Private Limited ("**MMT**") for abuse of dominance, and against Oravel Stays Private Limited ("**OYO**") for vertical restraints causing an appreciable adverse effect on competition in India. Both the investigations have arisen out of a single case filed by the Federation of Hotel and Restaurant Associations of India.

As regards MMT, the CCI considered the market for online intermediation services for booking of hotels in India, wherein MMT held a market share of approximately 63% (sixty three percent) in 2017. The CCI considered that the price-parity clauses in MMT's agreements with hotels, which restricted hotels from providing better prices to MMT's competitors, may result in removal of the incentive for platforms to compete on the commission they charge to hoteliers. The CCI ordered an investigation against MMT for a *prima-facie* violation of Section 3(4) and Section 4 of the Competition Act, 2002 ("**Act**").

As regards OYO, the CCI noted that in the market of franchising services for budget hotels in India, OYO is a significant player, although it is not dominant at this moment. The CCI took notice of the allegation that MMT and OYO have an agreement between themselves which gives preferential treatment to OYO hotels on the MMT website, to the detriment of other competitors of OYO. The CCI considered that such a conduct requires a detailed investigation under Section 3(4) of the Act.

A copy of the Order can be accessed here.

iii. Competition Commission of India (CCI) closes cases against LPG cylinder manufacturers for alleged cartelization

The CCI has closed the case against 3 (three) LPG cylinder manufacturers for alleged cartelization in bidding for tenders of Hindustan Petroleum Corporation Limited ("**HPCL**") for the supply of 14.2 kg LPG cylinders during 2010.

The CCI had ordered an investigation into a similar case against multiple LPG cylinder manufacturers, which had culminated into an order under Section 27 of the Competition Act, 2002 ("**Act**"). However, 3 (three) LPG cylinder manufacturers were left-out of the previous investigation and the present investigation was ordered against the said 3 (three) bidders, viz., Prathima Industries Private Limited; Prestige Fabricators Private Limited.; and Pankaj Gas Cylinders Limited.

The investigation focused on the bids submitted by the 3 (three) manufacturers in 18 (eighteen) states. It was revealed that Prathima Industries had quoted identical prices in the tender, along with other bidders in Andhra Pradesh, without having any plausible justification for the same. The other two bidders did not quote identical prices and/ or were not awarded the tender. As such, only Prathima Industries' conduct was found to be in violation of Section 3(3) of the Act, during the investigation.

The CCI noted that despite the identical pricing by bidders, it is the procurer HPCL in this case who negotiates with the L1 bidder and sets the prices. Such a position has been recognized by the Hon'ble Supreme Court, and the CCI decided not to proceed against Prathima Industries in the present matter. The matter has been closed forthwith.

A copy of the Order can be accessed here.

iv. Competition Commission of India (CCI) increases the filing fee for combination and antitrust filings

The CCI, through separate amendments to the requisite regulations, has enhanced the regulatory fee payable for filing a notice for seeking combination approvals, as well as the filing for cases alleging cartelization and abuse of dominance.

Under the new fee structure, the fee for filing a short form notice (Form-I) has been enhanced to INR 20,00,000/- (Rupees twenty lakhs only), while the fee for filing a long form notice (Form-II) has been enhanced to INR 65,00,000/- (Rupees sixty five lakhs).

Similarly, the fee for filing antitrust cases has been enhanced. Under the new regulations, the following fee is now payable for filing antitrust cases:

(i) Where informant is an individual or Hindu Undivided Family - INR 5,000/- (Rupees five thousand only);

(ii) Where informant is a Non-Governmental Organization or Consumer Association - INR 10,000/- (Rupees ten thousand only);

(iii) Where informant is a firm or a company having a turnover of up to INR 2,00,00,000/- (Rupees two crore only) in the preceding year – INR 40,000/- (Rupees forty thousand only);

(iv) Where informant is a firm or a company having turnover exceeding INR 2,00,00,000 (Rupees two crore only) and up to INR 50,00,00,000/- crore in the preceding year – INR 1,00,000/- (Rupees one lakh only); and

(v) In all other cases - INR 5,00,000/- (Rupees five lakhs only).

