DUA ASSOCIATES
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I. RBI, FEMA & FDI

A. UPDATES ISSUED IN VIEW OF COVID – 19

i. The Foreign Exchange Management (Export of Goods and Services) (Amendment) Regulations, 2020

The Government of India and the Reserve Bank of India ("**RBI**") have received representations from Export Trade Bodies to extend the period for realization of export proceeds, in view of the outbreak of the Covid-19 pandemic. The RBI has, by way of Notification No. FEMA 23(R)/(3)/2020-RB dated March 31, 2020 ("**Notification**"), amended the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 ("**Export Regulations**").

In terms of the Notification, Sub-regulations (1) and (2)(a) of Regulation 1 of the Export Regulations have been amended and the words "nine months" has been substituted with the words "nine months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time". Similarly, Sub-regulation (1)(a) of Regulation 1 of the Export Regulations has been amended and the words "fifteen months" has been substituted with the words "fifteen months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time".

Further, Sub-Regulation (1)(b) of Regulation 9 of the Export Regulations has been amended and the words "period of nine months or fifteen months, as the case may be" has been substituted with the words "said period". Similarly, the proviso to Sub-Regulation (2)(a) of Regulation 9 of the Export Regulations has been amended and the words "period of nine months" has been substituted with the words "said period".

Subsequently, the RBI has, by way of A.P. (Dir Series) Circular No. 27 dated April 1, 2020 increased the present period of realization and repatriation to India of the amount representing the full export value of goods or software or services exported, from 9 (nine) months to 15 (fifteen) months from the date of export, for the exports made up to or on July 31, 2020. The provisions with regard to the period of realization and repatriation to India of the full export value of goods exported to warehouses established outside India remain unchanged.

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

ii. Curbing opportunistic takeovers / acquisitions of Indian companies due to the current COVID-19 pandemic

The Government of India (through the Department for Promotion of Industry and Internal Trade) by way of Press Note 3 (2020 Series) dated April 17, 2020 has amended Paragraph 3.1.1 of the extant FDI policy as contained in Consolidated FDI Policy, 2017.

As per the amended position under the revised Paragraph 3.1.1 (a), an entity of a country, which shares land borders with India, or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can invest only under the Government approval route.

The amendment further states that Governmental approval will be required in the event of a transfer of beneficial ownership of any existing or future foreign direct investment in an entity in India to an entity or person situated in a country which shares land borders with India.

The existing position pertaining to investment by a citizen of and/ or an entity incorporated in Pakistan and other non-resident entity remains unchanged.

The Central Government by way of its Notification dated April 22, 2020, through Foreign Exchange Management (Non-debt Instruments) Amendment Rules, 2020, amended the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 to incorporate the above changes (proposed by the Department for Promotion of Industry and Internal Trade).

The full text of the Press Note can be accessed here.
The full text of the Notification can be accessed here.

B. OTHER UPDATES

i. 'Fully Accessible Route' for Investment by Non-residents in Government Securities

The RBI has, by way of A.P. (DIR Series) Circular No. 25 dated March 30, 2020 introduced a separate route called the Fully Accessible Route ("**FAR**") to enable non-residents to invest in specified securities issued by the Government of India. Eligible investors can invest in specified Government securities without being subject to any investment ceilings. This scheme will operate along with the 2 (two) existing routes, viz., the Medium Term Framework ("**MTF**") and the Voluntary Retention Route ("**VRR**"). Existing investments by eligible investors in specified securities shall be reckoned under the FAR. The FAR directions came into effect from April 1, 2020.

The full text of the Circular can be accessed here.

ii. Review of Foreign Direct Investment Policy in Insurance

The Government of India (through the Department for Promotion of Industry and Internal Trade) by way of Press Note 1 (2020 Series) dated February 21, 2020, has amended Paragraph 5.2.22 of the extant FDI policy, which is related to the Insurance sector as contained in Consolidated FDI Policy, 2017. Pursuant to the amendment, investment in intermediaries, including insurance brokers and third party administrators, has been increased to 100% (hundred percent) under the automatic route and consequent amendments have been made to the attendant conditions in relation to the investment in intermediaries including insurance brokers and third party administrators. Foreign investment in an insurance company remains capped at 49% (forty nine percent) under the automatic route.

The Central Government by way of its Notification dated April 27, 2020 ("Notification") amended the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 to incorporate the abovementioned changes. The Notification, inter alia, inserted a new Rule 7A which provides that a person resident outside India may acquire a right from an Indian resident, which he/she has renounced, in compliance

with the pricing guidelines as prescribed under Rule 21 of the said Rules. Additionally, the Notification deleted the explanation to Rule 7 which permitted a person resident outside India to acquire rights in equity instruments of a company from an Indian resident who has renounced it.

The full text of the Press Note can be accessed here.
The full text of the Notification can be accessed here.

iii. Review of the Foreign Direct Investment Policy in Civil Aviation

The Government of India (through the Department for Promotion of Industry and Internal Trade) by way of Press Note 2 (2020 Series) ("**PN2**") dated March 19, 2020 has amended Paragraph 5.2.9 of the extant FDI policy which is related to the 'Civil Aviation' sector as contained in Consolidated FDI Policy, 2017. Pursuant to the amendment, the permissible foreign investment limit in Air India Limited has been increased from 49% (forty nine percent) to 100% (one hundred percent) under the automatic route in the event of such investment made by non-resident Indians, who are Indian nationals.

It is to be noted that the Central Government is yet to amend the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 to incorporate the above changes (proposed by the DPIIT). Consequently, the provisions set out in PN2 are yet to come into effect.

The full text of the Press Note can be accessed here.

II. CORPORATE[1]

A. UPDATES IN VIEW OF COVID – 19

i. The Companies (Meetings of Board and its Powers) Rules, 2014 - Amendment

The Ministry of Corporate Affairs ("**MCA**") has, by way of Notification No. G.S.R. 186 (E) dated March 19, 2020, brought into force from March 19, 2020, the Companies (Meetings of Board and its Powers) Amendment Rules, 2020 ("**Amendment Rules**"), which has the effect of amending the Companies (Meetings of Board and its Powers) Rules, 2014 ("**Meeting Rules**").

In terms of Rule 4 of the Meeting Rules, there are certain matters which are not allowed to be dealt with in any meeting held through video conferencing or other audio-visual means. The Amendment Rules have allowed for the dealing of such matters, through video conferencing or other audio-visual means, for the period beginning from March 19, 2020 until June 30, 2020.

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

ii. Compliance Relaxation and The Companies Fresh Start Scheme, 2020 – Introduction

The MCA has, by way of General Circular No. 11/ 2020, dated March 24, 2020 ("**Circular**"), reduced the compliance burden and other risks, in order to enable companies and limited liability partnerships ("**LLPs**") to function amidst the COVID-19 pandemic.

[1] Please note that the updates set out herein are as issued by the Ministry of Corporate Affairs, up till May 8, 2020.

These reduced compliances are in relation to certain matters such as: (i) a relaxation in the gap between 2 (two) consecutive meetings of the Board, which has now been increased to 180 (one hundred and eighty) days, instead of 120 (one hundred and twenty days), till September 20, 2020; (ii) a non-compliance of the minimum residency in India, of at least one of the directors of a company, for a period of at least 182 days (one hundred and eighty two), would not be treated as a non-compliance for the financial year 2019-2020; (iii) a newly incorporated company is given an additional period of 180 (one hundred and eighty) days, to file its declaration for commencement of business; (iv) the requirement to invest or deposit at least 15 (fifteen) percent of the amount of the debentures maturing, in specified methods of investments or deposits could be complied with until June 30, 2020, instead of by April 30, 2020, etc.

The abovementioned Circular particularly specifies that no additional fees would be charged for the late filing of any document, return, statement, etc., as required to be filed Registry, between April 1, 2020 and September 30, 2020, irrespective of the due date. This relaxation will reduce the compliance and financial burden on companies and LLPs, and will also enable long standing non-compliant companies and LLPs to make a '*fresh start*'.

In furtherance to the above, the MCA issued a separate circular, i.e., General Circular No. 12/ 2020 dated March 30, 2020, introducing the Companies Fresh Start Scheme, 2020 ("**Scheme**"), effective from April 1, 2020, up to September 30, 2020. The Scheme applies to all companies, as defined in Section 2 (20) of the Companies Act, 2013 ("**Act**").

The Scheme permits defaulting companies to file belated documents that were due on a given date, and also prescribes the manner to do the same, without the payment of any additional fees, and provides such companies immunity from any form of prosecution to the extent that the non-compliance is in relation to a delay in filing the document. The Scheme prescribes a form in which companies may apply to the Registrar of Companies, for the issuance of an Immunity Certificate, in certain instances.

The Scheme also allows defaulting inactive companies to apply for: (i) a change of status, to a 'dormant company'; and (ii) striking off the name of the company. The Scheme, however, specifies certain instances, wherein the provisions set out in the Scheme would not be applicable.

The full text of General Circular No. 11/ 2020 can be accessed here. The full text of General Circular No. 12/ 2020 can be accessed here.

iii. Circulars in relation to the passing of ordinary and special resolutions of an urgent nature, in view of the threats posed by COVID-19

The MCA has, by way of General Circular Nos. 14/2020 and 17/2020, dated April 8, 2020 and April 13, 2020, respectively, ("**Circulars**") provided a clarification on the passing of ordinary and special resolutions, of an urgent nature, in view of the ongoing lockdown in India. In view of the extra-ordinary circumstances which require social distancing, companies have been requested to take all decisions, of an urgent nature, and requiring the approval of members, through the mechanism of postal ballot/ e-voting, in terms of the Act, and the rules made thereunder, without holding a general meeting, which requires the physical presence of the members at a common venue. The aforesaid provision, however, is not applicable to decisions in relation to items of ordinary business or items where any person has the right to be heard.

Further, in the event that the holding of an extra-ordinary general meeting by any company is unavoidable, the Circulars provide the procedure to be adopted for holding the meeting on or before June 30, 2020, in addition to any requirement, as set out in the Act and the rules made thereunder. It categorically sets out the procedure for: (i) companies which are required to provide the facility of e-voting in terms of the Act, or any other company which has opted for such a facility; and (ii) companies which are not required to provide the facility of e-voting in terms of the Act. For the latter category of companies, the Circulars allow the holding of extra-ordinary general meetings through video-conferencing and other audio-visual means.

