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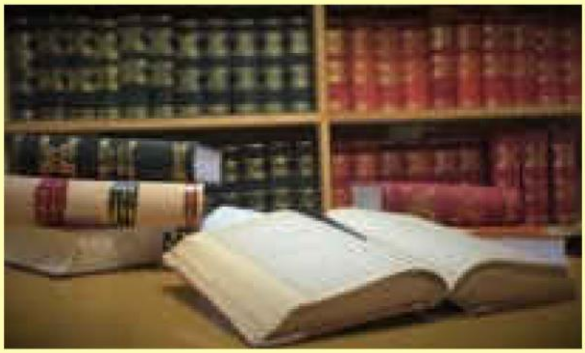

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## INSIGHTS

### I. THE ORDINANCE INSERTING SECTION 10A IN THE INSOLVENCY AND BANKRUPTCY CODE HAS OPENED ITSELF TO A LEGAL CHALLENGE

Hours after India went into lockdown, the Finance Minister announced certain measures to alleviate the economic crisis. She proposed changes to the Insolvency and Bankruptcy Code, 2016 ("**IBC**") that enables smooth and quick resolutions for companies facing insolvency and bankruptcy and avoid liquidation. The Government, the Finance Minister said, was considering suspension of certain provisions of the IBC that enabled creditors to file insolvency petitions against Indian companies for one year beyond April 30. April 30 came and went without any announcement in this regard.

In mid-May, the Finance Minister announced that the government was planning to bring in an ordinance to suspend provisions enabling filing of fresh insolvency cases for a period of one year. This was followed by absolute silence on the modalities or mechanism of suspension of the provisions. Banks, financial institutions (FIs), and insolvency law practitioners had no idea where they stood with these announcements.

Finally, on June 5, the Government passed an ordinance which inserted Section 10A in the IBC. The government said the ordinance was promulgated because the lockdown has caused business disruptions which may lead to default on debts pushing such companies into insolvency. Therefore, it felt that suspending Sections 7, 9 and 10 of the IBC would be the right course of action.

**Clear provision, unclear proviso**

Towards that end, Section 10A provides that "no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from this period, as may be notified in this behalf". This means that these provisions shall remain suspended from March 25 till September 25, unless extended for another six months, which would extend the suspension until March 25, 2021.

However, the proviso to the section states that no application for insolvency resolution shall ever be filed against a corporate debtor for any default occurring during the suspension period. While the main Section 10A suspends such applications for a limited period, the proviso enlarges the scope to provide complete amnesty under the IBC for any default occurring during the suspension period. The role of a proviso in a statute is to restrict the application of the main provision under exceptional circumstances. However, the proviso to Section 10A expands the substantive provision. Further, if the main provision is unclear, a proviso may be given to explain its true meaning. In this case the main provision appears to be clear and is obfuscated by the proviso. The proviso therefore does not appear to be legally tenable. The creditors can still approach courts, and as banks/FIs can still approach Debt Recovery Tribunals, the protection given by this proviso seems illusory.

Notably, Section 10A also suspends provisions of Section 10 of the IBC which enables voluntary insolvency resolution. This is difficult to understand as voluntary insolvency resolution by companies facing distress could have been made easier.

**Nature of default**

The ordinance appears to consider every default occurring during the suspension period to be a consequence of the pandemic. There could be cases where defaults were imminent due to other reasons, but which will now still

enjoy this protection. The ordinance should have protected only those defaults which may occur as a direct consequence of the pandemic or the lockdown and should have left this determination to the National Company Law Tribunal.

Also, a company defaulting on its payment obligations on March 24 (a day before the lockdown started) would not be provided any relief under the IBC as compared to a company defaulting on or immediately after March 25 due to similar reasons. This makes the suspension, in the absence of definition of a COVID-19 default, prima facie arbitrary.

Earlier, the government increased the minimum default amount to trigger corporate insolvency resolution from Rs. 1,00,000/- (Rupees one lakh) to Rs. 1,00,00,000/- (Rupees one crore). This was purportedly done to protect MSMEs from insolvency petitions. However, this also operates against such MSMEs since they will now be forced to approach civil courts to recover undisputed debts below Rs. 1,00,00,000/- (Rupees one crore). The suspension of these provisions would now impact even claims above Rs. 1,00,00,000/- (Rupees one crore) for at least six months to a year.

The ordinance has opened itself up to a legal challenge on grounds of arbitrariness and untenability of the proviso.

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## UPDATES

## I. RBI, FEMA & FDI

### i. Import of Goods and Services - Extension of Time Limits for Settlement of Import Payment

The Reserve Bank of India has extended the time period for remittances against imports in view of the disruption caused by the Covid-19 pandemic by issuing A.P. (DIR Series) Circular No. 33 dated May 22, 2020. The time limit for completion of remittances against normal imports has been extended from 6 (six) months to 12 (twelve) months from the date of shipment of such imports, made on or before July 31, 2020.

*The full text of the Circular can be accessed here.*

### ii. Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) (Amendment) Regulations, 2020

The Reserve Bank of India has, by way of Notification No. FEMA 395(1)/ 2020-RB dated June 15, 2020 ("**Notification**") amended the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 ("**Principal Regulations**").

In terms of the Notification, 'Mode of Payment' with respect to 'Investments by Foreign Portfolio Investors ("**FPIs**")' as provided in Serial No. II of Regulation 3.1 of the Principal Regulations have been amended, and the restriction on use of balances in Special Non-Resident Rupee ("**SNRR**") account for the purpose of making investment in units of investment vehicles in India, other than the units of domestic mutual fund has been removed. Additionally, the FPIs have now been permitted to use the sale proceeds (net of taxes)

from units of REITs and InViTs for the purpose of crediting the same to the foreign currency account or SNRR account of the FPI (in addition to the ability of remitting such sale process outside India).

