DUA ASSOCIATES
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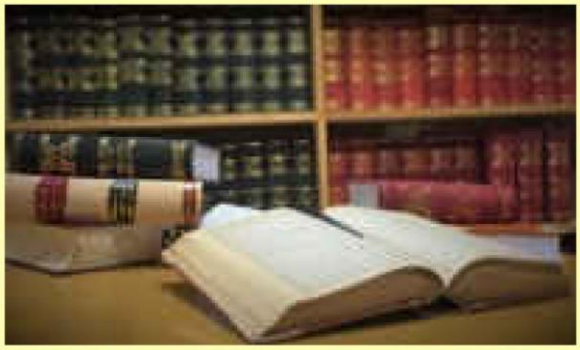

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UPDATES

I. RBI, FEMA & FDI

i. Consolidated FDI Policy 2020

The Department for Promotion of Industry and Internal Trade ("**DPIIT**") has issued the Consolidated FDI Policy 2020 ("**FDI Policy**") which has come into effect from October 15, 2020, superseding the previous FDI Policy of 2017 and the press notes, etc., which were in force as on October 15, 2020. Various changes have been made to the FDI Policy to align the same with the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 ("**NDI Rules**"), and the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019.

<u>Key Changes introduced by the FDI Policy:</u>

- The definition of warrants now includes such share warrants, which have been issued in compliance with the provisions of the Companies Act, 2013, as well as the regulations issued by the Securities and Exchange Board of India ("**SEBI**"). Compliance with regulations prescribed by SEBI in case of issuance of share warrants was not required under the previous FDI Policy.

- The FDI Policy includes the restriction imposed by the DIIPT by way of Press Note 3 (2020 Series) on FDI from neighbouring countries with whom India shares its land borders. The said Press Note 3 (2020 Series) states that FDI from the entities or citizens of neighbouring countries must be made through the Government route, with prior Government approval. The FDI Policy also provides that any transfer of ownership of any existing (or future) FDI in an Indian entity, resulting in transfer of beneficial ownership to an entity or citizen of any of the neighbouring countries, directly or indirectly, will require prior Government approval. The term 'beneficial interest' has not been defined in the FDI Policy.

- Various sectoral caps have been reviewed and revised from time to time since the erstwhile FDI Policy of 2017. The same has been consolidated in the extant FDI Policy. Sectoral limits in single brand retail trading sector, under the automatic route, has been increased from 49% (forty nine percent) to 100% (one hundred percent), along with some revision in the sector specific conditions including some relaxations from the local sourcing norms. Sectoral limits in defence sector under the automatic route has been increased from 49% (forty nine percent) to 74% (seventy four percent), along with some revisions in the sector specific conditions. The ambit of investment in the 'Manufacturing Sector' has been expanded to include contract manufacturing. A new category under the 'Broadcasting Content Sector' called 'Uploading/ Streaming of News & Current Affairs through Digital Media' has been included which can have upto 26% (twenty six percent) of foreign investment under the Government route. Certain restrictions have been imposed on e-commerce marketplace entities or group companies from selling their products on the platform run by the said marketplace entity. Further, e-commerce marketplace entities need to obtain and maintain a report from its statutory auditor by the 30th September every year, confirming compliance of e-commerce guidelines.

- This FDI Policy has added the definition of 'automatic route' 'domestic custodian', 'domestic depository', 'foreign investment', etc.

- As per the FDI Policy, capital instruments should be issued within 60 (sixty) days from the date of receipt of the inward remittance. The previous FDI policy of 2017 had prescribed a period of 180 (one hundred and eighty) days. Further, in the event of a failure in the issuance of capital instruments within 60 (sixty) days from the date of receipt of the inward remittance, the money has to be refunded within 15 (fifteen) days from the expiry of the said 60 (sixty) days period. The previous FDI Policy of 2017 specified that the money is to be refunded immediately instead of the now prescribed 15 (fifteen) days period.