The notifications can be accessed here and here.

VI. LITIGATION & ARBITRATION

i. Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited [SLP (C) No. 11476 of 2018 before the Supreme Court of India, decided on November 27, 2019]

Scope of examination by the High Court while exercising its powers under Section 11 of the Arbitration and Conciliation Act, 1996

Background:

The Parties, in the present matter, had entered into a 'Services Agreement', which contained an 'arbitration clause'. Disputes arose between the parties with respect to the payment of amounts under the agreement, by the Respondent, and the deduction of security amounts under the running bills. The Respondent did not respond to the notices issued by/ on behalf of the Petitioner at 3 (three) recorded instances, namely: (i) legal notice demanding payment of the concerned amount dated May 29, 2013; (ii) notice of arbitration dated March 09, 2016 calling upon the Respondent to nominate a sole arbitrator in terms of the arbitration clause; and (iii) notice dated May 30, 2016 proposing the name of a sole arbitrator.

The Petitioner on September 20, 2016 filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), invoking the power of the High Court of Madhya Pradesh to appoint the sole arbitrator. The High Court in its Order dated January 11, 2018 held that the claims of the Petitioner were barred by limitation, and therefore an arbitrator could not be appointed under Section 11 of the Arbitration Act. Aggrieved by the order of High Court, the Petitioner approached the Hon'ble Supreme Court of India ("**Hon'ble Supreme Court**").

The core issue before the Hon'ble Supreme Court was whether the High Court was justified in rejecting an application filed under Section 11 of the Arbitration Act for reference to arbitration on the ground that it was barred by limitation.

Findings of the Court:

The Hon'ble Supreme Court observed that since the notice for invocation of arbitration was issued on March 9, 2016, subsequent to the coming into force of the amendments made to the Arbitration Act by the Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment Act**"), the amended Section 11 of the Arbitration Act would apply to the instant case.

The Hon'ble Supreme Court thereafter analysed the changes bought about in the appointment process under Section 11 of the Arbitration Act, subsequent to the 2015 Amendment Act, and *inter alia* observed that the 2015 Amendment Act had brought about a two fold change in the appointment process under Section 11 of the Arbitration Act. Firstly, the default power of appointment shifted from the Chief Justice of the High Court (*in arbitrations governed by Part 1 of the Arbitration Act*) to the High Court. Secondly, the scope of jurisdiction under Section 11(6A) of the Arbitration Act was confined to the examination of the existence of an arbitration agreement, at the pre reference stage.

The Hon'ble Supreme Court found that by insertion of the non obstante clause in sub-section (6A) of section 11 of the Arbitration Act by the 2015 Amendment Act, the previous judgements of the Hon'ble Supreme Court have been legislatively overruled and the scope of the examination is now confined only to the existence of the arbitration agreement at the stage of appointment under Section 11 of the Arbitration Act and nothing more. The Hon'ble Supreme Court has relied on its earlier judgment in Duro Felguera S.A. v. Gangavaram Port Limited [(2017) 9 SCC 729] to arrive at this conclusion.

The Hon'ble Supreme Court in this case, held that the High Court is empowered to look only into the existence of an arbitration agreement, and all other preliminary/ threshold issues are to be decided by the arbitrator under Section 16 of the Arbitration Act, which enshrines the 'Kompetenz-Kompetenz' principle.

In view of the above, and in view of the fact that limitation is a mixed question of fact and law, the Hon'ble Supreme Court set aside the impugned order of the High Court, appointed an arbitrator and directed that the issue of limitation should be decided by the arbitral tribunal.