In terms of the Notification, 'Mode of Payment' with respect to 'Investments by Persons Resident Outside India in an Investment Vehicle' as provided in Serial No. VIII of Regulation 3.1 of the Principal Regulations have been amended and FPIs and Foreign Venture Capital Investors ("**FVCI**") can now pay their considerations towards Non-Debt Instruments out of their SNRR account for trading in units of an Investment Vehicle which are listed or proposed to be listed (primary issuance) on the stock exchanges in India. Additionally, sale / maturity proceeds (net of taxes) of such units in Investment Vehicle can now be credited to the SNRR account of the FPI or FVCI (in addition to the ability of remitting such sale proceeds outside India or crediting the same into the NRE or FCNR(B) account of the FPI or FVCI).

*The full text of the Notification can be accessed here.*

## II. CORPORATE

### i. Circular in relation to the dispatch of Notice, by Listed Companies, for a Rights Issue

The Ministry of Corporate Affairs ("**MCA**") has, by way of General Circular No. 21/2020, dated May 11, 2020 ("**Circular**"), provided a clarification in relation to the dispatch of notice by a listed company proposing to issue its shares by way of a 'rights issue', under the Companies Act, 2013 ("**Act**"). As per the Act, the offer for such an issue is required to be made by way of a notice to all the existing shareholders, that is to be sent either through registered post, speed post, through any electronic mode or courier, or any other mode that would have a proof of delivery. The MCA has clarified by way of the Circular that a failure or inability of the company to dispatch such a notice through registered post or speed post or courier, would not be viewed as a violation of the Act, as long as the offer is being made upto July 31, 2020.

*The full text of the Circular can be accessed here.*

### ii. Schedule VII of the Companies Act, 2013 – Amended

The Ministry of Corporate Affairs ("**MCA**") has, by way of Notification No. G.S.R. 313(E), dated May 26, 2020, brought into force from March 28, 2020, an amendment to Schedule VII of the Companies Act, 2013 ("**Act**"), to provide for activities which may be included by companies in their corporate social responsibility policies.

The spending of CSR funds for the Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PM CARES Fund), will now be considered as an eligible CSR activity under Schedule VII of the Act.

*The full text of the Notification can be accessed here.*

### iii. The Companies (Share Capital and Debentures) Rules, 2014 – Amended

The Ministry of Corporate Affairs ("**MCA**") has, by way of Notification No. G.S.R. 372(E), dated June 5, 2020, brought into force from June 12, 2020, the Companies (Share Capital and Debentures) Amendment Rules, 2020 ("**Amendment Rules**"), which has the effect of amending the Companies (Share Capital and Debentures) Rules, 2014 ("**Share Capital Rules**").

The Amendment Rules have revised the definition of a 'start-up company', as provided under Rule 8 of the Share Capital Rules in relation to the issue of sweat equity shares by a 'start-up company', to mean those companies as defined under Notification No. G.S.R. 127(E), dated February 19, 2019, issued by the Department for Promotion of Industry and Internal Trade ("**Notification**"). As per the Notification, a 'start-up' has been defined to be an entity having the following characteristics:

(i) a company which has been incorporated as a private limited company or registered as a partnership firm or a limited liability partnership in India, upto a period of 10 (ten) years from the date of incorporation/ registration;

(ii) an entity whose turnover for any of the financial years, since its incorporation/ registration, has not exceeded 100 (one hundred) crore rupees; and

(iii) an entity which is working towards innovation, development or improvement of products or processes or services, or if it is a scalable business model with a high potential of employment generation or wealth creation.

An entity formed by splitting up, or reconstruction of an existing business, is not to be considered to be a 'start-up'.

Further, in accordance with the Amendment Rules, 'start-up companies' may now issue sweat equity shares not exceeding 50% (fifty percent) of its paid up capital, upto 10 (ten) years from the date of its incorporation or registration, instead of 5 (five) years which was the earlier provision.

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

### iv. Circular for passing Ordinary and Special Resolutions by Video Conferencing or Other Audio-Visual Means

The Ministry of Corporate Affairs has, by its General Circular No. 22/2020, dated June 15, 2020, extended up to September 30, 2020 (from June 30, 2020), the permission to hold extra-ordinary general meetings through video conferencing or other audio-visual means, for the passing of ordinary and special resolutions.

*The full text of the Circular can be accessed here.*

### v. Circular for Filing of Forms for the Creation and Modification of Charges

The Ministry of Corporate Affairs ("**MCA**") has, by way of General Circular No. 23/2020, dated June 17, 2020, introduced a scheme, namely the 'Scheme for relaxation of time for filing forms related to creation or modification of charges under the Companies Act, 2013' ("**Scheme**"), for the purposes of extending the timelines to file the forms for the creation and the modification of charges. The Scheme will be effective from June 17, 2020.

The Scheme is applicable to the filing of Forms CHG-1 and CHG-9, where the charge was created/ modified before March 1, 2020, and the timeline to file the requisite forms had not expired as on March 1, 2020. In such cases, for the purpose of calculating the timeline, the time period between March 1, 2020 and September 30, 2020 will not be counted.

The Scheme is also applicable to charges where the date of creation/ modification falls between March 1, 2020 and September 30, 2020. In such cases, the time period between the date of creation/ modification of the charge till September 30, 2020 would not be counted for the purpose of calculating the timeline to make the requisite filings.

*The full text of the Scheme can be accessed here.*

### vi. Circular related to the Deposit Repayment Reserve

The Ministry of Corporate Affairs ("**MCA**") has, by way of General Circular No. 24/2020, dated June 19, 2020, extended the timeline for the creation of the deposit repayment reserve and to invest or deposit 15% (fifteen percent) of the debentures maturing, as set out in the Companies Act, 2013, and the Companies (Share Capital & Debentures) Rules, 2014, to September 30, 2020.