- As per the FDI Policy in case of secondary investment, Form FC-TRS is required to be filed with Authorised Dealer – Category I bank within 60 (sixty) days of the transfer of capital instruments or receipt / remittance of funds, whichever is earlier. Under the previous FDI policy of 2017, Form -FC TRS was to be filed within 60 (sixty) days from the date of receipt of the amount of consideration.

- While the FDI Policy has incorporated most of the Notifications, Circulars and Clarifications issued in relation to FDI from time to time, there might be some room for conflicts with the NDI Rules. The FDI Policy also specifies that in such event of conflict between FDI Provisions and NDI Rules, the provisions of NDI Rules shall prevail.

The full text of the FDI Policy can be accessed here.

ii. Standard Operating Proposal for Processing FDI Approval

The Department for Promotion of Industry and Internal Trade ("**DPIIT**") has issued a Standard Operating Procedure for Processing of FDI Proposals ("**SOP**") dated November 9, 2020. The SOP provides for a standard mode of operation while processing the applications for foreign investment in sectors / activities requiring Government approval, as per the Consolidated FDI Policy dated October 15, 2020, as amended from time to time ("**FDI Policy**") and the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019, as amended from time to time ("**NDI Rules**").

The SOP provides that all foreign investment proposals requiring Government approval as per the FDI Policy and NDI Rules must be filed online, through the Foreign Investment Facilitation Portal. Section I of the SOP lays down the procedure for filing such proposals/ applications and the list of documents to be submitted along with such application seeking Government approval.

Section II of the SOP assigns responsibilities to the relevant competent authorities (i.e., administrative ministry or department of the Government of India) for examining foreign investment applications and to provide their approval or rejection. Section III of the SOP sets out the procedure for processing the applications seeking approvals for foreign investment. Further, Section IV of the SOP prescribes the time period (*for each stage of clearance*) given to the jurisdictional competent authority to respond to the applications seeking approvals for foreign investment. Section V of the SOP specifies that the competent authorities should hold regular meetings for the purpose of monitoring and reviewing the pending proposals and to ensure disposal of such proposals in a time bound manner.

As per the SOP, the final clearance of the proposals are to be issued within 10 (ten) weeks from the date of its receipt, by the DPIIT, in cases where no security clearance is required and proposals requiring security clearance are to be cleared within 12 (twelve) weeks from the application date. An additional time of 2 (two) weeks has been given to the DPIIT for consideration of those proposals which are proposed for rejection or where additional conditions which are not provided in the FDI Policy, are proposed to be imposed by the competent authority.

The full text of the SOP can be accessed here.

iii. Discontinuation of Returns/ Reports under the Foreign Exchange Management Act, 1999

With a view to improve the ease of doing business and reduce the cost of compliance, the Reserve Bank of India ("**RBI**") has by way of A.P. (DIR Series) Circular No. 05 dated November 13, 2020 ("**Circular**"), discontinued the requirement of filing the 17 (seventeen) returns/ reports, as listed in the Circular, with immediate effect.

Some of the reports/ returns discontinued by the RBI, pursuant to the Circular, relate to the extension of liaison offices, extension of project offices, daily inflow/ outflow of foreign funds on account of investment by foreign portfolio investors, inflows/ outflows of remittances on account of investments by foreign venture capital investors and market value of investments made by foreign venture capital investors, reporting of inflow/ outflow details in respect of mutual funds by asset management companies, repatriation of sales proceeds of underlying shares represented by FCCBs/ GDRs/ ADRs and monitoring of disinvestments by overseas corporate bodies. It may be noted that the obligation of filings these reports/ returns was imposed on the authroised dealer banks or custodian banks.

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

iv. Compliance with FDI Policy 2020, with regard to the entities involved in uploading/ streaming of news and current affairs through digital media

The Ministry of Information and Broadcasting has issued a Public Notice No. O-14011/11/2019-MUC-I dated November 16, 2020 ("**Public Notice**") regarding the compliance with the Consolidated FDI Policy dated October 15, 2020, as amended from time to time ("**FDI Policy**") in respect of entities involved in uploading/ streaming of news and current affairs through digital media ("**Digital Media Entities**"). Pursuant to the Press Note No. 4 of 2019 dated September 18, 2019, the Government had permitted foreign direct investment up to 26% (twenty six percent), under the Government approval route, in Digital Media Entities.