The full text of the Circulars can be accessed here and here.

iv. Spending of Corporate Social Responsibility Funds for COVID-19

The MCA has, by way of General Circular No. 10/2020 dated March 23, 2020, Office Memorandum eF. No. CSR-05/1/2020-CSR-MCA dated March 28, 2020 and General Circular No. 15/ 2020 dated April 10, 2020, provided certain clarifications on the contributions that could be undertaken by companies, to discharge their Corporate Social Responsibility ("**CSR**") obligations, in the wake of COVID-19.

The spending of CSR funds, for COVID-19 relief activities, would be considered as eligible CSR activities, in terms of Schedule VII to the Act, which provides the activities which may be included by companies in their CSR policies.

The MCA provided additional clarifications through certain frequently asked questions on such eligibility. It is now clarified *inter-alia* that contributions made to the Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund ("**PM CARES Fund**") and the contributions made to the State Disaster Management Authority to Combat COVID-19 would qualify as CSR expenditure. Additionally, as a one-time exception, any ex-gratia payment made to temporary/ casual workers/ daily wage workers, over and above their wages, for the purpose of combatting COVID-19, would be admissible as CSR expenditure. The payment of salary/ wages to employees and workers, however, do not qualify as CSR expenditure, as these are contractual and statutory obligations of a company.

The full text of General Circular No. 10/ 2020 can be accessed here. The full text of General Circular No. 15/ 2020 can be accessed here.
The full text of the Office Memorandum eF. No. CSR-05/1/2020-CSR-MCA can be accessed here.

v. Circular in relation to the relaxation of the timeline for the due filings and actions, in terms of Section 124 and 125 of the Companies Act, 2013

The MCA has, by way of General Circular No. 16/2020, dated April 13, 2020 ("**Circular**"), provided clarification in relation to the filings to be made in terms of Section 124 and Section 125 of the Act.

The Circular clarifies that the relaxations provided for the due filings, without additional fees, up to September 30, 2020, as set out in the General Circular Nos. 11/2020 and 12/2020, dated March 24, 2020 and March 30, 2020, respectively, would also apply to the filings, in terms of Section 124 and Section 125 of the Act, which are in relation to the transfer of dividend which has not been claimed for a period of 7 (seven) years and the relevant shares in respect of which the divided has not been claimed.

The full text of the Circular can be accessed here.

vi. Circular in relation to holding of annual general meeting for companies whose financial year had ended on December 31, 2019

The MCA has, by way of General Circular No. 18/2020, dated April 21, 2020 ("**Circular**"), provided a clarification for companies whose financial year had ended on December 31, 2019, and who are accordingly required to hold their annual general meeting within 6 (six) months from the closure of the financial year, and within 15 (fifteen) months from the date of the last annual general meeting.

In terms of the Circular, the companies whose financial year (*other than the first financial year*) had ended on December 31, 2019, have been allowed to hold their annual general meeting, for such financial year, within a period of 9 (nine) months from the closure of the financial year, i.e., by September 30, 2020, and the same would not be viewed as a violation.

The full text of the Circular can be accessed here.

vii. The Companies (Appointment and Qualification of Directors) Rules, 2014 – Amendment

The MCA has, by way of Notification No. G.S.R. 268 (E) dated April 29, 2020, brought into force from April 29, 2020, the Companies (Appointment and Qualification of Directors) Second Amendment Rules, 2020 ("**Amendment Rules**"), which has the effect of amending the Companies (Appointment and Qualification of Directors) Rules, 2014 ("**Director Qualification Rules**").

In terms of Rule 6 (1) of the Director Qualification Rules, every individual who has been appointed as an independent director in a company, as on December 1, 2019, was required to apply for the inclusion of his/ her name in the data bank of independent directors, before May 1, 2020. The Amendment Rules have now extended this deadline to July 1, 2020.

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

viii. Circulars in relation to the holding of Annual General Meetings, through video-conferencing and other audio-visual means

The MCA has, by way of General Circular No. 20/2020, dated May 5, 2020, ("**Circular**") provided a clarification on the holding of annual general meetings, through video-conferencing and other audio-visual means, due to the restrictions placed on the movement of persons, in several parts of the country, during the calendar year 2020.

The Circular categorically sets out the framework for: (i) companies which are required to provide the facility of e-voting in terms of the Act, or any other company which has opted for such a facility; and (ii) companies which are not required to provide the facility of e-voting in terms of the Act, but can hold their annual general meetings through video-conferencing and other audio-visual means, subject to compliance with the procedure laid down in the Circular. The Circular particularly lays down procedures in relation to sending notices and financial statements, declaration of dividend, etc.

The Circular also states that in the event that certain companies, as specified therein, are unable to comply with the framework laid down, such companies may apply for an extension to the concerned Registrar of Companies, under Section 96 of the Act, for holding of the annual general meeting.

The full text of the Circular can be accessed here.

B. OTHER UPDATES:

i. The Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 - Amended

The MCA has, by way of Notification No. G.S.R. 13 (E), dated January 3, 2020, amended the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, by way of the Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2020 ("**Amendment Rules**"). The Amendment Rules will be applicable to all financial years which commence on or after April 1, 2020.

The Amendment Rules clarify that a 'private company', having a paid up share capital of Rs. 10,00,00,000/- (Rupees ten crore only) or more, is required to appoint a whole-time company secretary. Further, the Amendment Rules insert Rule 9 (c), which, in addition to the criteria specified, now requires every company having outstanding loans or borrowings from banks or public financial institutions of an amount of Rs. 100,00,00,000/- (Rupees one hundred crore only) or more, to also annex a secretarial audit report, as given by a company secretary in practice, to the Board's report.

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

ii. The Companies (Winding Up) Rules, 2020 - Introduced

The MCA has, by way of Notification No. G.S.R. 46 (E), dated January 24, 2020, introduced the Companies (Winding Up) Rules, 2020 ("**Winding Up Rules**"), which would come into effect from April 1, 2020, and would apply to the winding up of companies under the Act.

The Winding Up Rules lay down provisions relating to the winding up of companies by the National Company Law Tribunal, appointment of liquidators, winding up orders, applications for commencing/ carrying on of suits during the winding up of companies, and such other matters in relation to the winding up of companies.

The Winding Up Rules also introduce summary procedures for the winding up of certain companies and such companies are required to approach the Central Government as against the National Company Law Tribunal. The Central Government has delegated this power and responsibility to the Regional Directors at Mumbai, Kolkata, Chennai, New Delhi, Ahmedabad, Hyderabad and Shillong.

The full text of the Winding Up Rules can be accessed here.

iii. The Companies (Accounts) Rules, 2014 - Amended

The MCA has, by way of Notification No. G.S.R. 60 (E), dated January 30, 2020, brought into force, with effect from February 5, 2020, the Companies (Accounts) Amendment Rules, 2020 ("**Amendment Rules**"), which has the effect of amending the Companies (Accounts) Rules, 2014 ("**Accounts Rules**").

The Amendment Rules include a new provision, Rule 12 (1A) of the Accounts Rules, which now mandate every Non-Banking Financial Company, that is required to comply with the Indian Accounting

Standards, to file its financial statements with the Registrar of Companies, along with Form AOC-4 NBFC (Ind AS), and the consolidated financial statement, if any, along with Form AOC-4 CFS NBFC (Ind AS). The Amendment Rules, accordingly, also provide for the appropriate forms in this regard.

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

iv. Extension of the applicability of Section 460 of the Companies Act, 2013

The MCA has, by way of Notification No. G.S.R 59 (E), dated January 30, 2020, issued a direction to state that Section 460 of the Act, which provides for the condonation of delay in certain cases, would also apply to a limited liability partnership, with effect from the date of publication of the notification in the Official Gazette, i.e., from February 1, 2020.

The full text of the Notification can be accessed here.

v. Section 230 (11) and Section 230 (12) of the Companies Act, 2013 - Notified

The MCA has, by way of Notification No. S.O. 525 (E), dated February 3, 2020, appointed February 3, 2020 as the date on which Sections 230 (11) and 230 (12) of the Act have been brought into force.

Section 230 of the Act is in relation to the power of a company to compromise or make arrangements with its creditors and members. Section 230 (11) of the Act explains that a compromise or an arrangement may also include a takeover offer, as long as it is made in accordance with the rules and regulations set out, and Section 230 (12) of the Act permits an aggrieved party to make an application to the National Company Law Tribunal in the event of any grievances related to the takeover offers made (other than in relation to listed companies).

The full text of the Notification can be accessed here.

vi. The National Company Law Tribunal Rules, 2016 - Amended

The MCA has, by way of Notification No. G.S.R. 80 (E), dated February 3, 2020, brought into force, from February 6, 2020, the National Company Law Tribunal (Amendment) Rules, 2020 ("**Amendment Rules**"), which has the effect of amending the National Company Law Tribunal Rules, 2016.

The Amendment Rules have inserted Rule 80A, which states that an application made under Section 230 of the Act, in relation to any grievance with respect to a takeover offer of a company, is required to be made in Form NCLT-1, accompanied by documents set out in Annexure B, as amended by the Amendment Rules. The Amendment Rules have further prescribed the fees payable for an application made under Section 230 (12) of the Act, as Rs. 5,000/- (Rupees five thousand only).

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

vii. The Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 – Amended

The MCA has, by way of Notification No. G.S.R. 79 (E), dated February 3, 2020, brought into force, with effect from February 7, 2020, the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2020 ("**Amendment Rules**") which has the effect of amending the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 ("**Rules**").

The Amendment Rules inserted Rules 3 (5) and 3 (6) in the Rules, in order to set out the procedure for making an application for an arrangement, for the purpose of a takeover offer, as contemplated in terms of Section 230 (11) of the Companies Act, 2013.

The Amendment Rules state that an application in terms of Section 230 (11) of the Companies Act, 2013, may be made by shareholder/s holding not less than three-fourth of the shares in the company, for the purposes of acquiring any part of the remaining shares of the company. The aforementioned application is required to be accompanied by: (a) a report of a registered valuer setting out certain details in relation to the shares proposed to be acquired; and (b) the details of the bank account, wherein a sum of not less than 50% (fifty percent) of the total consideration of the takeover offer is deposited.

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

viii. The Companies (Issue of Global Depository Receipts) Rules, 2014 - Amended

The MCA has, by way of Notification No. G.S.R. 111 (E), dated February 13, 2020, brought into force, from February 14, 2020, the Companies (Issue of Global Depository Receipts) Amendment Rules, 2020 ("**Amendment Rules**"), which has the effect of amending the Companies (Issue of Global Depository Receipts) Rules, 2014 ("**GDR Rules**").