The MCA had, by way of Circular No. 11/2020, dated March 24, 2020, introduced certain relaxations for companies and limited liability partnerships, which also extended the timeline to create the deposit repayment reserve and to invest or deposit 15% (fifteen percent) of the debentures maturing, to June 30, 2020.

*The full text of the Circular can be accessed here.*

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

The Ministry of Corporate Affairs ("**MCA**") has, by way of Notification No. G.S.R. 395(E), dated June 23, 2020, brought into force the Companies (Meetings of Board and its Powers) Second Amendment Rules, 2020, extending the time period, from June 30, 3030 to September 30, 2020, for holding board meetings through video conference or other audio-visual means in relation to matters which are generally not allowed to be dealt with during such meetings, such as approval of annual financial statements.

*The full text of the Notification can be accessed here.*

### viii. The Companies (Appointment and Qualification of Directors) Rules, 2014 – Amended

The Ministry of Corporate Affairs ("**MCA**") has, by way of Notification No. G.S.R. 396(E), dated June 23, 2020, brought into force the Companies (Appointment and Qualification of Directors) Third Amendment Rules, 2020, ("**Amendment Rules**"), extending the time period, from June 30, 2020 to September 30, 2020, for filing the online application by individuals who have been appointed as independent directors as on December 1, 2019, for the inclusion of the names in the data bank of independent directors.

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

## III. COMPETITION

### i. CCI finds ball and roller bearing manufacturers guilty of collusion

The Competition Commission of India ("**CCI**") has held that the bearing manufacturers (National Engineering Industries Ltd., Schaeffler India Ltd., SKF India Ltd. and Tata Steel Ltd. Bearing Division) colluded in violation of Section 3 of the Competition Act, 2002 ("**Competition Act"**) in an attempt to raise the price of ball and roller bearings in the automotive and industrial OEM segment of the bearings market

from November 3, 2009 to March 31, 2011. A leniency application is permitted by the Competition Act and is in the nature of a confession of having committed the offence, to be made in the early stages of an investigation, in a bid to escape harsher punishment prescribed.

The decision is based on leniency applications filed by Schaeffler India Ltd. and National Engineering Industries Ltd., wherein they admitted to collusively seeking price increase from the industry and OEM customers between 2009 and 2011.

The CCI relied on the evidence showing meetings between the manufacturers through which they decided to collectively seek price increase from OEMs. Even though the manufacturers contended that the collusion/agreement was never implemented in the market, the CCI was of the opinion that even an attempt to collude is likely to cause appreciable adverse effect on competition in the market and hence in violative of Section 3 of the Competition Act. However, no fine was imposed by CCI in light of the particular facts and circumstances of the case.

*A copy of the Order can be accessed here.*

### ii. NCLAT holds compensation application of Food Corporation of India against ALP Tablet Manufacturers as maintainable

A compensation application of the Food Corporation of India ("**FCI"**) based on findings of the CCI of collusive bidding by Excel Crop Care Ltd., UPL Ltd. and Sandhya Organic Chemicals (P) Ltd (ALP manufacturers) has been held to be maintainable by the National Company Law Appellate Tribunal ("**NCLAT"**) The Competition Act allows a person who has suffered loss at the hands of a cartel or as a result of other conduct violative of Section 3 of the Competition Act or as a result of abuse of dominance by an enterprise under Section 4 of the Competition Act, to file a claim for compensation against the offending enterprise(s) which has been held to be as such by the CCI.

In 2012, the CCI found the ALP manufacturers guilty of violation of Section 3 of the Competition Act. The erstwhile appellate tribunal, the Competition Appellate Tribunal, upheld the finding of the CCI in 2013 and the Supreme Court confirmed the decision through its judgment in 2017. FCI filed its compensation applicable against the ALP manufacturers in 2019. The Respondents contended that the application was not maintainable on two counts: Firstly, Section 53N of the Competition Act provides for filing of the compensation applicable after the order of the CCI or the appellate tribunal. However, the present application was filed after the final judgment of the Supreme Court, which is not specifically provided for in Section 53N of the Competition Act. Secondly, the Respondents also contended that the application was barred by limitation as it was filed in 2019, 7 (seven) years after the CCI decision and 6 (six) years after the appellate tribunal decision.

The NCLAT held that Section 53N of the Competition Act requires that the compensation applicable should 'arise from the findings of the Competition Commission of India or the Appellate Tribunal' and decisions of the CCI/appellate tribunal merged into the judgment of the Supreme Court vide the Doctrine of Merger.

Further, as regards limitation period, the NCLAT held that the same has to be counted from the date of judgment of the Supreme Court which gave finality to the case and hence the applicable was held as been filed within a reasonable time.

*A copy of the Order can be accessed here.*

### iii. CCI closes case against food delivery platform Swiggy for alleged abuse of dominance

The CCI has by its order dated June 19, 2020 closed a case of alleged abuse of dominance against app-based food delivery operator Swiggy.

The informant alleged that Swiggy is charging prices higher than the prices (menu prices) charged by the respective restaurants for walk-in customers, without the knowledge of the customers. Thus, the customers ordering food online via app/website of Swiggy end up paying higher prices than they would have paid by walking-in or ordering directly through phone from that particular restaurant. The informant alleged that Swiggy is abusing its dominance by charging unfair price to its customers, thus, acting in contravention of Section 4(2)(a)(ii) of the Competition Act.