As per the Public Notice, Digital Media Entities having foreign investments below 26% (twenty six percent) were required to furnish an intimation with the details, as specified in the Public Notice, to the Ministry of Information and Broadcasting by December 15, 2020.

The Digital Media Entities having an equity structure with the foreign investment exceeding 26% (twenty six percent) were also required to furnish the requisite details to the Ministry of Information and Broadcasting by December 15, 2020. Additionally, such Digital Media Entities are required to take necessary steps for bringing down the foreign investment to 26% (twenty six percent) by October 15, 2021 and further seeking approval from the Ministry of Information and Broadcasting.

Any Digital Media Entity seeking fresh foreign investment is required to obtain prior approval of the Government in compliance with the FDI Policy and Foreign Exchange Management (Non-Debt Instruments) Rules, 2019.

Every Digital Media Entity must ensure that the citizenship of a majority of the directors on the Board and the chief executive officer (by whatever name called) is 'Indian'. Further, every Digital Media Entity must obtain security clearance from the Ministry of Information & Broadcasting for all foreign personnel who are likely to be deployed in any capacity with such Digital Media Entity for more than 60 (sixty) days in a year, prior to their deployment.

The full text of the said Public Notice can be accessed here.

v. Compounding of Contraventions under the Foreign Exchange Management Act, 1999

The Reserve Bank of India ("**RBI**") has by way of A.P. (DIR Series) Circular No. 06 dated November 17, 2020 ("**Circular**") has granted powers to its regional offices/ sub offices to compound identified contraventions under the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 and the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019. Additionally, with respect to the classification of certain contraventions under Foreign Exchange Management Act, 1999 ("**FEMA**"), the RBI has decided to discontinue the classification of a contravention as 'technical' that was dealt with by way of an administrative/ cautionary advice and regularize such contraventions by imposing a minimal compounding amount, as per the compounding matrix specified in the Master Direction - Compounding of Contraventions under FEMA. Further, the RBI has decided that with respect to the compounding orders passed on or after March 1, 2020, a summary information of the orders passed shall be published on the RBI's website.

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

vi. Establishment of Branch Office (BO)/ Liaison Office (LO)/ Project Office (PO) or any other Place of Business in India by Foreign Law Firms

The Reserve Bank of India ("**RBI**") has by way of A.P. (DIR Series) Circular No. 07 dated November 23, 2020 ("**Circular**"), directed the RBI and/ or authorised dealer– category I banks to not grant any permission to foreign law firms/ companies or foreign lawyers or any other persons resident outside India to establish branch office, project office, liaison office or other places of business in India for the purpose of practicing the legal profession in India. This policy of the RBI would continue to be applicable, until the same is revised based on final disposal of the matter before the Hon'ble Supreme Court of India, which deals with the issue of advocates enrolled under the Advocates Act, 1961, alone, are entitled to practice law in India and foreign law firms/ companies or foreign lawyers cannot practice the profession of law in India.

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

vii. Foreign Exchange Management (Export and Import of Currency) Regulations, 2015 - Amended

The Reserve Bank of India ("**RBI**") has, by way of Notification No. FEMA 6 (R)/(3)/2020-RB dated December 3, 2020 ("**Notification**") amended the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015.

In terms of the Notification, a new Regulation 10 has been inserted which provides that the RBI may, in the public interest and in consultation with the Central Government restrict the amount of Indian currency notes of Government of India and/or of Reserve Bank, and/or foreign currency, on case-to-case basis, that a person may bring into or take outside India and prescribe such conditions as it may deem necessary.

The Notification came into effect from December 4, 2020.