The Amendment Rules have amended the definition of 'Scheme' in Rule 2 of the GDR Rules to mean the 'Depository Receipts Scheme, 2014' ("**Scheme**"), and has drawn consequent reference to the Scheme across the GDR Rules. The change in the definition of the term Scheme is in view of the supersession of the erstwhile Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme of 1993. Furthermore, the Amendment Rules have introduced the meaning of 'overseas depository' or 'overseas depository bank' to mean 'foreign depository', as defined in the new Scheme.

The Amendment Rules have also made certain changes to Rule 5 of the GDR Rules, where the references to the term 'abroad' have either been removed or substituted with the term 'concerned jurisdiction'. Rule 5 of the GDR Rules relate to the manner in which depository receipts may be issued. The Amendment Rules, by amending Rule 7 of the GDR and adding a proviso, has provided that the proceeds of the issue of depository receipts could be remitted in an International Financial Services Centre Banking Unit (IBU), and be utilised in accordance with the instructions issued by the Reserve Bank of India, from time to time. The Amendment Rules have also amended Rule 9 of the GDR Rules, so as to state that the provisions of the Companies Act, 2013 and the rules made thereunder, relating to the public issue of shares or debentures, shall not apply to the issue of depository receipts, whether abroad or not.

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

ix. The Nidhi Rules 2014 – Amendment

The MCA has, by way of Notification No. G.S.R. 114 (E) dated February 14, 2020, brought into force from February 15, 2020, and Corrigendum No. G.S.R 150(E) dated March 2, 2020, made an amendment to Rule 23A and Rule 23B of the Nidhi Rules, 2014, by way of the Nidhi (Second Amendment) Rules, 2020 ("**Amendment Rules**").

The Amendment Rules extend the time period for companies functioning on the lines of a 'Nidhi', or a 'Mutual Benefit Society', which have not made the required applications or have made the applications to be notified as such, in terms of the erstwhile Companies Act, 1956, and all Nidhis incorporated under the Act, to make the required declaration, within 1 (one) year from the date of the incorporation of the Nidhi or within 9 (nine) months from the date of commencement of the Nidhi (Amendment) Rules, 2019, whichever is later, as against the earlier 6 (six) months from the date of commencement of the Nidhi (Amendment) Rules, 2019.

In addition to the above, every company that has been declared as a Nidhi or a Mutual Benefit Society, as per the erstwhile Companies Act, 1956 and is required to file Form NDH-4, will not be charged any fees for filing the said Form NDH-4, within 9 (nine) months of the commencement of the Nidhi (Amendment) Rules, 2019, as against the earlier 6 (six) months.

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

x. The Companies (Auditor's Report) Order, 2020 - Introduced

The MCA has, by way of Notification No. S.O. 849 (E), dated February 25, 2020, brought into force, from February 29, 2020, the Companies (Auditor's Report) Order, 2020 ("**Order**"), in supersession of the Companies (Auditor's Report) Order, 2016.

The Order is applicable to all companies, including foreign companies, as defined under the Act, however, the Order does not apply to certain kinds of companies, the details of which are set out therein.

The Order specifies that a report which is prepared by the auditor is required to include certain additional information, such as whether the company is maintaining the particulars of its intangible assets, etc., as applicable, in addition to the matters specified under Section 143 of the Act. The Order initially applied to reports being made prepared by auditors under the Act, for the financial years commencing on and from April 1, 2019. The MCA has, however, subsequently amended the earlier notification by way of Notification No. S.O. 1219 (E), dated March 24, 2020, wherein the applicability of the Order and the required changes to the made to the auditor's report is to be complied with from the financial years beginning from April 1, 2020, and not from April 1, 2019.

The full text of the Order can be accessed here. The full text of the Amendment Notification can be accessed here.

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

The MCA has, by way of Notification No. G.S.R. 145 (E), dated February 28, 2020, brought into force, with effect from March 2, 2020, the Companies (Appointment and Qualification of Directors)

Amendment Rules, 2020 ("**Amendment Rules**"), which has the effect of amending the Companies (Appointment and Qualification of Directors) Rules, 2014 ("**Qualification Rules**").

The Amendment Rules amend Rule 6 of the Qualification Rules, that sets out the compliances required to be undertaken by a person eligible and willing to be appointed as an independent director. The first step required to be undertaken by such person is to take steps to get his/ her name included in the data bank. The provision earlier stated that a person who is already an independent director, on the commencement of the Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2019, is required to undertake the needful to include his/ her name in the bank within a period of 3 (three) months from the commencement of the aforementioned rules. This time period has now been extended to 5 (five) months.

Another requirement for an independent director is for the individual, whose name is included in the data bank, to pass the online proficiency self-assessment test, within 1 (one) year from the date of inclusion of his/ her name in the data bank. The proviso to the aforementioned requirement stated that in the event the individual has served, for a total period of not less than 10 (ten) years, as a director or key managerial personnel, in a listed public company, or in an unlisted public company having a paid-up share capital of Rs. 10,00,00,000/- (Rupees ten crores only) or more, as on the date of inclusion of his name in the data bank, such a person shall not be required to pass the online proficiency self-assessment test. The Amendment Rules have now expanded the exemption provided by way of the proviso to an individual that may have served as a director or a key managerial person, for not less than 10 (ten) years in a body corporate listed on a recognised stock exchange, as well.

The Amendment Rules have accordingly, amended the second proviso to Rule 6 of the Qualification Rules, that sets out the manner in which the period of 10 (ten) years, as stated in the first proviso must be calculated, in order to bring the two in consonance with each other.

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

xii. Circular in relation to determining an 'officer who is in default'

The MCA has, by way of General Circular No. 5/2020[2] ("**Circular**"), dated March 2, 2020, issued certain clarifications in relation to the term 'officer who is in default', as defined under Section 2(60) of the Act.

The Circular provides that, ordinarily, a whole-time director and key managerial personnel ("**KMP**"), are associated with the day to day functioning of a company, and are therefore held liable for defaults committed by the company. In the absence of such KMPs, those directors that will be held liable, are those who expressly give their consent to incur liability in the e-Form GNL-3. The penal provisions of the Act, however, at times, only hold certain specific directors, or officers, or any other persons, to be accountable for a default, and in such cases only such persons should be held liable, such as for a disclosure of interest by a director under Section 184 of the Act.

The Circular further goes on to discuss Section 149 (12) of the Act, which states that independent directors and non-executive directors are not to be held liable unless the criteria as mentioned therein has

[2] Please note that there seems to be a minor typographical error in the numbering of the circular. The circular is the 5th in the series of general circulars, and is referred to as General Circular No. 5/ 2020, but is however, labelled as General Circular No. 1/ 2020.

been satisfied. Accordingly, an independent director and a non-executive director, not being a promoter or a KMP ("**NEDs**"), should not be arrayed in any criminal or civil proceedings, unless, the acts of omission or commission by a company, had occurred with their knowledge, attributable through board processes, and with their consent or connivance, or where they had not acted diligently.

The Circular specifies that the nature of default is crucial to place liability on an officer. For instance, independent directors or NEDs, would not be held liable, for filing of information etc., with the registry, or maintaining statutory registers, etc., unless any specific requirement is provided for. The responsibility of NEDs arises only where there are no KMPs or whole-time directors. Additionally, where a default is attributable to the decisions taken by the Board or its Committees, unnecessary civil or criminal action must not be initiated against independent directors or NEDs, unless sufficient evidence exists.

The full text of the Circular No. 5/2020 can be accessed here.

III. COMPETITION

A. UPDATES ISSUED IN VIEW OF COVID – 19

i. Measures taken by CCI/NCLAT in view of the lockdown in the country due to COVID-19

Pursuant to the announcement of the lockdown, the Competition Commission of India ("**CCI**") had initially decided not to accept any filings/submissions until March 31, 2020 including (a) any fresh merger filing and/or submissions in respect of any existing filing that is in the process of being reviewed; (b) any pre-filing consultation request; (c) any fresh complaint in respect of anti-competitive (such as cartel and bid rigging) and/or abusive practices; and (d) any filings/submissions in respect of existing antitrust proceedings.

Subsequently, the CCI has issued public notices (latest on April 20, 2020) stipulating that the combination notices as well as information regarding anti-competitive agreements and abuse of dominant market position, may be filed electronically. Further, parties to a combination may also avail pre-filing consultations through video conference. For all the matters listed for hearing upto May 3, 2020, fresh dates will be notified. As the lockdown has been extended until May 17, 2020, the CCI may issue a similar notification.

The CCI has also issued an Advisory to Businesses in Time of Covid-19 ("**Advisory**") on April 19, 2020. The Advisory acknowledges that Covid-19 has caused disruptions in supply chains, including those of critical healthcare products and other essential commodities / services and that the businesses may need to coordinate certain activities, by way of sharing data on stock levels, timings of operation, sharing of distribution network and infrastructure, transport logistics, research and development, production etc. to ensure continued supply and fair distribution of the products. It stipulates that the Competition Act has in-built safeguards to protect businesses from sanctions for certain coordinated conduct, provided such arrangements result in increasing efficiencies. The Advisory clarifies that only such conduct of businesses which is necessary and proportionate to address concerns arising from Covid-19 will be considered. It also cautions the businesses not to take advantage of Covid-19 situation to contravene any of the provisions of the Competition Act.

Pursuant to its order dated March 30, 2020, the National Company Law Appellate Tribunal ("**NCLAT**") has extended the limitation period for filing appeals/applications before the NCLAT. The interim direction(s) / order(s) passed by the NCLAT in all competition appeals shall continue till further orders.

A copy of the latest public notice issued by the CCI can be accessed here. A copy of the Advisory issued by the CCI can be accessed here. A copy of the NCLAT order can be accessed here.

B. OTHER UPDATES:

i. CCI penalizes Grasim Industries Limited for abuse of dominance

The CCI vide order dated March 16, 2020 has penalized Grasim Industries Limited for abuse of dominance in violation of Section 4 of the Competition Act, 2002 ("**Competition Act**") in the Viscose Staple Fiber ("**VSF**") market in India, being primarily used as an input in the spinning industry to produce yarn. The case (filed by a confidential informant) alleged that Grasim discriminates between customers who manufacture and supply yarn for the domestic market and those who manufacture and supply for the export market. Grasim allegedly compelled yarn manufacturers to submit monthly yarn production data to Grasim before deciding on the discount applicable to them.

During the investigation, the DG found that VSF is not substitutable with cotton due to several characteristics. Consequently, the DG considered the market for supply of VSF to spinners in India and Grasim had a market share of 85% and as such, the investigation found Grasim to be enjoying a dominant position. The investigation noticed that Grasim practiced discrimination in offering discounts and prices charged from customers of VSF fibre and also imposed supplementary obligations by requiring spinners to disclose their monthly yarn production in order to give discounts to such spinners. The investigation found the conduct of Grasim in violation of Section 4(2) of the Competition Act.