The CCI took note of the justifications offered by Swiggy including that it has no role to play in the pricing of menu items on the platforms as the restaurants themselves price the items accordingly. Where any discrepancy occurs, it is solely on account of restaurants themselves displaying increased pricing on its platform. Further, where any such discrepancy is bought to the notice of Swiggy, it takes up the same with the restaurant.

*A copy of the Order can be accessed here.*

## IV. INSOLVENCY & BANKRUPTCY

## A. REGULATORY UPDATES

### i. The Insolvency and Bankruptcy Code, 2016 – Amended

The Ministry of Law and Justice, by way of Notification No. 9 of 2020, dated June 5, 2020, brought into force the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020, promulgated to amend the Insolvency and Bankruptcy Code, 2016 ("**IBC**") by the insertion of the following sections:

- Section 10A which states that no application shall be filed for the initiation of a corporate insolvency resolution process ("**CIRP**"), of a corporate debtor, under Sections 7, 9 and 10 of the IBC, in respect of a default committed on March 25, 2020, or during the period of 6 (six) months thereafter. Section 10A further provides that the said period (during which a default is committed) may be extended upto an additional period of 6 (six) months, as and when notified at later date; and

- Section 66(3) which states that no application shall be filed by the resolution professional under Section 66(2) of the IBC (*i.e., an application for a director or partner to make contributions to the assets of the corporate debtor, for not exercising due diligence to minimise the potential loss to the creditors of a corporate debtor, which they knew would end up in CIRP*), in respect of a default in relation to which the CIRP is suspended, under Section 10A of the IBC.

*The full text of the Notification can be accessed here.*

## B. JUDICIAL PRONOUNCEMENTS

### i. Hussan Kadri v. Edelweiss Asset Reconstruction Co. Ltd. and Ors.

[Company Appeal (Insolvency) No.1073 of 2019 decided on May 22, 2020 by the National Company Law Appellate Tribunal]

***Background:***

An application was filed by Edelweiss Asset Reconstruction Company Limited, i.e., the financial creditor ("**FC**"), under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), for the initiation of a corporate insolvency resolution process ("**CIRP**") against K.K. Kadri Paper Mills Pvt. Ltd., i.e., the corporate debtor ("**CD**"), for defaulting in discharging its liability of a financial debt amounting to Rs. 44,51,74,964/-. The CIRP was admitted by National Company Law Tribunal, Ahmedabad ("**NCLT**"), by way of its order dated July 25, 2019.

The present appeal was filed before the National Company Law Appellate Tribunal ("**NCLAT**") with the limited scope that the application filed by the FC was barred by limitation, and hence could not have been admitted by the NCLT.

The CD had approached the Bank of Baroda to avail of credit facilities for promoting its business, and the CD was sanctioned a loan in the form of cash credit, letters of credit, and various term loan facilities amounting to Rs. 14.80 crores by way of the sanction letter dated January 6, 2011. The CD failed to repay the loan amount despite the demands raised by the Bank of Baroda. The Bank of Baroda thereafter had assigned its debts to the FC.

***Findings of the Court:***

The NCLAT has restated that an application under Section 7 of the IBC is governed by Article 137 of the Limitation Act, 1963, prescribing a 3 (three) years period for triggering of the CIRP, and such period of limitation shall commence from the date the financial debt is declared as a non-performing asset.

The NCLAT examined the effects of Section 18 and 19 of the Limitation Act, 1963 and reiterated that:

- As per Section 18 of the Limitation Act, 1963 an acknowledgment of liability in respect of a right made, in writing, and signed by the debtor before the expiration of the prescribed period for a suit, or an application, would result in a fresh period of limitation being computed from the time when acknowledgment was so signed;

- Section 19 of the Limitation Act, 1963 gets attracted if 2 (two) conditions are satisfied: (a) payment must be made within the prescribed period of limitation; (b) such payment must be acknowledged either, in writing, by the person making such payment or signed by him. What extends the period of limitation is the payment made, and not the writing but since such writing is construed as a mode of proof of such payment, such acknowledgment becomes relevant.

In view of the fact that the acknowledgment of liability in the form of letters, OTS or settlement terms were made by the CD before the expiry of the period of limitation, and thereafter part payments had also been made within the period of limitation, it was held that the application filed on August 16, 2018 by the FC

has been filed within 3 (three) years of the last part payment of Rs. 1,50,00,000/- effected on February 9, 2017, and was therefore held to be clearly within the period of limitation.

### ii. Allahabad Bank v. Poonam Resorts Limited and Ors.

[Company Appeal No. 1303 of 2019 decided on May 22, 2020 by the National Company Law Appellate Tribunal]

***Background:***

Allahabad Bank, i.e., the financial Creditor ("**FC**") had filed 2 (two) separate applications under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), against 2 (two) separate Corporate Debtors ("**CD's**"), and separate orders were passed by National Company Law Tribunal, Mumbai Bench ("**NCLT**"), which were impugned before the National Company Law Appellate Tribunal ("**NCLAT**"). By way of the Impugned Orders, the NCLT had appointed (*at the behest of the CD's in their applications under Section 75 of the IBC*) Pricewaterhouse Coopers Services LLP, as a forensic auditor to examine the allegations raised by the CD's, and submit an independent report delineating some factual aspects bearing upon the utilisation of the credit facility extended by the FC to the corporate debtors. The NCLAT in its order has deliberated on:

(i) Whether the NCLT was justified in ignoring the time frame as prescribed under Section 7 of the IBC for ascertaining the existence of a default; and

(ii) Whether the NCLT could embark upon an enquiry to determine whether the applications filed under Section 7 of the IBC contained false information, when the matters were at the very threshold stage.

***Finding of the Court:***

The NCLAT has observed that the IBC consolidates and amends the law relating to insolvency resolution of corporate persons in a time bound manner for various objects sought to be achieved by the statute.