<u>Conclusion and Analysis:</u>

The judgment of the Hon'ble Supreme Court has sought to reinforce the doctrine of "Kompetenz-Kompetenz" enshrined in Section 16 of the Arbitration Act, empowering the arbitral tribunal to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement.

ii. S. Satyanarayana & Co v. West Quay Multiport Private Limited
[Arbitration Application No. 261 of 2018 before the High Court of Bombay, decided on November 22, 2019]

<u>Payment of difference in stamp duty on agreements containing an arbitration clause in the State where the seat of the arbitration is located, even when the agreement relates to matters outside the State.</u>

<u>Background:</u>

The present application was filed by the Petitioner under Section 11 of the Indian Arbitration and Conciliation Act, 1996 (**"Arbitration Act"**), seeking appointment of the Respondent's nominee arbitrator, pursuant to the Respondent failing to nominate its arbitrator as per the arbitration agreement.

The concerned agreement was entered into by the parties outside Maharashtra, and while the subject matter of the agreement was related to a state outside of Maharashtra, the only connection the agreement had to the State of Maharashtra was that it provided that the place of arbitration would be Mumbai. The Respondent did not dispute the existence of the arbitration clause, however, the dispute related to whether the agreement was liable to be stamped as per the Maharashtra Stamp Act, 1958, once the agreement was brought into the State for the purposes of being acted upon under Section 11 of the Arbitration Act.

The question to be adjudicated by the Hon'ble High Court of Bombay was whether the agreement was required to be stamped as per the Maharashtra Stamp Act, 1958, once the agreement was brought into the State of Maharashtra, before an application under Section 11 of the Arbitration Act could be entertained.

Findings of the Court:

The Hon'ble High Court, while interpreting Section 19 of the Maharashtra Stamp Act, 1958, held that the stamp duty has to be paid on the agreement, as per the Maharashtra Stamp Act, 1958, since the arbitration is taking place in Mumbai. The Hon'ble High Court relied on the decisions of the Supreme Court in Garware Wall Ropes v. Coastal Marine Constructions & Engineering Ltd. (AIR 2019 SC 2053), and SMS Tea Estate Private Limited v. Chandmari Tea Company Pvt. Ltd. [(2011) 14 SCC 66], to hold that an arbitration agreement can only be acted upon if it is stamped as per the proper law.

It was argued by the counsel for the Petitioner that under Section 19 of the Maharashtra Stamp Act, 1958, only those agreements relating to a matter done, or to be done in the State needs to be stamped, and that arbitration being only a procedural remedy was not a '*thing done or to be done*' in the State.

The Hon'ble High Court, however, relying on precedents, disagreed with the counsel for the Petitioner, and held that the arbitration clause cannot be severed from the rest of the agreement. An interpretation that the arbitration clause (*being not required to be stamped on its own*) is the only part of the agreement that is brought into the State will lead to a severance of the arbitration clause, from the underlying agreement. Further, the Hon'ble High Court has held that it cannot be said that arbitration is not a "*thing done or to be done at all*" for the purposes of the Maharashtra Stamp Act, 1958. Therefore, it held that when an arbitration clause in an agreement is to be acted upon in the State of Maharashtra, it has to be adequately stamped as per applicable state law.

Conclusion and Analysis:

It is now a settled position of law that for an arbitration agreement to be acted upon, it requires to be adequately stamped, and it cannot be severed from the underlying agreement. The Bombay High Court while reiterating the decisions of the Supreme Court in Garware Wall Ropes v. Coastal Marine Constructions & Engineering Ltd. (AIR 2019 SC 2053), and SMS Tea Estate Private Limited v. Chandmari Tea Company Pvt. Ltd. [(2011) 14 SCC 66], has gone a step forward, and held that not only is an agreement required to be stamped in the State which is related to the subject matter of the agreement, but it is also required to be stamped in the State where the arbitration is to be held, provided there is a difference payable under the respective State legislation.

iii. Perkins Eastman Architects DPC and Another v. HSCC (India) Ltd. [Arbitration Application No. 32/ 2019 before the Supreme Court of India decided on November 26, 2019]

Person interested in the outcome of the decision of the dispute, will not have the power to appoint a sole arbitrator.

Background:

The case had been filed by a consortium of Applicants, namely: (i) Perkins Eastman Architects DPC, an architectural firm, having its registered office in New York; and (ii) Edifice Consultants Private Limited, having its office in Mumbai, under Section 11(6), read with Section 11(12)(a) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), for the appointment of an arbitrator to adjudicate the disputes.