The CCI agreed with the definition of the market and held that Grasim was dominant in the said market. On the issue of seeking production details of customers, the CCI noted that such invasive requirements were ex-facie unfair and manifestation of the abuse of market power by Grasim. The CCI held that "a contractual obligation put in place by a dominant undertaking which contravenes the provisions of the Competition Act cannot stand and it is no answer for a dominant undertaking to take such plea that such terms were mutually agreed." The CCI found the conduct violative of Section 4(2)(d) of the Competition Act, issued a cease and desist order against Grasim and imposed a penalty at the rate of 5% of the average turnover for the years 2014-15 to 2016-17.

A copy of the order can be accessed here.

ii. CCI closes investigation into supply of rubber products and hoses to automobile original equipment manufacturers

The CCI vide its order dated February 26, 2020 has closed the investigation into alleged cartelization in supply of (i) anti-vibration rubber products; and (ii) automotive hoses (water and fuel) to certain automobile original equipment manufacturers ("**OEMs**").

A leniency application filed with the CCI stated that certain manufacturers of the products had divided the supply to OEMs in response to the Request for Quotation ("**RFQs**"). Through alleged information exchange and collusion on the quotes to the RFQs, the said companies had allocated the OEMs for supply

among themselves. The CCI considered the same as a *prima-facie* violation of Section 3(3) of the Competition Act and ordered an investigation into the same.

In relation to the rubber products, the investigation revealed that information supplied by the leniency application could not be corroborated with any evidence. As such, no appreciable adverse effect on competition ("**AAEC**") in India could be established by the investigation. As regards allegation for hoses, the investigations found that some of the allegations, while true, related to the period before the enforcement of provisions of Section 3 of the Competition Act and hence were not punishable. Some of the allegations pertained to the collusion for the market of North America and hence did not result in AAEC in India.

In view of the above findings of the investigation, the CCI held that no contravention of Section 3(3) of the Competition Act was established against the opposite parties.

A copy of the order can be accessed here.

iii. CCI closes case of abuse of dominance against IRCTC

The CCI vide its order dated February 2, 2020 has closed a case of abuse of dominance against the Indian Railway Catering and Tourism Corporation ("**IRCTC**") in relation to alleged unfair pricing of tickets on its official website. In a case filed by two individual persons, it was alleged that the base fare for each ticket issued by IRCTC is rounded off to the nearest multiple of INR 5 and thus IRCTC engages in unfair pricing for each ticket sold through its website. The CCI considered that the IRCTC was *prima-facie* dominant in the market for e-payment service for online rail ticket booking in India, and its conduct *prima-facie* violated Section 4(2) of the Competition Act. A detailed investigation was ordered into the said conduct of IRCTC.

The investigation revealed that the rounding off for ticket prices was happening on account of the circulars issued by the Ministry of Railways to that effect. Further, the rounding off was resulting in less than 0.50% of the total revenue generated by ticket sales by the railways. IRCTC also stated that since a greater share of tickets were sold through the PRS counters physically, the policy of rounding off was adopted to create convenience in booking online tickets. Further, the price paid for tickets by passengers is heavily subsidized and hence the same cannot be considered unfair. The investigation did not find any violation of Section 4 of the Competition Act.

The CCI accepted the rationalisation explanation offered by the railways. The CCI noted that the tickets fares are highly subsidized as railways performs a social service obligation. Lastly, the CCI accepted that the logic of rounding off was non-discriminatory as it was applied to all passenger uniformly. The CCI ultimately held that such conduct cannot be classified as exploitative abuse by a dominant enterprise and closed the investigation accordingly.

A copy of the order can be accessed here.

iv. CCI closes case against electrical equipment manufacturer ABB India Limited for alleged abuse of dominance

The CCI vide its order dated January 31, 2020 closed a case of alleged abuse of dominance against ABB India Limited ("**ABB**"). The case was filed by InPhase Power Technologies Private Limited ("**InPhase**"), a competitor of ABB in manufacture of static synchronous compensator panels ("**Panels**"). It was stated

in the complaint that ABB and InPhase have competing Panels, however InPhase's Panels had more advanced features and were superior to ABB's Panels.

It was claimed that customers started to prefer InPhase's products and that fearing erosion of its dominance, ABB allegedly started abusing its dominant position by instituting frivolous litigations against InPhase and obtained multiple ex-parte injuctions against InPhase. Further, ABB allegedly circulated letters to customers claiming that InPhase was an illegal and sham company against whom legal proceedings have been initiated.

The investigation noted that the market share of ABB in the relevant market was only 15% based on sales and it was the third largest player in the market. As such, the investigation concluded that ABB was not dominant in the relevant market. The CCI considered the investigation report and did not find ABB to be enjoying a position of dominance. Since ABB was not held to be dominant, its conduct could not be assessed under Section 4 of the Competition Act. The case was accordingly closed by the CCI.

A copy of the order can be accessed here.

v. NCLAT upholds the decision of the CCI penalizing Adani Gas Limited for abuse of dominance, reduces penalty imposed

The National Company Law Appellate Tribunal ("**NCLAT**"), New Delhi has upheld the order of the CCI which had penalized Adani Gas Limited ("**AGL**") for abuse of dominance for incorporating unfair conditions upon buyers in its Gas Supply Agreements ("**GSA**") with industrial consumers of natural gas in Faridabad, Haryana. The CCI, vide its order dated July 3, 2014, found the conduct of AGL in violation of Section 4 of the Competition Act and had imposed a penalty of 4% of its average turnover for the preceding three years. The CCI had also directed AGL to modify certain clauses of the GSA.

The CCI had noted that the AGL was the only supplier of natural gas to industrial consumers in Faridabad and as such enjoyed dominant position in the said market. The CCI considered the clause which did not give any interest to customer in case any amount becomes due from AGL to consumers on account of erroneous billing/invoicing by AGL, as unfair. Similarly, the CCI also held as unfair the clause which authorized AGL to terminate the agreement in the event of consumer's failure to take 50% or more of the Cumulative Daily Contracted Quantity ("**DCQ**") during a period of 45 consecutive days. The CCI held the clause requiring the buyer to meet its minimum guaranteed take-off volume even in the event of total shutdown, as unfair.

The NCLAT noted that piped natural gas ("**PNG"**), the focal product in the case is not substitutable with other fuels for industrial consumers and hence the CCI was right in determining the relevant product market as supply of piped natural gas to industrial consumers in Faridabad. The NCLAT also agreed with the finding of CCI on the aspect of dominance of AGL in the relevant market. As regards abuse of dominance, the NCLAT agreed with the observations of the CCI on the various unfair clauses of the GSA as described above.

However, during the pendency of the appeal before NCLAT, AGL modified the said GSA to the extent that it complies with the requirements of Section 4 of the Competition Act. The NCLAT held that these modifications reasonably take care of all objections and reservations as regards the contravening clauses bringing it within the fold of acceptable conduct and safeguarding the concerns and legitimate interests of

industrial consumers. Given the same, the NCLAT deemed in fit to reduce the penalty imposed on AGL from 4% to 1% of its average annual turnover of the relevant three years.

A copy of the order can be accessed here.

vi. NCLAT sets aside CCI Order penalizing Eli Lily for delayed notification and consumption of its acquisition of Novartis business

The NCLAT has set aside the CCI's order which penalized Eli Lily and Company for delayed notification of the acquisition of the animal husbandry business of Novartis India.

Eli Lily had acquired the animal husbandry business of Novartis India in 2014. However, the acquisition was not notified under the extant merger control regime to the CCI, as the assets and turnover of the animal husbandry division of Novartis India were miniscule and were covered within the extant de-minimis exemption or the target exemption.

The then prevalent target exemption exempted those acquisitions from notification to the CCI, where the assets of the enterprise acquired were less than INR 240 Crore in India or the turnover of the enterprise acquired was less than INR 750 Crore in India. The CCI held that the assets/turnover of Novartis India (as an enterprise) was higher than the thresholds prescribed in the target exemption notification and thus the transaction was notifiable. The transaction was belatedly notified (and approved). The transaction had already been consumed before being notified to the CCI for its approval. The CCI imposed a penalty of INR 1 crore on Eli Lily under Section 43A of the Competition Act.

In appeal, the NCLAT took cognizance of the target exemption notification as well as the Press Release dated March 30, 2017 by the Ministry of Corporate Affairs. The press release clarified that the method of calculation under the target notification was applicable to acquisition of business divisions also where such divisions are acquired, and not only to enterprises as a whole.

The NCLAT, while setting aside the CCI's order, held that, "*For the purpose of the calculation of assets and turnover what is being acquired is relevant, as the assets/turnover of what is left over with the sellers after the acquisition will have no role to play in the context of the business conducted by the purchaser post-acquisition.*".

A copy of the order can be accessed here.

vii. CCI orders investigations against e-retail giants Flipkart and Amazon

The CCI has ordered an investigation against e-commerce platforms Amazon and Flipkart for alleged exclusive listing of smartphones and preferential treatment to certain sellers on the platform in India.

The CCI stated that there appears to be exclusive partnership between smartphone manufacturers and e-commerce platforms for exclusive launch of smartphone brands. Thus, it held that exclusive launch coupled with preferential treatment to a few sellers and the discounting practices create an ecosystem that may lead to an appreciable adverse effect on competition.

The CCI held that the exclusive arrangements between smartphone/mobile phone brands and e-commerce platform/select sellers selling exclusively on either of the platforms, coupled with the

allegation of linkages between these preferred sellers and e-commerce platforms merits an investigation. The CCI ordered a detailed investigation under Section 3(4) of the Act.

It is understood that Amazon has filed a writ petition in the High Court of Karnataka at Bengaluru against the investigation order of the CCI. The Court has granted an interim stay against the investigation into the matter.

A copy of the CCI order can be accessed here.

IV. INSOLVENCY & BANKRUPTCY

A. REGULATORY UPDATES ISSUED IN VIEW OF COVID – 19

i. The Insolvency and Bankruptcy Code, 2016 – Amended

The Ministry of Corporate Affairs ("**MCA**") vide its notification dated March 24, 2020 bearing no. S.O. 1205(E) has exercised its powers under Section 4 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") to increase the minimum amount of default for triggering the corporate insolvency resolution process to 1 (One) crore rupees.

The full text of the notification can be accessed here.

ii. Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2020 – Notified

The Insolvency and Bankruptcy Board of India ("**Board**") vide its notification dated April 20, 2020 bearing no. IBBI/2019-20/GN/REG060 has amended the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2020. The said amendment has been deemed to have come into force on April 17, 2020. Regulation 47A has been inserted to state that for the purposes of calculation of time to complete the activities during the liquidation process, the period of lockdown imposed by the Central Government due to COVID-19 shall be excluded.