The NCLAT has, while referring to Section 7(4) of the IBC, once again reiterated the law laid down by the Supreme Court of India in "*Innoventive Industries Limited v. ICICI Bank and Anr.*" [(2018) 1 SCC 407], that the satisfaction in regard to occurrence of default has to be drawn by the adjudicating authority either from the records of the information utility or other evidence provided by the financial creditor.

The NCLAT has, while allowing the appeal and setting aside the Impugned Orders passed by the NCLT, held that the NCLT cannot direct a forensic audit and engage in a long drawn pre-admission exercise which will have the effect of defeating the object of the IBC. It has further held that the provisions of Section 75 of the IBC, under which the order was passed by the NCLT, pertain to penal provisions which postulate an enquiry, and recording of finding in respect of culpability of the applicant regarding commission of an offence, and that the same cannot be allowed to thwart the initiation of a corporate insolvency resolution process, unless in a given case of forgery or falsification of documents is patent and *prima facie* established.

The NCLAT has therefore directed that in the event of failure by the FC to provide evidence as required, the NCLT shall be at liberty to take an appropriate decision. In the event the application is incomplete, the NCLT can return the same to the FC for rectifying the defect and the same is required to be done within 7 (seven) days of the receipt of notice from the NCLT.

### iii. Kotak India Venture Fund-I v. Indus Biotech Private Limited

[Company Petition (IB) No. 3077 of 2019 decided on June 9, 2020 by the National Company Law Tribunal, Mumbai Bench-IV]

***Background:***

Kotak India Venture Fund, i.e., the Financial Creditor ("**FC**") had subscribed to Optionally Convertible Redeemable Preference Shares ("**OCRPS**"), issued by Indus Biotech Private Limited, i.e., the Corporate Debtor ("**CD**"), pursuant to a Share Subscription and Shareholders Agreement ("**SSSA**"). Several disputes arose between the parties in relation to the valuation of OCPRS, when the same were sought to be converted to equity shares. Whilst the dispute was pending, the FC triggered the early redemption clause as mentioned in the SSSA, and further, when CD failed to redeem the OCRPS, the FC approached the National Company Law Tribunal, Mumbai Bench ("**NCLT**") under Section 7 of the Insolvency and Bankruptcy Code, 2016, for the initiation of a corporate insolvency resolution process ("**CIRP**") against the CD. The CD had invoked the arbitration clause under the SSSA, and thereafter filed an interlocutory application under Section 8 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") before the NCLT praying for reference of the parties to arbitration, as an arbitration agreement exists in the agreements between the parties. As such, the issues that fell for consideration before the NCLT were whether the dispute was arbitrable, whether the provisions of the Arbitration Act would prevail over the provisions of the IBC, and if so, in what circumstances and whether the Interlocutory Application under Section 8 of the Arbitration Act was to be allowed.

***Findings of the Court:***

The NCLT held that in a petition under Section 7 of the IBC there has to be a judicial determination by the adjudicating authority, as to whether there has been a default under Section 3(12) of the IBC. The dispute centres around the valuation of shares, calculation and conversion formula and fixing of the qualified initial public offering ("**QIPO**") date which are important determinants for concluding that a default has occurred. The NCLT held that it was not satisfied that a default had occurred, and that the disputes are all arbitrable.

The NCLT has on the above basis allowed the Interlocutory Application filed by the CD under Section 8 of the Arbitration Act, and dismissed the application under Section 7 of the IBC filed by the FC.

## V. LITIGATION & ARBITRATION

### i. The Workmen through the Convener v. Ravuthar Dawood Naseem

[Contempt Petition (C) No.404 of 2019 in Civil Appeal No.10511 of 2011 before the Supreme Court of India, decided on May 19, 2020]

*To constitute civil contempt, it must be established that disobedience is wilful, deliberate and with full knowledge of the consequences*

***Background:***

In the present case, the petition relates to a non-compliance of a direction given to the Respondent, i.e., Food Corporation of India, to regularise and departmentalise the concerned workers who had initiated industrial disputes before the Industrial Tribunal under Section 10(1)(d) of the Industrial Disputes Act, 1947.

The Petitioners had submitted that the direction given by the Industrial Tribunal, and upheld by the Madras High Court, and by the Supreme Court is unambiguous, as it directs the Respondent to regularise the concerned workers in the Departmental Labour System. The Respondent contended that it has already regularised the eligible employees, who were party to the 2 (two) references, under the Direct Payment System (DPS), and nothing further was required to be done.

***Findings of the Court:***

The Supreme Court noted that to punish a contemnor, it is necessary to establish that the disobedience of the order is "wilful". The term "wilful" introduces a mental element and hence, requires looking into the mind of a person/ contemnor by gauging his actions, which is an indication of one's state of mind. "Wilful" means knowingly, intentional, conscious, calculated and deliberate with the full knowledge of the consequences flowing therefrom. It excludes casual, accidental, bona fide or unintentional acts or genuine inability. Wilful acts do not encompass involuntarily or negligent actions. The act has to be done with a "bad purpose or without justifiable excuse or stubbornly, obstinately or perversely". A wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. It does not include any act done negligently or involuntarily. The deliberate conduct of a person means that he knows what he is doing and intends to do the same. Therefore, there has to be a calculated action with an evil motive on his part.

Even if there is a disobedience of an order, but such disobedience is the result of some compelling circumstances under which it was not possible for the contemnor to comply with the order, the contemnor cannot be punished. "Committal or sequestration will not be ordered unless contempt involves a degree of default or misconduct."