The Applicants had submitted a bid in relation to a tender issued by the Respondent for the comprehensive architectural planning and designing of the works provided under the Pradhan Mantri Swasthya Suraksha Yojna. The Applicants, as a consortium, were the successful bidders.

Subsequently, disputes arose between the parties, as the Respondent alleged a failure on the part of the Applicants, and the Respondent issued a 'stop work notice'. Thereafter, the Respondent also issued a termination notice. In light of this, the Applicants issued a notice invoking the dispute resolution clause. It was the contention of the Applicants that the Respondent did not comply with the procedure of the arbitration clause, by appointing an arbitrator, within a period of 30 (thirty) days, through its Chairman and Managing Director, and that after the 30 (thirty) day period, the Chief General Manager of the Respondent had issued a letter to the Applicants appointing one Major General K.T. Gajria, as the sole arbitrator.

According to the Applicants, the Respondent was not in compliance with the arbitration clause, and hence they sought for the appointment of an arbitrator to adjudicate the disputes by the Hon'ble Supreme Court of India.

The main issues that arose for consideration, in the case, were:

- Whether this was an international commercial arbitration?
- Whether the Chief General Manager of the Respondent could have appointed a sole arbitrator to adjudicate the disputes between the Applicants and the Respondent?
- Whether the Hon'ble Supreme Court could exercise its powers under Section 11 of the Arbitration Act, when the appointment of the arbitrator has already been made by the Respondent, or whether the Applicants should be left to raise the challenge, at an appropriate stage, in terms of remedies available in law?

Findings of the Court:

- Whether this was an international commercial arbitration?

The Hon'ble Supreme Court placing reliance on Larsen and Toubro Limited v. SCOMI Engineering BHD, [(2019) 2 SCC 271], held that since Perkins Eastman Architects DPC is the lead member of the consortium and as it has its registered office in New York, the requirements of Section 2(1)(f) of the Arbitration Act would be satisfied. The Hon'ble Supreme Court therefore held that the arbitration, in this case, would be an international commercial arbitration.

- Whether the Chief General Manager of the Respondent could have appointed a sole arbitrator to adjudicate the disputes between the Applicants and the Respondent?

Relying upon the earlier decision of the Hon'ble Supreme Court in TRF Limited v. Energo Engineering Projects Limited, [(2017) 8 SCC 377] ("**TRF**"), the Hon'ble Supreme Court categorised the disqualifications in relation to interested persons to a dispute, into 2 (two):

Category No.1: Where the interested person to a dispute is named as an arbitrator, with an additional power to appoint any other person as an arbitrator, it was reiterated that such a person is disqualified from being an arbitrator, and consequently is found to be incompetent to appoint any other person as the arbitrator (*as held in TRF*).

Category No.2: Where the interested person to a dispute is not to act as an arbitrator himself/ herself, but is empowered or authorized to appoint any other person of his/ her choice or discretion, such persons were found to be incompetent to appoint any other person as the said arbitrator.

The Hon'ble Supreme Court has held that the basis for Category No. 1 being a ground for disqualification was because of the interest that the person would have in the outcome of the result of the dispute and that the "*element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision*". It further held that, similar invalidity would also arise even in Category No. 2. Therefore, an interested person in the outcome of the dispute has been held to be ineligible to even appoint an arbitrator.

- <u>Whether the Hon'ble Supreme Court could exercise its powers under Section 11 of the Arbitration Act, when the appointment of the arbitrator has already been made by the Respondent, or whether the Applicants should be left to raise the challenge at an appropriate stage in terms of remedies available in law?</u>

After discussing various case laws of the Hon'ble Supreme Court, the Hon'ble Supreme Court entertained the application and appointed an arbitrator.