The full text of the amendment regulations can be accessed here.

iii. Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2020 – Notified

The Board vide its notification dated April 20, 2020 bearing no. IBBI/2019-20/GN/REG059 has amended the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulation**") by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2020. The said amendment has been deemed to have come into force on March 29, 2020. Regulation 40(c) has been inserted to state that for the purposes of calculation of time to complete the activities during the corporate insolvency resolution process, the period of lockdown imposed by the Central Government due to COVID-19 shall be excluded.

The full text of the amendment regulations can be accessed here.

iv. Notice by Hon'ble National Company Law Appellate Tribunal for extension of limitation period

The Hon'ble National Company Law Appellate Tribunal ("**NCLAT**") has issued a notice dated March 24, 2020 whilst relying on the order dated March 23, 2020 passed by Hon'ble Supreme Court of India in its Suo Motu Civil Writ Petition bearing no.3 of 2020, to state that till further orders the period of limitation for filing an appeal with NCLAT shall stand extended with effect from March 15, 2020.

The full text of the notice can be accessed here.

v. Notice by Hon'ble National Company Law Tribunal for closure of benches

The Hon'ble National Company Law Tribunal ("**NCLT**") has issued a notice dated March 22, 2020 stating that except for urgent matters, all benches of the NCLT shall remain closed from March 22, 2020 to March 31, 2020 for the judicial work. It has been clarified that the matters relating to extension of time, approval of resolution plan and liquidation under the IBC cannot be considered to be urgent matters as such applications for such matters will not be filed and will be taken up as soon as regular benches start functioning.

Further to the above notice, a notice dated March 30, 2020 has been issued by the by Hon'ble NCLT stating that the matters to be listed from March 23, 2020 to April 14, 2020 shall be listed from April 15, 2020, before the respective NCLT benches.

Thereafter, in view of the extension of the lockdown on account of Covid – 19 until May 03, 2020 by the Central Government, the Hon'ble NCLT has issued a notice dated April 14, 2020 stating that directions given under its notice dated March 22, 2020 shall stand extended till May 3, 2020.

The full text of the notice dated March 22, 2020 can be accessed here and the notice dated April 14, 2020 can be accessed here.

vi. Notice by Hon'ble National Company Law Appellate Tribunal for closure till May 3, 2020

The NCLAT has issued a notice dated April 15, 2020 stating that except for urgent cases/matters, the NCLAT shall remain suspended till May 3, 2020 for the judicial work.

The full text of the notice can be accessed here.

B. JUDICIAL PRONOUNCEMENTS IN VIEW OF COVID - 19

i. Suo Moto - Company Appeal bearing no. 01 of 2020 decided on March 30, 2020

The NCLAT has while exercising its powers conferred under Rule 11 of National Company Law Appellate Tribunal Rules, 2016 taken *suo motu* cognizance of the situation arising out of the lockdown on account of Covid-19 and passed an Order stating that the period of lockdown including any extension of such period shall be excluded while calculating the time period specified under Section 12 of the IBC for completion of the corporate insolvency resolution process initiated or pending against the corporate debtor. It has further ordered that the interim order(s) or stay order(s) passed by NCLAT in respective appeals under IBC and Companies Act, 2013 shall continue till the next date of hearing as may be

notified and interim order(s) or stay order(s) passed in Competition Appeals under the Competition Act, 2002 will continue until further orders.

C. OTHER REGULATORY UPDATES

i. The Insolvency and Bankruptcy Code (Amendment) Act, 2020 - Notified

The Insolvency and Bankruptcy Code (Amendment) Act, 2020 ("**Amendment Act 2020**") has been notified by the Gazette Notification dated March 13, 2020 as Act 1 of 2020 issued by the Ministry of Law and Justice for amending the IBC. The Amendment Act 2020 has repealed the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 ("**Amendment Ordinance 2019**") and the Amendment Act has brought in force its provisions with effect from December 28, 2019.

Key amendments to the IBC under the Amendment Act 2020 are provided hereinbelow:

- Section 7 has been amended to state that an application for initiation of corporate insolvency resolution process ("**CIRP**") by financial creditors including the real estate allottees and security or deposit holders [referred in S. 21(6A)(a) or (b)] shall be filed jointly by at least 100 such creditors in the same class or 10% of their total number in the same class, whichever is less.

- In cases where an application for initiating the CIRP has been filed by a financial creditor to whom the amended proviso is applicable and the application has not been admitted before the commencement of the Amendment Ordinance 2019, those applications are required to be modified to comply with the requirements of the amended proviso within 30 days of the commencement of the Amendment Ordinance 2019 failing which the application would be deemed to have been withdrawn.

- Explanation II to Section 11 has been inserted to clarify that a corporate debtor undergoing a CIRP or a corporate debtor having completed CIRP twelve months preceding the date of making of the application or a corporate debtor in respect of whom a liquidation order has been made can initiate the CIRP against another corporate debtor.

- Explanation to sub-section (1) of Section 14 has been inserted to state that subject to no default in payment of current dues during the moratorium period, any existing license, permit, registration, quota, concession, clearance or similar grant or right given by any government or authority to the corporate debtor will not be suspended or terminated on the ground of insolvency proceedings initiated against the corporate debtor.

- Section 2A has been inserted in Section 14 to state that the supplies of goods and services considered critical to protect and preserve the value of the corporate debtor by the resolution professional and manage the operations of a corporate debtor as a going concern cannot be discontinued during the moratorium period. However, the suppliers of critical goods and services will have the liberty to stop supplying if: (a) the debtor fails to pay the dues arising from the supplies during the moratorium period, or (ii) in certain other circumstances as may be specified.

- Section 14(3)(a) has been amended to also state that the moratorium shall not apply to a surety in a contract of guarantee to a corporate debtor.

- Section 16 has been amended to state that insolvency resolution professional shall be appointed by the adjudicating authority on the insolvency commencement date i.e. the date of admission of the application as opposed to fourteen days from the insolvency commencement date as it stood earlier.

- Proviso to Section 23 has been amended to now state that the resolution professional shall manage the operations of the corporate debtor till the approval of the resolution plan or appointment of the liquidator.

- Section 32A has been inserted to state that the corporate debtor shall not be held liable for any offence committed prior to the commencement of the CIRP and such liabilities will cease and the corporate debtor will not be prosecuted from the date of approval of the resolution plan by the NCLT. Further, no action of attachment, seizure, retention or confiscation, shall be taken against their property included in the resolution plan in relation to such offences. Such action will not be taken in case the resolution plan results in a change in the management or control of the corporate debtor. The subsequent management should not include: (i) a person who was a promoter, or in the management or control, of the corporate debtor, (ii) a related party of such a person, or (iii) a person suspicious of abetting or conspiring for commission of the offence against whom a complaint has been filed in court. However, the officers in default or persons associated with the corporate debtor and directly or indirectly involved in the offences committed by the corporate debtor will be liable for the offences and the corporate debtor and other persons shall extend all assistance and co-operation to any authority investigating the offence committed prior to commencement of the CIRP.

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

ii. The Insolvency and Bankruptcy Code, 2016 – Extension to Jammu and Kashmir

The Central Government has notified the Jammu and Kashmir Reorganisation (Adaptation of Central Laws) Order, 2020 on March 18, 2020 vide notification bearing S.O. 1123 (E). The Jammu and Kashmir Reorganisation (Adaptation of Central Laws) Order, 2020 has omitted the proviso to sub section (2) of Section 1 of the IBC. Before omission it stood as "*Provided that Part III of this Code shall not extend to the state of Jammu and Kashmir*". Therefore, after the omission, Part III of the IBC, i.e. Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms has now been extended to the State of Jammu and Kashmir.

The full text of the order can be accessed here.

iii. Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020 – Amendment

The Board vide its Gazette notification dated January 6, 2020 bearing no. IBBI/2019-20/GN/REG053 has amended the Insolvency and Bankruptcy Board of India (Liquidation process) Regulations 2016 ("**Liquidation Regulations**") by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020.

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

- Regulation 2(1)(ca) has been inserted to provide for the definition of 'Corporate Liquidation Account' ("**CLA**") and Regulation 46 as it existed has been substituted to provide for operation and

maintenance of the CLA by the Board as a part of Public Accounts of India. It has been mandated for the Liquidator to deposit the unclaimed dividends, undistributed proceeds and income earned during the liquidation process into the CLA before submitting an application with the final report. A stakeholder and any other person can by producing evidence to satisfy the board of their entitlement seek to withdraw the amount it is entitled to, from the CLA. Pursuant to the substitution of Regulation 46, a circular dated January 9, 2020 bearing no. IBBI/LIQ/027/2020 has also been issued by the Board providing the details of the account wherein the unclaimed dividends and/ or undistributed proceeds of liquidation process as mentioned are required to be deposited.

- A proviso to Regulation 2B(1) has been inserted to provide that a person who is not eligible to submit a resolution plan for the insolvency resolution of a corporate debtor cannot be a party to the compromise or arrangement proposed under Section 230 of the Companies Act, 2013.

- Regulation 6(2)(q) has been amended to state that the liquidator shall maintain a register of unclaimed dividends and undistributed proceeds.

- Regulation 21A(2) has been substituted to provide that if a secured creditor proceeds to realise its security interest, then it shall contribute its share of the insolvency resolution process cost, liquidation process cost and workmen's dues, within 90 days of the liquidation commencement date. Additionally, such secured creditor shall within 180 days of the liquidation commencement date, pay the excess of realised value of asset, which is subject to security interest, over the amount of its claims admitted. In the event of failure to pay such amounts to the liquidator within 90 days or 180 days, as the case may be, the asset which is subject to security interest shall become part of liquidation estate.

- Regulation 37(8) has been inserted which bars the secured creditor who has chosen to realise its security interest from selling or transferring the asset to any person who is not eligible to submit a resolution plan for insolvency resolution of the corporate debtor.

- Form I has been provided setting forth the nature of the amount deposited into the CLA and the names and last known addresses of the stakeholders entitled to receive the unclaimed dividends or undistributed proceeds. This form needs to be submitted by the Liquidator to the authority with which the corporate debtor is registered and the Board.

- Form J has been inserted which would need to be filed with the Board by the stakeholder seeking to withdraw money it is entitled to from the CLA.