As it is indisputable that the Food Corporation of India has 4 (four) systems of labour engagement, including the Direct Payment System (DPS), the Petitioner Union(s) ought to have sought specific relief against the Corporation in that regard. The issue as to regularisation of the concerned workmen under a particular labour system had not been put in issue before the Tribunal and upto the Supreme Court. A general direction came to be issued to regularise and departmentalise them. Resultantly, the Respondents

were left with the only option to regularise the concerned workmen as per the extant applicable policy of the Corporation, under the Direct Payment System (DPS).

***Observation and Analysis:***

The Court has held that no specific direction had been given to the Respondent to regularise the concerned workmen only in the Departmental Labour System. Furthermore, the Departmental Labour System is now a dying cadre and the policy of the Respondent at the relevant time entailed regularisation of such workmen, only under the Direct Payment System (DPS). Thus, no contempt action can be initiated on the basis of a general direction to the Respondents to regularise and departmentalise the concerned workmen. No case for initiating contempt action against the Respondent Corporation and its officers had been made out and accordingly the present petitions were dismissed.

### ii. Sun Pharma Laboratories Limited v. BDR Pharmaceuticals International Pvt. Ltd. & Anr.

[Civil Suit (Comm.) No.757 of 2017 before the High Court of Delhi, decided on June 5, 2020]

*Courts have to adopt a stricter approach regarding trademarks in the case of medicinal products as it may have adverse consequences on the health and life of the individual*

***Background:***

The suit was filed before the High Court of Delhi by the Plaintiff seeking a decree of permanent injunction to restrain the Defendants from manufacturing, marketing, selling, offering for sale, advertising, directly or indirectly, dealing in medicinal preparations under the impugned mark "LULIBET" or any other mark that may be visually, structurally or phonetically deceptively similar to the Plaintiff's trademark "LABEBET", which amounted to an infringement of the registered trademark of the Plaintiff. The Plaintiff's trademark is "LABEBET", whereas the trademark of the Defendant is "LULIBET".

***Findings of the Court:***

The Court had observed that the marks have to be compared as a whole, and have to be judged by their look and their sound. Further, the nature of customers who are likely to buy the goods should also be considered, and if the 2 (two) marks are compared as a whole, the mark of the Defendant is phonetically, visually and structurally, similar to that of the Plaintiff. A person of average intelligence and imperfect recollection is likely to be deceived or confused.

The Court noted that where medicinal products are involved, the test to be applied, as laid down by the Supreme Court, in *Cadila Health Care Limited v. Cadila Pharmaceuticals Ltd. [AIR 2001 SC 1952]* should be stricter than it would be applied to non-medicinal products. In the case of non-medicinal products, a confusion only creates economic loss, but in the case of medicinal products, it may have adverse consequences on the health and life of the individual. The fact that the Plaintiff did not oppose the application of the Defendant before the Trademark Registry does not mean that the Defendant can continue to violate the trademark of the Plaintiff.

The Court noted the fact that the Plaintiff's drug is sold in the form of tablet/ injectable form, and the defendant's drug is sold by way of a lotion/ cream, and stated that it cannot be ignored that both the drugs are sold through a common retail shop.

***Observation and Analysis:***

The Court held that the trademark of the Defendant is phonetically, structurally and visually similar to the trademark of the Plaintiff, and this would likely create confusion, and the possibility of deception or confusion being caused to a unwary purchaser of average intelligence and imperfect recollection cannot be ruled out. As such, in case of medicinal products, the courts have to adopt a stricter approach.

**iii. Ramanand & Ors. v. Dr. Girish Soni & Anr.**

[Rec. Rev. No. 447 of 2017 before the High Court of Delhi, decided on May 21, 2020]

*Temporary non-use of premises due to the lockdown cannot be construed as rendering the lease void*

***Background:***

A revision petition was filed by the Appellants/ tenants against the order passed by the learned Senior Civil Judge-cum-Rent Controller ("**RC**"), wherein a decree of eviction in respect of tenanted premises was granted. The Appellants runs a shoe store called 'Baluja' in Khan Market, and the landlord/ Respondent is a dentist. The premises was given on rent for commercial purposes, by way of a lease deed executed on February 1, 1975, at a rent amounting to Rs. 300/- (Rupees three hundred only) per month. In 2008, the Respondent had filed an eviction petition under Section 14(1)(e) of the Delhi Rent Control Act, 1958 ("**DRC Act**"). On March 31, 2012, leave to defend was granted by the RC, however, a decree for eviction was passed by way of an order dated March 18, 2017. The Appellants had then filed an appeal against the said order dated March 18, 2017 and the said appeal which was dismissed by the Rent Control Tribunal ("**RCT**") by way of an order dated September 18, 2017, on the ground that the same is not maintainable. Hence, a petition was filed challenging the eviction order.

Thereafter, an application was filed before the High Court of Delhi to determine whether the lockdown would entitle the tenant to claim a waiver or exemption from payment of rent or suspension of rent.

***Findings of the Court:***

In order for a lessee (the Appellants in the present case) desiring to seek protection under Section 108(B)(e) of the Transfer Of Property Act, 1882 ("**TPA**"), there has to be complete destruction of the property, which is permanent in nature, due to the force majeure event. Until and unless, there is a complete destruction of the property, Section 108(B)(e) of the TPA cannot be invoked. In view of this settled legal position, temporary non-use of a premises due to the lockdown which was announced due to the COVID-19 pandemic, cannot be construed as rendering the lease void under Section 108(B)(e) of the TPA. The tenant/ Appellant cannot also avoid payment of rent in view of Section 108(B)(l) of the TPA. The tenanted premises is located in the prime commercial area of Khan Market for running of a shop. It is well-known that the commercial area of Khan Market is a sought-after location for business purposes.

The monthly payment of Rs. 3,50,000/- (Rupees three lakh fifty thousand) had been fixed by the Court, as a condition for grant of the stay for continued use and occupation, after the decree of eviction was passed.