The full text of the Notification can be accessed here.

viii. External Trade – Facilitation – Export of Goods and Services

The Reserve Bank of India ("**RBI**") has by way of A.P. (DIR Series) Circular No. 08 dated December 4, 2020 ("**Circular**"), with a view to enhance the ease of doing business in India and quicken the approval process, delegated more powers to the authorised dealer– category I banks in the areas of: (i) Direct Dispatch of Shipping Documents; (ii) "Write-off" of Unrealized Export Bills; (iii) Set-off of Export Receivables against Import Payables; and (iv) Refund of Export Proceeds. The detailed process and powers of authorised dealer– category I banks have been enshrined in the Circular.

The full text of the Circular can be accessed here.

ix. Foreign Exchange Management (Non-Debt Instrument) Rules, 2019 - Amended

The Department of Economic Affairs, Ministry of Finance has, by way of SO. 4441 (E) dated December 8, 2020 ("**Amendment**") amended the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019

("**Principal Rules**"). The significant change introduced by the Amendment is in relation FDI in the 'Defence' sector.

Serial No. 6 in Schedule I of the Principal Rules has been substituted which records the revised condition of foreign investment in the Defence Sector, in India. The sectoral cap for automatic route has been increased from 49% (forty nine percent) to 74% (seventy four percent), and all foreign investment in the Defence Sector beyond 74% (seventy four percent) would require the approval from the Government. Further, for companies seeking new industrial licenses, foreign direct investment up to 74% (seventy four percent) will be permitted under the automatic route. Additionally, any infusion of fresh foreign investment up to 49% (forty nine percent) in a company not seeking industrial license or which already has Government approval for foreign direct investment in the Defence Sector will have to make a mandatory submission of a declaration with the Ministry of Defence, Government of India in case of change in shareholding pattern/ transfer of stake by existing investor to the new foreign investor for foreign direct investment up to 49% (forty nine percent), within 30 (thirty) days of such change. Further, any proposal for foreign direct investment beyond 49% (forty nine percent) from such companies would require Government approval. Also, foreign investment in the Defence Sector would be subject to security clearance by the Ministry of Home Affairs and would be issued as per guidelines of the Ministry of Defence.

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

II. CORPORATE

i. The Companies (Prospectus and Allotment of Securities) Rules, 2014 – Amended

The Ministry of Corporate Affairs has, by way of Notification No. G.S.R. 642 (E), dated October 16, 2020, brought into force, with immediate effect, the Companies (Prospectus and Allotment of Securities) Amendment Rules, 2020 ("**Amendment Rules**"), which has the effect of amending the Companies (Prospectus and Allotment of Securities) Rules, 2014 ("**Prospectus Rules**").

The Amendment Rules have inserted an additional proviso to Rule 14(1) of the Prospectus Rules, in terms of which, a company, may offer or provide an invitation to subscribe to securities, through a private placement, to qualified institutional buyers, throughout the year, based on a previous special resolution, passed once in the year, for all such allotments.

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

ii. Circular – Special Measures under the Companies Act, 2013

The Ministry of Corporate Affairs ("**MCA**") has, by way of General Circular No. 36/2020, dated October 20, 2020, relaxed the current requirement under Section 149 of the Companies Act, 2013, for at least 1 (one) director in every company, to reside in India for at least 182 (one hundred eighty two) days in a year. The MCA has, while providing for this relaxation, kept in mind the difficulties caused by the Covid-19 pandemic and has stated that the failure of at least 1 (one) of the directors in every company to reside, in India, for at least 182 (one hundred eighty two) days, would not be treated as a non-compliance for the year 2020-2021, as well.

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

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

The Ministry of Corporate Affairs has, by way of Notification No. G.S.R. 773(E), dated December 17, 2020, brought into force with immediate effect the Companies (Compromises, Arrangements and Amalgamations) Second Amendment Rules, 2020 ("**Amendment Rules**"), which has the effect of amending the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 ("**Amalgamation Rules**").