The full text of the amendment regulations can be accessed here.

iv. Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Amendment) Regulations, 2020 – Amendment

The Board vide its gazette notification dated January 15, 2020 bearing no. IBBI/2019-20/GN/REG054 amended the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 ("**Voluntary Liquidation Regulation**") by the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Amendment) Regulations, 2020.

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

- Regulation 2(1)(ba) has been inserted to provide for the definition of Corporate Voluntary Liquidation Account ("**CVLA**") and Regulation 39 as it existed has been substituted to provide for operation and maintenance of the CVLA by the Board as a part of Public Accounts of India. It has been mandated for the Liquidator to deposit the unclaimed dividends, undistributed proceeds and income earned during the voluntary liquidation process in the CVLA before submitting an application with the final report. A stakeholder and any other person can by producing evidence to satisfy the board of their entitlement seek to withdraw the amount it is entitled to, from the CVLA. Additionally, a circular dated January 20, 2020 bearing no. IBBI/VL/028/2020 was issued by the Board providing the details of the account wherein the unclaimed dividends and/ or undistributed proceeds of voluntary liquidation proceeds as mentioned below are required to be deposited.

- Regulation 10(2)(q) has been amended to state that the liquidator shall maintain a register of unclaimed dividends and undistributed proceeds.

- Form G has been provided setting forth the nature of the amount deposited into the CVLA and the names and last known addresses of the stakeholders entitled to receive the unclaimed dividends or undistributed proceeds. This form needs to be submitted by the Liquidator to the authority with which the corporate debtor is registered and the Board.

- Form H has been inserted which would need to be filed with the Board by the stakeholder seeking to withdraw money it is entitled to from the CVLA.

The full text of the amendment regulations can be accessed here.

v. Bench of the National Company Law Appellate Tribunal constituted at Chennai – Notified

- Vide notification dated March 13, 2020 bearing S.O. 1060(E), the Central Government has constituted another bench of the NCLAT at Chennai to hear appeals against orders of the benches of the NCLTs having jurisdiction over Karnataka, Tamil Nadu, Kerala, Andhra Pradesh, Telangana, Lakshadweep and Puducherry.

- The NCLAT at New Delhi would be known as the Principal Bench and would hear appeals other than those over which the NCLAT, Chennai bench would hear.

- The notification has come into effect from March 18, 2020.

The full text of the notification can be accessed here.

D. OTHER JUDICIAL PRONOUNCEMENTS

i. Flat Buyers Association Winter Hills -77, Gurgaon v. Umang Realtech Pvt. Ltd. [Company Appeal No. 926 of 2019 decided on February 4, 2020]

The NCLAT has while adjudicating on an application filed by the home buyers for initiating CIRP against the project developer namely Umang Realtech and resisting the idea of approval of resolution plan of a third party by the committee of creditors held that reverse corporate insolvency resolution

process shall be followed in case of real estate infrastructure companies. It has *inter alia* held that as such the insolvency proceedings against a real estate developer would be limited to that particular project and would not go on to include the other projects of the corporate debtor. Further, the NCLAT has observed that the home buyers cannot approach the adjudicating authority for seeking refund. However, after completion or during completion of the flat or the project, the home buyer can (i) request the insolvency resolution professional to find out a third party to purchase the flat or the apartment; or (ii) reach an agreement with the promotor for refund of the amount paid for the flat or the apartment.

ii. Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited Etc.
[Civil Appeal No. 8512-8527 of 2019 decided on February 26, 2020]

The Hon'ble Supreme Court has dealt with several issues including whether a transaction of transfer of property, or an interest thereof of corporate debtor falls within the ambit of preferential transactions under Section 43 of the IBC and the nature of financial debt particularly in relation to third-party mortgage (collateral securities) created by the corporate debtor for borrowings of another entity (its holding company in the present case).

The Hon'ble Supreme Court has held that in order to find whether a transaction of transfer of property or an interest thereof of the corporate debtor, falls squarely within the ambit of Section 43 of the IBC, ordinarily, the following questions shall have to be examined in a given case:

i. Whether such transfer is for the benefit of a creditor or a surety or a guarantor?

ii. Whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor?

iii. Whether such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets being made in accordance with Section 53 of the IBC?

iv. If such transfer had been for the benefit of a related party (other than an employee), whether the same was made during the period of two years preceding the insolvency commencement date; and if such transfer had been for the benefit of an unrelated party, whether the same was made during the period of one year preceding the insolvency commencement date?

v. Whether such transfer is not an excluded transaction in terms of Sub-section (3) of Section 43?

The Hon'ble Supreme Court has observed that the financial creditor apart from securing its own interest can be entrusted with the task of ensuring the sustenance and growth of the corporate debtor. A person having only security interest over the property of the corporate debtor will only have interest in realising the value of the security without being involved in or having a stake in corporate debtor's growth or equitable liquidation. Further, it has held that the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of Section 5(8) of the IBC and that only a creditor to whom a financial debt is owed could be a financial creditor under the IBC. Every secured creditor would be a creditor; and every financial creditor would also be a creditor but every secured creditor may not be a financial creditor.

In view of the above the Hon'ble Court has held that a person only having security interest on the assets of the corporate debtor cannot be regarded as 'financial creditor' even if falling within the description of 'secured creditor' by virtue of collateral security extended by the corporate debtor and such debt cannot be termed as a financial debt under the IBC.

iii. D & I Taxcon Services Pvt. Ltd. Mr. Vinod Kumar Kothari, Liquidator of Nicco Corporation Limited
[Company Appeal No. 1347 of 2019 decided on March 3, 2020]

The NCLAT has while deliberating on the issue whether a tenant can seek a direction against the liquidator with regard to an alleged unvalued transaction has observed that a tenant has no *locus standi* as it is not a creditor or a member or partner of the corporate debtor and hence has no *locus standi* under S. 47 (Application by Creditor in cases of undervalued transactions) of the IBC.

iv. Digamber Bhondwe, Director Raipur Treasure Island Pvt. Ltd. v. JM Financial Asset Reconstruction Company Ltd.
[Company Appeal No. 1379 of 2019 decided on March 5, 2020]

The NCLAT has dealt with an issue whether the limitation period for an application to be filed by a financial creditor to initiate of corporate insolvency resolution process under the IBC shall start running from the date when the corporate debtor was declared a non-performing asset or from the date when the order was passed by the Debts Recovery Tribunal ("**DRT**") for issuance of recovery certificate. The NCLAT has held that Article 137 of the Schedule to the Limitation Act, 1963 (application for which no period of limitation is provided elsewhere, the period of limitation shall be 3 years from the date when the right to apply accrues) is applicable and the relevant date shall be the date of default for which applications under IBC shall be filed. Further, the NCLAT has stated that once the time starts running then the subsequent filing of the application before the DRT and judgment passed shall not make a difference or extend the period of limitation, for the purposes of applications under the IBC.

V. LITIGATION & ARBITRATION

A. JUDICIAL PRONOUNCEMENTS IN VIEW OF COVID - 19

i. M/s Halliburton Offshore Services Inc. v. Vedanta Limited & Anr.
[O.M.P. (I) (COMM) No. 88 of 2020 before the High court of Delhi, decided on April 20, 2020]
Restraining the invocation of bank guarantees amidst lockdown which is prima facie in the nature of a force majeure

Background:

The Plaintiff had filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") seeking injunction by way of a restraint on the Defendant from invocation and encashment of 8 bank guarantees as the Petitioner was contractually obligated to fulfil the project within the extended period granted till March 31, 2020.

Findings of the Court:

The High Court of Delhi while examining the facts of the case held that the countrywide lockdown was ordered on March 24, 2020 and is *prima facie* in the nature of *force majeure* as such a lockdown is unprecedented, and was incapable of being predicted either by the Respondent or by the Petitioner. The Court also held that interim injunction may be granted in the interest of justice as the Petitioner was working on completion of the said project till complete lockdown was ordered.

Observation and Analysis

The High Court observed that as per existing law a stay against demand for encashment of bank guarantee cannot be granted except under three circumstances, namely (i) there was serious fraud, or (ii) there was likelihood of irretrievable harm being caused to the person on whose behalf the bank guarantee was given, or (iii) special equities. The High Court further went on to observe that the spread of COVID-19 pandemic and the resultant restrictions constitutes 'special equities' and therefore ordered that interim injunction be granted to the Petitioner for restraining the Defendant from invoking the bank guarantees till a period of one week from May 3, 2020 (i.e. the date until which the lockdown was imposed at that time).

ii. Standard Retail Pvt. Ltd. v. M/s. G. S. Global Corp & Ors.
[Commercial Arbitration Petition (L) No. 404 OF 2020 alongwith Commercial Arbitration Petition (L) no. 405 to 408 of 2020, before the High Court of Bombay, decided on April 8, 2020]
Current lockdown cannot be used to reslie from payment obligation under contract.

Background:

The above said Petitions were filed under section 9 of the Arbitration Act seeking directions restraining the Respondent–Bank from negotiating/ encashing the letters of credit. Under the Contracts, the Respondent No. 1 which has its head office at South Korea was to supply certain steel products, the shipments of which were to be dispatched from South Korea, to the Petitioners at Mumbai. It was claimed by the Petitioners that in view of the COVID-19 pandemic and the lockdown declared by the Central/State Government, its contracts with Respondent No. 1 were terminated as unenforceable on account of frustration, impossibility and impracticability. The Petitioners have relied upon Section 56 of the Indian Contract Act, 1872.

Findings of the Court:

The High Court of Bombay, whilst refusing to grant interim stay of invocation of letter of credit by the Respondent. *inter-alia*, held that:

(i) The letters of credit are an independent transaction with the bank and the bank is not concerned with underlying disputes between the Petitioners who are buyers and the Respondent No. 1 who is the seller.

(ii) The Force Majeure clause in the present contracts is applicable only to the Respondent No. 1 and cannot come to the aid of the Petitioners.

(iii) The contract terms are on Cost and Freight basis and the Respondent No. 1 has complied with its obligations and performed its part of the contracts and the goods have been already shipped from South Korea. The fact that the Petitioners would not be able to perform its obligations so far as its own purchasers are concerned and/or it would suffer damages, is not a factor which can be considered and held against the Respondent No. 1.

(iv) As per Notifications/Advisories issued by the Government, the distribution of steel has been declared as an essential service. There are no restrictions on its movement and all ports and port related activities.

(v) The lockdown would be for a limited period and cannot come to the rescue of the Petitioners so as to resile from its contractual obligations with the Respondent No. 1 of making payments.

Observation and Analysis

The High Court observed that the lockdown being for a limited period cannot be claimed to be an event under Section 56 (Agreement to do impossible act) of the Indian Contract Act, 1872 and further went on to hold that a letter of credit is an independent transaction with the bank and the bank is not concerned with the underlying dispute in the agreement arising between the parties.