The Appellants did not wish to vacate the property due to the lockdown, but wished to continue to occupy the property. The amount being paid, when compared to the prevalent market rent in the area, is on the lower side. This is clear from a perusal of the lease deed of a neighbouring property placed on record by the Respondents. Even if the said lease deed is to be ignored and not taken on record, judicial notice can be taken of the fact that the prevalent rent in Khan Market is amongst the highest in the whole of Asia. The amount being paid by the Appellants, though substantial, is on the lower side as compared to other properties in Khan Market.

The Appellants are 'unauthorised occupants' of the tenanted premises as a decree of eviction has already been passed. The monthly payment of rent had been fixed by the Court by way of the interim order dated September 15, 2017, in view of the judgment of the Supreme Court in *Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd* [(2005) 1 SCC 705]. The use and occupation charges are required to be determined in a manner to fully compensate the landlord, as if the landlord had let out the property to a third party. In any case, the compensation ought to be reasonable and should make up for the loss caused to the landlord due to a delay in execution of the eviction decree. These factors completely tilt the balance in favour of the landlord/ respondents.

It was further noted that there is no contractual condition in the present case that permits non-payment or suspension of rent. There are cases where the Central and State governments may have, from time to time, given protection to some classes of tenants such as migrants, labourers, students, etc. The present case is not covered by any of executive orders.

***Observation and Analysis:***

The High Court of Delhi has thus observed that the application for suspension of rent is liable to be rejected, as while invoking the doctrine of suspension of rent, on the basis of a force majeure event, it is clear from the submissions made that the Appellants/ tenants that they do not intend to surrender the tenanted premises. The Court has held that suspension of rent is not permissible with these facts, and some postponement or relaxation in the schedule of payment can be granted owing to the lockdown.

Further, the Court has whilst disposing off the application directed that the Appellants/ tenants should pay the use and occupation charges for the month of March, 2020 on or before May 30, 2020, and for the months of April, 2020 and May, 2020 by June 25, 2020. From June 2020 onwards, the payment shall be strictly as per the interim order dated September 25, 2017 and subject to these payments being made, the interim order already granted shall continue.

### iv. Siri Chand v. Surinder Singh

[Civil Appeal No. 2617 of 2020 before the Supreme Court of India, decided on June 17, 2020]

*A contingent clause cannot be read to mean tenancy for more than a one year period*

***Background:***

The present appeal was filed before the Supreme Court of India to deliberate on several issues, including whether tenancy can be treated from year to year or for any term exceeding 1 (one) year, or reserving a yearly rent, when a rent deed/ lease deed does not provide for a period and when it provides for payment of rent monthly?

***Findings of the Court:***

The Court has noted that under Section 17(1)(d) of the Registration Act, 1908, leases of the immovable property from year to year or for a term exceeding one year or reserving a yearly rent requires compulsory registration. Further, the rent deed does not provide the period for which the rent deed was executed.

It was also observed that, in the present case, the rent deed does not prescribe any period for which it is executed. Therefore, where the lease deed does not mention the period of tenancy, other conditions of the lease/ rent deed and intention of the parties have to be gathered to find out the true nature of the lease deed/ rent deed. The 2 (two) conditions written in the rent note are also relevant to the notice. First, if payment of rent in any month is not made by the 5$^{th}$ of a month, the owner shall have right to get the shop evicted and second if the owner is in need of the shop, he, by serving notice, of 1 (one) month can get the shop vacated.

It was also observed that the rule of construction is to be applied when there is no period agreed upon between the parties in a lease deed. As such the Supreme Court noted that the clauses of the rent note makes it clear that there was a categorical promise that tenancy is a monthly tenancy and rent is to be paid every month by the 5$^{th}$ of every month. It is true that although in Clause (9), it was mentioned that the tenant will be bound to pay the rent money by increasing it by 10% (ten percent) each year, that was promise by the tenant to increase the rent by 10% (ten percent) each year for the period of tenancy, though the period of tenancy was unspecified. Clause (9) may or may not operate in view of specific clauses reserving the right of the landlord to evict the tenant on committing default of non-payment of rent by the 5$^{th}$ of every month or when landlord requires shop by giving one month's notice. Clause (9) was a contingent clause which binds the tenant to increase the rent by 10% (ten percent) each year, which was contingent on tenancy to continue for more than a year, but that clause cannot be read to mean that the tenancy was for a period of more than one year.

***Observation and Analysis:***

The Supreme Court has observed that, merely because the rent deed contains a clause which binds the tenant to increase the rent by certain percentage each year, it cannot be read to mean that the tenancy was for a period of more than one year.

### v. South East Asia Marine Engineering and Constructions Ltd. v. Oil India Limited

[Civil Appeal No. 673 of 2012 before the Supreme Court of India, decided on May 11, 2020]

*The thumb rule of interpretation is that the document forming a written contract should be read as a whole and so far as possible as mutually explanatory.*

***Background:***

The Appellant was awarded a work order dated July 20, 1995, pursuant to a tender floated by the Respondent in 1994. The agreement was for the purpose of well drilling and other auxiliary operations in Assam. The contract, after the expiry of the initial term of 2 (two) years, was extended for 2 (two) successive periods of 1 (one) year each by mutual agreement and finally expired on October 4, 2000.

During the tenure of the contract, the prices of High-Speed Diesel ("**HSD**"), one of the essential materials

for carrying out the drilling operations, increased. The Appellant raised a claim that the increase in the price of HSD, an essential component for carrying out the contract triggered the "change in law" clause under the contract (i.e., Clause 23) and that the Respondent has become liable to reimburse the Appellant for the same. The Respondent rejected the said claim. As such, the Appellant invoked the arbitration clause under the contract and the dispute was referred to an arbitral tribunal.