The Amendment Rules have inserted the definition of the term 'corporate action' and have defined the same to mean *"any action taken by the company relating to the transfer of shares and all the benefits accruing on such shares namely, bonus shares, split, consolidation, fraction shares and right issue to the acquirer."*

Additionally, the Amendment Rules have also inserted Rules 26A to the Amalgamation Rules, in relation to the purchase of the minority shareholding, in a company, pursuant to Section 236 of the Companies Act, 2013, that is held in a dematerialised form. In terms of the said amendment, a detailed process and procedure has been set out for the acquisition of the shares of the minority shareholders in the company, when the shares are held in dematerialised form, which includes a notice to be sent to the minority shareholders, circulating a copy of the notice in 2 (two) widely circulated newspapers (one in English and one in vernacular language), intimating the depository, and such other requirements.

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

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

The Ministry of Corporate Affairs has, by way of Notification No. G.S.R. 774 (E), dated December 18, 2020, brought into force, with immediate effect, the Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2020 ("**Amendment Rules**"), which has the effect of amending the Companies (Appointment and Qualification of Directors) Rules, 2014 ("**Directors Rules**").

The Amendment Rules have amended certain of the compliances that are required to be undertaken, by an individual that is eligible and willing to be appointed as an independent director, of a company, in terms of Rule 6 of the Directors Rules. An individual, prior to the amendment, was required to pass an online proficiency self-assessment test, within a period of 1 (one) year, from the date on which the individuals name was included in the data bank, created to collect the details of such persons, eligible and willing to be appointed as independent directors. This compliance is now required to be completed, within a period of 2 (two) years.

The Amendment Rules also bring about a change for those individuals who may not be required to pass the online proficiency self-assessment test. This exemption has now been expanded and there are many more exemptions that have been provided to such persons. These include individuals who have served for a total period of not less than 3 (three) years, as on the date of inclusion of his/ her name in the data bank, as a director or key managerial personnel in one or more of certain types of entities, such as in a listed public company, an unlisted public company having a paid-up share capital of Rs. 10,00,00,000/- (Rupees ten crore only) or more, etc.

Additionally, the Amendment Rules have reduced the pass percentage for the proficiency test, from 60% (sixty percent) to 50% (fifty percent).

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

v. The Companies (Amendment) Act, 2020 – Enforced

The Ministry of Corporate Affairs has, by way of Notification No. S.O. 4646 (E), dated December 21, 2020, brought into force with immediate effect, certain sections of the Companies (Amendment) Act, 2020 ("**Amendment Act**"), which has the effect of amending various provisions of the Companies Act, 2013 ("**Act**").

The Notification has brought into force, Sections 1, 3, 6 to 10 (both inclusive), 12 to 17 (both inclusive), 18(a), 18 (b), 19 to 21 (both inclusive), 22(i), 24, 26, 28 to 31 (both inclusive), 33 to 39 (both inclusive), 41 to 44 (both inclusive), 46 to 51 (both inclusive), 54, 57, 61, and 63, of the Amendment Act.

A majority of the abovementioned provisions have the effect of amending the Act, in a manner, whereby the penalties applicable for certain contraventions of the provisions of the Act, have either been removed, or have been reduced in such a manner, that certain offences have now been decriminalised, wherein the punishment of imprisonment has been removed. Further, in certain cases, the amount of fine payable, in relation to a contravention, has also been reduced, while in certain other cases, a fixed amount has been set, as the fine payable.

The Amendment Act has also inserted certain provisions, that relate to the responsibilities of the National Company Law Tribunal and a Company Liquidator.

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

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

The Ministry of Corporate Affairs ("**MCA**") has, by way of Notification No. G.S.R. 795 (E), dated December 24, 2020, introduced the Companies (Incorporation) Third Amendment Rules, 2020 ("**Amendment Rules**"), which has the effect of amending the Companies (Incorporation) Rules, 2014 ("**Incorporation Rules**").

The Amendment Rules have inserted Rule 9A, which would come into force and effect from January 26, 2021. In terms of Rule 9A, the MCA has now extended the period for which a name, proposed to be used in relation to an existing, or a company proposed to be incorporated, could be reserved. In order to avail of such extension, the Amendment Rules now require an applicant, to pay the required fees through the web services of the MCA.