It is pertinent to note that this judgment of the Bombay High Court is somewhat contrary to the abovementioned judgement of the Delhi High Court in the matter of M/s Halliburton Offshore Services Inc. The law on force majeure in context of COVID-19 is still evolving and we are keeping a close watch on further developments in this regard.

iii. IN RE: COGNIZANCE FOR EXTENSION OF LIMITATION
[Suo Motu Writ Petition (Civil) No(s).3/2020 before the Supreme Court of India, decided on March 23, 2020]
Extension of Limitation period for filing proceedings in respective Courts/Tribunals across the country including the Hon'ble Supreme Court due to COVID-19.

Background:

The Hon'ble Supreme Court took Suo Motu cognizance of the situation arising out of the challenge faced by the country on account of Covid-19 Virus and resultant difficulties that may be faced by litigants across the country in filing their petitions/applications/suits/ appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under special laws (both Central and/or State).

Findings of the Court:

The Hon'ble Supreme Court held that to obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including the Hon'ble Supreme Court, it ordered that the period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or special laws whether condonable or not shall stand extended w.e.f. March 15, 2020 till further order/s to be passed by the Hon'ble Supreme Court in the said proceedings.

B. OTHER JUDICIAL PRONOUNCEMENTS

i. Ambalal Sarabhai Enterprise Limited and Ors. v. KS Infraspace LLP Limited and Ors. [Civil Appeal No. 9346 of 2019 before the Supreme Court of India, decided on January 6, 2020]

Requirement of a strong prima facie case while plaintiff seeks injunction in specific performance suit

Background:

The Plaintiff had filed two suits for declaration and specific performance against the Defendant sister concern with regard to a piece of land in Gujrat. According to Plaintiff he had a valid contract with the Defendant wherein he had communicated the acceptance of final draft of memorandum and also paid a token amount as advance and only formal execution of contract was remaining. The Plaintiff claims he was also ready with balance amount while the Defendant entered into a registered agreement with another party (Defendant no. 2).

The Principal Civil Judge, Vadodara by order dated February 18, 2019 held that the terms and conditions for sale stood finalised and hence passed an interim injunction restraining the Defendants from any further execution relating to the land in any manner. Upon appeal, the High Court of Gujarat affirmed the order of injunction by the civil judge.

Findings of the Court:

The Hon'ble Supreme Court while examining the facts of the case observed that all evidence (Whatsapp messages and e-mails of negotiation between the Plaintiff and the Defendant) were to be read and understood cumulatively to decipher whether there was a concluded contract or not. The Hon'ble Supreme Court further observed that the Plaintiff was well aware that the Defendant was negotiating for sale of land simultaneously with another party (Defendant No. 2). It was held that merely the MoU being labelled as 'final-for discussion' cannot lead to an inference of a concluded contract. No evidence of communication of acceptance was produced while the Defendant No. 2 paid an amount towards the Income Tax dues of the Defendant. The Hon'ble Supreme Court came to a conclusion that the matters were still at the 'embryo stage'. It was held that grant of injunction was unsustainable and accordingly the order of granting injunction by lower court was set aside.

Observation and Analysis:

The Hon'ble Supreme Court reiterated that in a matter concerning grant of injunction, apart from the existence of a prima facie case, balance of convenience, irreparable injury, the conduct of the party seeking the equitable relief of injunction are also very essential to be considered before granting injunction.

ii. G + H Schallschutz Gmbh v. M/s Bharat Heavy Electricals Ltd.
[O.M.P. (COMM) 158/2019, before the High Court of Delhi, decided on January 7, 2020]
Scope of interference with the international commercial arbitration is limited

Background:

Petitioner is a company incorporate under the laws of Germany engaged in the business of technical acoustics and industry. The Respondent is a power plant equipment manufacturer and one of the largest manufacturing companies in India engaged in engineering, manufacturing, construction and commissioning of products for several industries, such as power, renewable energy, oil & gas, water and defence, amongst others. A purchase order was issued by the Respondent in favour of petitioner for manufacture, supply and supervision erection and commissioning of Exhaust Gas Systems in two lots. The first lot was delivered and second lot was partially delivered but before the remaining supply of second lot, the Respondent wrote to the Petitioner to hold the purchase order with immediate effect as Government of India enforced a travel advisory asking Indians to leave Yemen and to avoid travel to the said destination due to deterioration of political situation. The Petitioner replied that part of the remaining lot was ready and the other part was in final stage. In terms of the contract the Respondent declared Force Majeure conditions to come into effect from March 27, 2015 and subsequently the Force Majeure clause in purchase order was invoked on May 1, 2015. The parties invoked the arbitration under the contract and Arbitral tribunal was constituted.

The Arbitral Tribunal held that the Petitioner is entitled to protection of Force Majeure clause of the contract but rejected the claims of the Petitioner/ claimant's claiming damages however, the Respondent was directed to pay EUR 18, 685.39 in respect of claimant's storage cost along with interest.

The present petition was filed before the Hon'ble High Court of Delhi by Petitioner/ G + H Schallschutz Gmbh under Section 34 of the Arbitration Act for setting aside the final award passed by the Arbitral Tribunal. The award is challenged on the grounds, *inter-alia*, that it is contrary the public policy of Indian laws and vitiated by patent illegality.

Findings of the Court

The High Court concluded that findings on damages are based purely on facts and the same ought not to be interfered while exercising jurisdiction under Section 34 of the Arbitration Act.

Observation and Analysis

The High Court based the above said finding basis its reiteration of the law laid down under the judgment passed by the Hon'ble Supreme Court in *Ssangyong Engineering & Construction Co. Ltd. Vs NHAI [2019 SCC Online Sc 677]* wherein the scope of interference for international commercial arbitration in India subsequent to amendment of Section 34 of the Act, was narrowed down and stated that even patent illegality will no longer be a ground available to challenge international commercial award passed in India.

iii. SSIPL Lifestyle Private Ltd. v. Vama Apparels (India) Pvt Limited & Anr.
[CS (COMM) 735/2018, before the High Court of Delhi, decided on February 19, 2020]
Limitation period for filing written statement applies to applications filed under Section 8 of Arbitration Act

Background:

Two suits were filed by SSIPL Lifestyle Pvt. Ltd. against the two defendants Vama Apparels and Ms. Jay Pramanand Patel, both for recovery of a sum along with interest and other reliefs. SSIPL undertook to supply to Vama various products for sale from Vama Department Store. Some minimum amount of sale was also guaranteed by Vama. Several disputes arose between the parties. Summons were issued in the instant suit on March 15, 2018 and on May 17, 2018 insolvency proceedings were commenced against Defendant no. 1 (Vama Apparels) before the NCLT which was closed on October 8, 2018. Thereafter, Vama moved two applications in the instant suit under Section 8 of the Arbitration Act relying on the presence of the arbitration clause in the agreement. According to the Plaintiff no arbitrable dispute exists between the parties as period of limitation for filing application under Section 8 had expired.

The core issues before the Court were:

- Whether there is limitation period prescribed for filing of an application under section 8 of the Arbitration Act?

- Whether limitation for filing of the written statement as prescribed in the Code of Civil Procedure, 1908, as also in Commercial Courts Act 2015 would be applicable for filing of Section 8 application?

Findings of Court:

The Delhi High Court after hearing the submissions of the parties held that the invocation of arbitration clause can be waived by a party under dual circumstances - one by filing of a statement of defence or submitting to jurisdiction and secondly, by unduly delaying the filing of the application under Section 8 of the Arbitration Act by not filing the same till the date by which the statement of defence could have been filed. It was held under both situations, there can be no reference to Arbitration. In the present case the opportunity for filing written statement was closed on July 13, 2018. Thus, the application under section 8 was dismissed.

Observation and Analysis:

The Delhi High Court held that the provision of limitation for filing written statement also applies to applications filed under Section 8 of the Arbitration Act.

iv. Sirpur Paper Mills Ltd. v. I.K. Merchants Pvt. Ltd.
[Appeal No. 550 of 2008, before the High Court of Calcutta, decided on January 10, 2020]
Application to set aside arbitral award cannot be put on hold due to invocation of IBC

Background:

The Petitioner prayed for setting aside award dated July 7, 2008 and contended that an application under Section 34 of the Arbitration Act, cannot be proceeded since Corporate Insolvency proceeding under the

Insolvency and Bankruptcy Code, 2016 ("**IBC**") has been initiated against Petitioner being the Corporate Debtor and the Decree Holder i.e. the Respondent has not taken steps to include its claim before the Resolution Professional. The core issue before the Court was whether an application under Section 34 of Arbitration Act should be kept in abeyance by reason of the provisions of the IBC being invoked by the Operational Creditor against the Petitioner.

Findings of Court:

The High Court after carefully considering the sequential stages which are significant as contemplated under the IBC concluded that corporate insolvency proceedings cannot be used to defeat a claim or a dispute which existed prior to the initiation of the insolvency proceedings.

The insolvency proceedings were admitted on September 18, 2007 whereas the arbitrator was appointed in 2006. Once the award was challenged by the petitioner in 2008, the debt became disputed and subject to a decision in Section 34 proceedings, as such the Respondent could not have filed a claim before the NCLT/IRP since Section 34 proceedings had not been decided and there being no final or adjudicated claim.

It was held by the High Court of Calcutta that the Petitioner being a corporate debtor/judgment debtor cannot be permitted to take refuge under the provisions of IBC for relegating the claim of the Respondent/ decree holder to a limbo for an indefinite period of time on the specious plea of the Respondent not having gone before NCLT. The High Court further did not find any basis for relegating the Section 34 proceeding to the backburner.

Observation and Analysis:

The Calcutta High Court has stated that an application to set aside an arbitral award under the Arbitration Act cannot be kept in abeyance because of the provisions of IBC being invoked by operational creditors against corporate debtor/ judgment debtor.

v. Union of India & Anr. v. M/s V.V.F. Limited & Anr.
[Civil Appeal no.2256-2263 of 2020 before the Supreme Court of India, decided on April 22, 2020]
Industrial policies or notifications cannot be hit by the doctrine of promissory estoppel

Background:

The present appeal has been filed by the Petitioner against the order passed by the High Court of Delhi. Kutch District in the State of Gujarat was struck by a devastating earthquake on January 26, 2001 which destroyed the existing infrastructure in that District. With a view to attract large scale investment and to generate new employment opportunities in the said District, the Government of India announced an incentive scheme for setting up new industries in Kutch by issuing Central Excise Exemption Notification No. 39/2001-CE dated January 31,2001. The said notification granted exemption to goods cleared from a new industrial unit set up in the Kutch District of Gujarat prior to July 31, 2003 (which was subsequently extended to December 31, 2005) from duty of excise as was equivalent to the amount of duty paid in cash/Personal Ledger Account (PLA) on the finished goods for the period of 5 years from the date of commencement of commercial production. The Respondents had initially planned to expand their manufacturing activities at Maharashtra, but instead decided to set up the new units in the Kutch

District, as inventive was offered by the government to refund excise duty paid in the Kutch area. Later, the notification was amended, and provided that the benefit of refund would be granted with reference to the value addition, which was notionally fixed @ 34% for the commodity manufactured. This subsequent notification was impugned.