The arbitral tribunal issued the award. The majority opinion allowed the claim of the Appellant. The arbitral tribunal held that while an increase in HSD price through a circular issued under the authority of State or Union is not a "law" in the literal sense, but as the same has the "force of law" and thus falls within the ambit of Clause 23 of the contract. On the other hand, the minority held that, the executive orders do not come within the ambit of Clause 23 of the contract.

Aggrieved by the award, the Respondent challenged the same under Section 34 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) before the District Judge. The learned District Judge upheld the award. The Respondent challenged the order of the District Judge by filing an appeal under Section 37 of the Arbitration Act, before the High Court of Guwahati. By the impugned judgment, the High Court, allowed the appeal and set aside the award passed by the Arbitral Tribunal.

The High Court held that the interpretation of the terms of the contract by the Arbitral Tribunal is erroneous and is against the public policy of India. On the scope of judicial review under Section 37 of the Arbitration Act, the High Court held that the Court had the power to set aside the award as it was passed overlooking the terms and conditions of the contract. Aggrieved by the same, the Appellant has filed this present appeal before the Supreme Court.

The question in the present case is whether the interpretation provided to the contract in the award of the Arbitral Tribunal was reasonable and fair, so that the same passes the muster under Section 34 of the Arbitration Act.

***Findings of the Court:***

It is a settled position that a Court can set aside the award only on the grounds as provided in the Arbitration Act, as interpreted by the Courts. It is also settled law that where 2 (two) views are possible, the Court cannot interfere with the plausible view taken by the arbitrator supported by reasoning.

The Supreme Court in *Satyabrata Ghose v. Mugneeram Bangur & Co*. [AIR 1954 SC 44], held that when the parties have not provided for what would take place, when an event which renders the performance of the contract impossible, then Section 56 of the Contract Act, 1872 applies. When the act contracted for becomes impossible, then under Section 56 of the Contract Act, 1872, the parties are exempted from further performance and the contract becomes void.

Under the Indian contract law, the effect of the doctrine of frustration is that it discharges all the parties from future obligations. In order to mitigate the harsh consequences of frustration and to uphold the sanctity of the contract, the parties with their commercial wisdom, chose to mitigate the risk under Clause 23 of the contract. The interpretation of Clause 23 of the contract by the Arbitral Tribunal, to provide a wide interpretation cannot be accepted, as the thumb rule of interpretation is that the document forming a written contract should be read as a whole and so far as possible as mutually explanatory. In the case at hand, this basic rule was ignored by the Arbitral Tribunal while interpreting the clause.

It can be said that the contract was based on a fixed rate. The party, before entering the tender process, entered the contract after mitigating the risk of such an increase. There is no gainsaying that there will be price fluctuations which a prudent contractor would have taken into margin, while bidding in the tender. Such price fluctuations cannot be brought under Clause 23 of the contract, unless specific language points to the inclusion.

***Observation and Analysis:***

The interpretation of the Arbitral Tribunal to expand the meaning of Clause 23 of the contract to include change in rate of HSD is not a possible interpretation of this contract, as the Appellant did not introduce any evidence which proves the same. The appeal was accordingly dismissed.

## VI. LABOUR & EMPLOYMENT

### i. Central Government reduces rate of PF contributions

The Ministry of Labour & Employment, by way of Notification No. S.O. 1513 (E) dated May 18, 2020, has reduced the statutory rate of contributions under the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 for both employers and employees, from the existing 12% to 10%, for the months of May, June and July, 2020. The said reduction in rate of contribution will not be applicable to: (i) Central and State Public Sector Enterprises; (ii) establishments owned or controlled by the Central or State Governments; and (iii) establishments eligible for benefits under the Pradhan Mantri Garib Kalyan Yojana.

*The full text of the Notification can be accessed here.*

### ii. Exemption from levy of penal damages for delayed deposit of dues under the EPF

Considering the difficulty faced by establishments in timely deposit of contributions or administrative charges due for any period during the lockdown, the Employees' Provident Fund Organisation, by way of Notification No. C-I/Misc./2020-21/Vol.I./1112 dated May 15, 2020, has exempted employers from the provisions of Section 14B (*power to recover damages*) of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 thereby implying that no proceeding shall be initiated for levy of penal damages against the employer for delay in payment of any contribution or administrative charges due for any period during the lockdown.

*The full text of the Notification can be accessed here.*

## VII. MISCELLANEOUS

### i. The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 – Amended

The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("**Takeover Regulations**") have been amended, with effect from June 16, 2020, to grant certain significant relaxations to persons who together with persons acting in concert with it/ him, own 25% (twenty five percent) or more of the voting rights in a company ("**Listed Company**"), but less than the maximum permissible non-public shareholding. The relaxations are as follows:

- Persons who together with persons acting in concert with it/ him, own 25% (twenty five percent) or more of the voting rights, are now permitted to increase their stake in the Listed Company by up to 10% (ten percent) (*increased from the earlier limit of 5% (five percent)*), during the current financial year 2020 - 2021. To avail of such relaxations, the underlying acquisition (*beyond 5% (five percent) and up to 10% (ten percent)*) must be so acquired through a preferential issue of equity shares, i.e., through a primary infusion of capital in the Listed Company; and

- The restriction on making a voluntary public announcement of an open offer, if the shares of a Listed Company, were acquired in the preceding 52 (fifty two) weeks, has been temporarily relaxed till March 31, 2021. Therefore, any acquirer or persons acting in concert, holding shares or voting rights to the extent of 25% (twenty five percent) or more, can now make a voluntary open offer, irrespective of whether such acquirer had acquired shares in the preceding 52 (fifty two) weeks, with or without making an open offer.

*The full text of the Notification can be accessed here*

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