The Registrar would, upon the payment of the applicable fees extend the period of the abovementioned reservation, from the date of the approval of SPICe+ (Form INC-32), submitted under Rule 9, up to: (i) 40 (forty) days, on the payment of Rs. 1,000/- (Rupees one thousand only), if the payment is made before the expiry of 20 (twenty) days from the date of approval of the SPICe+ (Form INC-32); or (ii) 60 (sixty) days on payment of Rs. 2,000/- (Rupees two thousand only), if the payment is made before the expiry of the 40 (forty) days set out in (i); or (iii) 60 (sixty) days on the payment of Rs. 3,000/- (Rupees three thousand

only), if the payment is made before the expiry of 20 (twenty) days from the date of approval of SPICe+ (Form INC-32).

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

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

The Ministry of Corporate Affairs has, by way of Notification No. G.S.R. 806 (E), dated December 30, 2020, brought into force with immediate effect, the Companies (Meeting of Board and its Powers) Fourth Amendment Rules, 2020 ("**Amendment Rules**"), which has the effect of amending the Companies (Meeting of Board and its Powers) Rules, 2014 ("**Meetings Rules**").

The Amendment Rules have extended the time, from December 31, 2020 to June 30, 2021, for a company to hold its board meetings, through video conferencing or other audio-visual means, particularly in relation to specific matters, such as the approval of the Board's Report, the approval of the prospectus, etc., which were otherwise not permitted, to be held, as such, in terms of Rule 4 of the Meetings Rules.

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

viii. Circular – Extension of Time to Conduct Extraordinary General Meetings through Video Conferencing or Other Audio Visual Means

The Ministry of Corporate Affairs has, by way of General Circular No. 39/2020, dated December 31, 2020, provided an extension to companies to conduct the extraordinary general meeting, through video conferencing or other audio-visual means, up to June 30, 2021. All of the other terms and conditions of the earlier circulars on the matter would remain the same and would have to be complied with.

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

III. COMPETITION

i. Supreme Court clarifies on the issue of "locus standi" to file information before the Competition Commission of India

In a landmark decision, the Hon'ble Supreme Court of India has clarified the requirement of "locus standi" to file information before the Competition Commission of India ("**CCI**").

In a case filed in the CCI, against cab-aggregators Ola and Uber by an individual, it was alleged that the cab drivers have formed a cartel amongst each other by utilizing the connectivity features of the software/ applications of Ola and Uber. The CCI dismissed the case on account of lack of evidence against the drivers or the cab aggregators.

On appeal, the National Company Law Appellate Tribunal ("**NCLAT**") upheld the CCI decision on merits. However, the NCLAT held that the informant did not have any locus standi to file information before the CCI pertaining to this matter as he has not suffered any legal injury on account of the alleged conduct of the cab-aggregators. Consequently, he could not have filed information before the CCI.

The Supreme Court disagreed with the findings of the NCLAT as far as the issue of locus standi was concerned. The Court held that the information may be received from any person, whether such person is or is not personally affected. The Court noted the 2007 Amendment to the Competition Act, 2002 ("**Act**") through which the word "Complainant" was substituted with the word "Informant".

Further, the Court also held that there is no "locus standi" requirement to file an appeal before the appellate tribunal against the order of the CCI by a person who has filed an information with the CCI. The Court held that:

"*Further, it is not without significance that the expressions used in sections 53B and 53T of the Act are "any person", thereby signifying that all persons who bring to the CCI information of practices that are contrary to the provisions of the Act, could be said to be aggrieved by an adverse order of the CCI in case it refuses to act upon the information supplied.*"

The Court concluded as follows:

"*When the CCI performs inquisitorial, as opposed to adjudicatory functions, the doors of approaching the CCI and the appellate authority, i.e., the NCLAT, must be kept wide open in public interest, so as to subserve the high public purpose of the Act.*"

The Court disposed off the matter in terms of the above observations.

The full text of the Order may be accessed here.

ii. Competition Commission of India closes investigation against Phenol importers for alleged cartelization

The Competition Commission of India ("**CCI**") has closed a case of alleged cartelization amongst Phenol importers, in India, for an alleged violation of Section 3(3) of the Competition Act, 2002 ("**Act**").