<u>Conclusion and Analysis:</u>

Section 12 of the Arbitration Act provides the grounds for challenge in relation to the appointment of an arbitrator. In continuance of this, the legislature has also elaborated the grounds which give rise to justifiable doubts to the independence or impartiality of arbitrators in the Fifth Schedule to the Arbitration Act, and the grounds for disqualification of an individual as an arbitrator under the Seventh Schedule to the Arbitration Act.

Nowhere in any of the abovementioned provisions or schedules does it mention that an interested party in a dispute cannot appoint an arbitrator. The Hon'ble Supreme Court, in the instant case, relying on its earlier judgment in TRF, has categorically held that the interested person to a dispute is not to act as an arbitrator himself/ herself and further cannot appoint any other person of his/ her choice or discretion as an arbitrator. However, the Hon'ble Supreme Court has drawn out an exception in cases where each of the parties are to appoint their own arbitrators, who would then appoint a presiding arbitrator on the ground that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party.

iv. Kaushaliya v. Jodha Ram
[Contempt Petition No. 1868 of 2018 in Special Leave Petition (C) No. 10022 of 2016 before the Supreme Court of India decided on November 25, 2019]

<u>Disputes beyond the subject matter of litigation can be settled in mediation.</u>

<u>Background:</u>

Disputes arose between the Applicant, Kaushaliya, and the Respondent, Jodha Ram (*her father*), with respect to certain properties. A suit for injunction came to be filed by the Applicant in which certain counter claims were filed on behalf of the Respondent. The Applicant lost the case before the Trial Court, while the counter claim of the Respondent came to be allowed. The matter ultimately came up before the Hon'ble Supreme Court of India, through a Special Leave Petition. The Hon'ble Supreme Court, during the course of hearing, had referred the matter to mediation to explore the possibilities of settlement. Both the parties amicably settled their disputes through mediation and entered into a settlement agreement, whereby the Applicant would hand over possession of the disputed properties to the Respondent, simultaneously upon him delivering possession of a certain other properties to her.

Since there were defaults in complying with the settlement agreement, an execution petition and a contempt petition was filed. In the execution proceedings, and thereafter before the Hon'ble Supreme Court, 2 (two) persons namely: (i) Ramu Ram Vishnoi; and (ii) Rampal Bishnoi, filed objections stating that the settlement agreement included properties owned by them, and that those properties were not subject matter of the proceedings before the Trial Court, and hence cannot be the subject matter of the settlement agreement.

<u>Findings of the Court:</u>

The Hon'ble Supreme Court while dismissing the claims of Ramu Ram Vishnoi and Rampal Bishnoi, held that the parties, during mediation, are capable of overall amicable settlement, including settlement of disputes which are not the subject matter of the proceedings before the court. It reiterated that after a settlement is entered into during mediation, the order in terms of the settlement agreement is executable, irrespective of the fact whether the settlement agreement is with respect to the properties, which was/ were not the subject matter of the proceedings before the Court.

v. Jindal Steel and Power Limited v. Arun Kumar Jagatramka and Another
[Company Appeal (AT) No.221 of 2018 before the National Company Law Appellate Tribunal decided on October 24, 2019]

<u>Maintainability of a scheme for compromise and arrangement under Sections 230-232 of the Companies Act, 2013, in a liquidation proceeding under the Insolvency and Bankruptcy Code, 2016</u>

<u>Background:</u>

Jindal Steel and Power Limited, the Appellant, an unsecured creditor of Gujarat NRE Coke Limited (Corporate Debtor) preferred the present appeal before the Hon'ble National Company Law Appellate Tribunal ("**NCLAT**") under Section 421 of the Companies Act, 2013 ("**Act**"), against an order passed by the National Company Law Tribunal, Kolkata Bench ("**NCLT**") (dated May 15, 2018). In terms of the said order, the NCLT had ordered for taking steps for a financial scheme of compromise and arrangement between the promoter (*Mr. Arun Kumar Jagatramka*) and the company (*Gujarat NRE Coke Limited*) through the liquidator, after holding debts of the shareholders, creditors, etc., in terms of Section 230 of the Act, since a resolution plan under the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), was not accepted within the stipulated 270 (two hundred and seventy) day period.