Finding of the Court:

The Hon'ble Supreme Court was of the view that the industrial policies or notifications are issued in the public interest and in the interest of revenue and seek to achieve the original object and purpose of giving incentive or exemption while inviting the persons to make an investment on establishing the new undertakings and they do not take away any vested rights conferred under the earlier notifications or industrial policies.

Observation and Analysis:

It was observed by the Hon'ble Supreme Court that the withdrawal of exemption "in public interest" is a matter of policy and the courts would not bind the Government to its policy decisions for all times to come, irrespective of the satisfaction of the Government that a change in the policy was necessary in the "public interest". It has been held that where the Government acts in "public interest" and neither any fraud nor lack of bonafides is alleged, much less established, it would not be appropriate for the court to interfere with the same. It is well settled that if a statute is curative or merely declaratory of the previous law, retrospective operation is generally intended. An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect. As such, the Hon'ble Supreme Court has held that the industrial policies or notifications cannot be hit by the doctrine of promissory estoppel.

vi. National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A. [Civil Appeal No. 667 of 2012 before the Supreme Court of India, decided on April 22, 2020]
Foreign awards against Indian companies cannot be enforced if the contract was against the policy decision of the Government

Background:

The Plaintiff had filed an appeal for adjudication of enforcement of arbitral award on merits as the petition for enforcement of award was rejected by the Delhi High Court stating that it was not maintainable. According to the Plaintiff, the arbitral award passed by the Federation of Oil, Seeds and Fats Associations Ltd., London was against the public policy of the Government of India on various grounds including not dealing with export restrictions, flouting the basis norms of justice, enforcement procedure being barred by limitation and no opportunity being given to the Plaintiff to present the case and was thus unenforceable.

Findings of the Court, Observation and Analysis

The Hon'ble Supreme Court while examining the facts of the case reiterated that if the award is against the fundamental public policy of India and the basic concept of justice, then the same would be unenforceable. In respect of the present case it was held that as the enforcement of the award in question

would be against the export policy made by the Government of India, therefore the same was unenforceable.

vii. Bank of Baroda v. Kotak Mahindra Bank Ltd.
[Civil Appeal No.2175 of 2020 before the Supreme Court of India, decided on March 17, 2020]
Limitation period for executing a decree passed by a foreign Court from the reciprocating country in India will be the limitation prescribed in the reciprocating foreign country

Background:

The Appellant had filed a suit against the Respondent for recovery of its dues in London. The said suit was decreed by the High Court of Justice, Queens Bench, Divisional Commercial Court of London on February 20, 1995 and a decree for US $1,267,909.26 along with interest thereon was passed in favour of the Appellant and against the Respondent. The said decree was not challenged and as such it became final. The Respondent filed an execution petition after 14 years of passing the decree by the London Court for execution of the same in terms of Section 44A (enforcement of foreign judgments and decrees in India) read with Order 21 Rule 3 (Execution of decree) of the Code of Civil Procedure, 1908 ("**CPC**") for recovery.

Findings of the Court:

The Hon'ble Court noted that if the law of a forum country is silent on the aspect of the limitation for execution of a foreign decree then the limitation period of the cause country would apply.

Observation and Analysis:

The Hon'ble Court has held that the limitation period for executing a decree passed by a foreign court (from reciprocating country), in India will be the limitation prescribed in the reciprocating foreign country, subject to the decree being executable in terms of Section 13 (when foreign judgment not conclusive) of the CPC.

VI. LABOUR & EMPLOYMENT

A. UPDATES ISSUED IN VIEW OF COVID – 19

i. Employees' Provident Fund Scheme, 1952 amended.

The Ministry of Labour & Employment ("**Labour Ministry**"), by way of Notification No. G.S.R. 225(E) dated March 27, 2020, has amended the Employees Provident Fund Scheme, 1952 to allow withdrawal of non-refundable advance by EPF members/subscribers in the wake of COVID 19 pandemic. The said notification permits withdrawal not exceeding the amount of basic wages and dearness allowances for three months or up to 75% of the amount standing to the member's credit in the EPF account, whichever is less.

The full text of the notification can be accessed here.

ii. Extension of time for filing of returns

- The Employees' State Insurance Corporation, by way of Notice bearing No. P-11/14/Misc./1/2019-Rev. dated March 16, 2020, has *inter alia* extended the timeline for making ESI contributions for the months of February and March 2020 to April 15, 2020 & May 15, 2020 respectively. As per the information available on the website of Ministry of Labour & Employment the period for filing ESI contribution for the month of February has been further extended to May 15, 2020.

The full text of the notification can be accessed here.

- The Labour Ministry, by way of Notice bearing No. DGMS/GENERAL/355 dated March 20, 2020, has relaxed the requirement for submission of notices, returns and other forms as required under the provisions of different rules/regulations framed under the Mines Act, 1952, due for submission in the month of March and April 2020 for a period of 1 (one) month from their respective due dates.

The full text of the notification can be accessed here.

- The Labour Ministry, by way of Circular No. F.No.14(112)/2013/Coord-IT Cell dated March 20, 2020, has extended the last date for filing of Unified Online Annual Returns for the year 2019 under eight Acts and ten Central Rules up to April 30, 2020.

The full text of the circular can be accessed here.

- The Employees' Provident Fund Organisation, by way of Circular No. C-I/Misc./2019-20/Vol.II./Part./9 dated April 15, 2020, has allowed a grace period of 30 days (from April 16, 2020 to May 15, 2020) for filing of Electronic Challan cum Return to employers of those establishments which have disbursed wages to their employees for the month of March 2020.

The full text of the circular can be accessed here.

iii. Advisory issued to Employers against termination of employees and reduction of wages.

The Labour Ministry, by way of Circular D.O. No. M-11011/08/2020-Media dated March 20, 2020, has issued an advisory to all employers of public/private establishments to not terminate their employees, particularly casual or contractual workers from job or reduce their wages. If any worker takes leave, he should be deemed to be on duty without any consequential deduction in wages for the said period. The advisory further states that if the place of employment is made non-operational due to COVID 19, the employees of such unit will be deemed to be on duty. It is pertinent to note that the notification, to the extent it requires employers not to deduct wages has been challenged in the Hon'ble Supreme Court. The matter came up for hearing on April 27, 2020 and has been adjourned for two weeks for the Government to file reply with no interim orders as yet.

The full text of the circular can be accessed here.

iv. Government of India to pay EPF contribution of both employer and employee

Government of India has decided to pay EPF contribution of both employer and employee (12 percent each) for the next three months so that nobody suffers due to loss of continuity in the EPFO contribution. This is applicable to establishments that have up to 100 employees and 90 percent of whom earn monthly wages under Rs. 15,000.

The full text of the circular can be accessed here.

v. Relaxation in labour laws by certain State Governments

In order to ease burden on the employers due to the Covid-19 pandemic as well as to generate more employment, certain State Governments have decided to take measures to provide relaxation in implementation of various labour laws. These range from certain States providing immediate relaxations to factories and industrial establishments in relation to weekly hours, daily hours, intervals for rest etc. subject to certain conditions, to announcements for exempting all establishments, factories and businesses from the purview of most labour laws for longer periods upto even 3 years. Various State Governments should be issuing notifications / passing ordinances to this effect.

B. OTHER UPDATES:

i. Central Government increases wage limit for calculation of compensation under Employee's Compensation Act, 1923.

The Central Government, by way of Notification No. S.O. 71(E) dated January 03, 2020, has enhanced the monthly wages for the purposes of calculation of compensation payable to an employee under the Employee's Compensation Act, 1923 from Rs. 8,000 to Rs. 15,000.

The full text of the notification can be accessed here.

ii. The Transgender Persons (Protection of Rights) Act, 2019 comes into force.

The provisions of the Transgender Persons (Protection of Rights) Act, 2019 **("Act")** have come into force from January 10, 2020, by way of Notification No. S.O. 135 (E) issued by the Ministry of Social Justice & Empowerment. The Act, which received the Presidential assent on December 05, 2019, comprises of nine chapters.

Key highlights of the Act include:

(i) A **"transgender person"** means a:

(a) person whose gender does not match with the gender assigned to that person at birth and includes a trans-man or trans-woman, irrespective of such person undergoing sex reassignment surgery or hormone therapy or laser therapy;
(b) person with intersex variations;
(c) genderqueer; and
(d) person having socio-cultural identities as 'kinner', 'hijra', 'aravani' or 'jogta'.

(ii) **Protection from discrimination**: A transgender person shall not be discriminated against in matters of education, employment/occupation, healthcare, right to movement, right to purchase/reside/rent/occupy property, opportunity to hold/stand for public or private office etc.

(iii) **Recognition of identity**: The Act recognizes a transgender person's right to self-perceived gender identity. A transgender person can make an application to the District Magistrate to obtain a certificate of identity as a transgender person.

(iv) **Welfare measures:** The Act seeks formulation of welfare measures, welfare schemes, programmes for education, social security, healthcare, effective participation in the society and facilitating access to these schemes.

(v) **Obligation of establishments:** The Act obligates establishments to ensure that transgender persons are not discriminated against in matters relating to employment. Further, every establishment is required to designate a person to act as a complaint officer for dealing with complaints relating to violation of provisions of the Act.

(vi) **Right of residence:** The Act recognizes the right of transgender persons to residence with parents and immediate family members.

(vii) **National Council for Transgender Persons:** The Act provides for setting up of a National Council for Transgender Persons to *inter alia* advice the Central Government on the formulation of policies/programmes/legislation/projects and monitor & evaluate the impact of programmes in relation to transgender persons.

(viii) **Penalties:** Some of the specifically recognized offences under the Act include forcing transgender persons to indulge in bonded labour, denying them the right of passage to a public place, forcing them to leave household, village or other place of residence, causing physical/sexual/verbal/emotional/economic abuse etc. Such offences are punishable with imprisonment between 6 months & 2 years and fine.

The full text of the notification can be accessed here.

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