In a case filed by Indian Laminate Manufacturers Association, it was alleged that the Phenol importers artificially increased Phenol prices from Rs. 60/ kg to Rs. 115/ kg between January, 2016 and March, 2016. It was alleged that there was no explanation for this concerted price increase as the demand was low during the period and the supply was high. Further, the prices in the international market had not increased.

The investigation noted that the Phenol supply in India is heavily dependent on imports as the local production is not enough. The investigation revealed that the market is concentrated with few manufacturers enjoying majority of the market share. Even though prices moved in a concerted manner during the period in question, there was no conclusive economic proof to establish cartelization. In view of the above, the investigation concluded that there was insufficient evidence to indicate cartel among the market players to manipulate the prices of Phenol, in India, during the relevant period.

Having observed that there was a steep rise in the domestic Phenol prices vis-à-vis international prices, the CCI proceeded to examine whether such a rise was a result of any concerted efforts on the part of the opposite parties examined by the investigation. However, the investigation did not find any cogent evidence in support of the allegation that the opposite parties cartelized by fixing prices of Phenol. In this regard, the CCI noted that the indication of price parallelism per se does not amount to collusion. Due to lack of sufficient evidence for conclusive finding of violation of Section 3(3) of the Act, the CCI closed the case.

The full text of the Order may be accessed here.

iii. Competition Commission of India dismisses a case of alleged cartelization against Hindalco Industries Limited and Vedanta Limited

The Competition Commission of India ("**CCI**") has dismissed a case against Hindalco Industries Limited and Vedanta Limited for alleged cartelization in the market for certain copper products. In a case filed by an anonymous informant, it was alleged that the 2 (two) opposite parties have a market share of 85-90% in the market for production of refined copper.

It was alleged that the opposite parties typically issue their price circulars containing various components including additional charges to buyers almost simultaneously. It was averred that the opposite parties give discounts to their customers on the premium that has been set out in their price circulars and that these discounts are also discussed and shared between the opposite parties in order to adjust volumes and maintain parity in the market. Allegedly, all these discussions/ agreements were captured on excel sheets maintained by both the opposite parties. It was also alleged that the opposite parties have also carved out certain customers amongst themselves.

The CCI noted that the informant had not supplied any data to support the allegations in the information. None of the sources based on which informant made his allegations have been revealed. In light of no evidence being produced by the informant, the CCI did not deem it necessary to order an investigation in the present case.

The full text of the Order may be accessed here.

iv. Competition Commission of India initiates investigation against Google in India in relation to abuse of dominance

The Competition Commission of India ("**CCI**") has ordered an investigation against Alphabet Inc., Google and its Indian subsidiaries for alleged abuse of dominance in relation to the Unified Payment Interface ("**UPI**") 'Google Pay', installed on smartphones running Google's Android mobile operating systems. The CCI considered that Google was *prima facie* dominant in the market for apps facilitating payment through UPI in India.

It was alleged that Google mandates use of Google Pay for purchasing apps and in-app purchases in the Google Play Store, while excluding other payment options and their service providers from such purchases made on its ecosystem. The CCI considered the imposition of such exploitative and exclusionary condition as *prima-facie* unfair in terms of Section 4(2)(a) of the Act.

It was also alleged that Google encourages pre-installation and opting of Google Pay as the default payment option on new smart mobile devices using the Android OS at the time of initial set up. The CCI observed that pre-installation of Google Pay may create a sense of exclusivity and default as users may not opt for downloading competing apps. Such conduct of Google was considered prima-facie violative of Section 4 of the Act.

It was also alleged that Google has provided search bias to its Google Pay app in the Play Store by placing it as the top result for queries even when it may not be the most relevant result based on specific queries. The CCI considered that such conduct is exclusionary and violative of Section 4(2) of the Act.

The CCI has ordered a detailed investigation against Google and its subsidiaries for the above conduct for alleged violation of Section 4 of the Act.