<u>Findings of the Court:</u>

The Appellant had challenged the impugned order on the following two grounds:

- Whether in a liquidation proceeding under the IBC, a scheme for compromise and arrangement can be made in terms of Sections 230 to 232 of the Act?
- If so permissible, whether the promoter was eligible to file an application for compromise and arrangement, while he was ineligible under Section 29A of the IBC to submit a resolution plan?

After referring to earlier judgments of the Hon'ble Supreme Court of India, and the NCLAT, the NCLAT found that a petition under Section 230 of the Act was maintainable. However, a promoter who is ineligible under

Section 29A of the IBC to submit a resolution plan, is ineligible to file an application for compromise and arrangement.

While holding that an application for compromise and arrangement is maintainable, in a liquidation proceedings, the NCLAT referred to the findings of the Supreme Court in Swiss Ribbons Pvt. Ltd v. Union of India [WP (Civil) No. 99 of 2019], and Meghal Homes Pvt. Ltd v. Shree Niwas Girni K.K Samiti & Ors [(2007) 7 SCC 753], and its earlier decisions in S.C. Sekaran v. Amit Gupta & Ors. [Company Appeal (AT) (Insolvency) Nos. 495 & 496 of 2019] and Y. Shivram Prasad vs. S. Dhanapal & Ors. [Company Appeal (AT) (Insolvency) No.224 of 2018]. The NCLAT reiterated that the primary focus of the IBC is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management, and from a corporate death by liquidation.

On the second question before it, the NCLAT held that the precedents of the Supreme Court make it clear that even during the period of liquidation, the Corporate Debtor is to be saved from its own management meaning thereby that the promoters who are ineligible under Section 29A of the IBC are not entitled to file an application for compromise and arrangement in their favour. Moreover, the NCLAT also relied on Section 35(f) of the IBC which prohibits the liquidator from selling the immovable and movable property or actionable claims of the Corporate Debtor in liquidation to any person, who is not eligible to be a resolution applicant.

On these grounds, the scheme of arrangement submitted by the Promoter were set aside.

Conclusion:

The NCLAT has reiterated that the primary focus of the IBC is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation.

Note: *The said order dated October 24, 2019 in CA (AT) No. 221 of 2018 has been challenged before the Supreme Court of India and is pending in C.A. No. 9664/2019*.

VII. LABOUR & EMPLOYMENT

i. Government of Karnataka allows women to work in nigh shifts in factories

The Government of Karnataka, by way of Notification No. D 61 KaBaSe 2015 dated November 20, 2019, has allowed the employment of women during night shifts, i.e., between 7 PM and 6 AM, in factories registered under the Factories Act, 1948. The aforesaid has been undertaken in view of the decision passed by Hon'ble High Court of Madras in the Writ Petition No. 4604 to 4606 of 1999 [(2001) II LLJ 843 Mad] declaring Section 66(1)(b) of the Factories Act, 1948 as unconstitutional and violative of Articles 14, 15 and 16 of the Constitution of India. The aforesaid is however subject to it not being made mandatory for any woman worker to work during night shifts, and also that written consent must be obtained from such women who are interested in working during that shift.

The permission to employ women during night shifts has been made subject to certain conditions and *inter alia* obligates the employer to:

(a) Prevent the commission of acts of sexual harassment, and to provide procedures for the resolution, statement or prosecutions of such acts;

(b) Provide proper lighting and CCTV coverage;

(c) Ensure that women are employed in a batch of not less than 10 (ten) and the total number of women employed during a night shift should not be less than two-thirds of the total strength;

(d) Provide a sufficient number of rest rooms, sufficient women security at the entry and exit points and separate canteen facility for female employees;

(e) Provide a transportation facility to women workers from their residence and back;

(f) Provide appropriate medical facilities and telephone connections during a time of urgency;

(g) Appoint not less than 2 (two) female wardens per night shift who would work as Special Welfare Assistants.

Further, the Chief Inspector has been given the power to withdraw permission issued to any factory in terms of the abovementioned Notification, if any of the conditions specified therein are not complied with.

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