The full text of the Order may be accessed here.

v. Competition Commission of India approves the acquisition of Future Group's retail business by Reliance

The Competition Commission of India ("**CCI**") has approved the acquisition of retail and wholesale undertaking as well as the logistics and warehousing undertaking of Future Group by Reliance Industries Limited, through its subsidiaries. The acquisition is a horizontal combination as both the entities/groups are engaged in retail and associated businesses.

The CCI has approved the said combination as per the information available on the website of the CCI. The detailed order of the CCI is yet to be made public.

The summary of the Notice may be accessed here.

vi. Competition Commission of India deletes requirement to separately disclose the non-compete restrictions in the merger notification

The Competition Commission of India, by way of the amendment regulations dated November 26, 2020, has modified the extant combination regulations by dispensing certain disclosure requirements in the combination notices. Parties to a combination are no more required to give separate details regarding their non-compete restrictions, in the combination notice. In this regard, the CCI has omitted item 5.7 of Form I of Schedule II to the combination regulations.

The full text of the Notification may be accessed here.

IV. INSOLVENCY & BANKRUPTCY

A. REGULATORY UPDATES

i. The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020 – Amendment

The Insolvency and Bankruptcy Board of India ("**Board**") *vide* its gazette notification dated November 13, 2020 bearing no. No. IBBI/2020-21/GN/REG066 has published the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020 ("**Amendment CIRP**") to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 by *inter alia* insertion of the following regulations:

- Regulation 2A – to now permit a financial creditor to furnish as record or evidence of default [as required under Section 7(3)(a) of the Insolvency and Bankruptcy Code, 2016] the following:
    - Certified copy of entries in the relevant accounts in the bankers book as defined in Section 2(c) of the Bankers Books Evidence Act, 1891;

- An order of a court or tribunal that has adjudicated on the non-payment of a debt, where the period of appeal against such order has expired;

- Regulation 13(2)(ca) - to now also require the insolvency resolution professional/ resolution professional to submit the list of creditors on an electronic platform of the Board for dissemination on its website; and

- Regulation 39(5)(A) - to require the resolution professional to intimate each claimant the principle or formulae for payment of debts under a resolution plan, within 15 (fifteen) days of the order of the adjudicating authority approving such resolution plan.

The aforementioned insertions are applicable to the corporate insolvency resolution process that are ongoing and commencing on or after the date of commencement of the Amendment CIRP i.e. November 13, 2020.

The full text of the Notification can be accessed here.

ii. The Insolvency and Bankruptcy Board of India (Liquidation Process) (Fourth Amendment) Regulations, 2020 - Amendment

The Insolvency and Bankruptcy Board of India *vide* its gazette notification dated November 13, 2020 bearing no. IBBI/2020-21/GN/REG067 has published the Insolvency and Bankruptcy Board of India (Liquidation Process) (Fourth Amendment) Regulations, 2020 to amend the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 by *inter alia* inserting the following regulations:

- **Regulation 30A** – To permit a creditor to assign or transfer during the liquidation process the debt due to him or it to any other person as per applicable laws. After the assignment/transfer the creditor and the assignee/ transferee are required to provide to the liquidator the terms of such assignment or transfer and the identity of the assignee /transferee.

- **Regulation 37A** – To permit the Liquidator in consultation with the stakeholders' consultation committee under regulation 31A to assign or transfer to any person 'not readily realisable asset' (meaning any asset included in the liquidation estate which could not be sold through available options and includes contingent or disputed assets, and assets underlying proceedings for preferential, undervalued, extortionate credit and fraudulent transactions).

The full text of the Notification can be accessed here.

iii. Suspension of initiation of corporate insolvency resolution process under the Insolvency and Bankruptcy Code - Extension

The Ministry of Corporate Affairs *vide* gazette notification bearing no.S.O.4638(E) dated December 22, 2020 has in exercise of the powers conferred on it under Section 10A of Insolvency and Bankruptcy Code, 2016, extended the period prescribed in Section 10A by 3 (three) months from December 25, 2020. In light of the said extension, no application shall be filed for initiation of corporate insolvency resolution process of a corporate debtor under Sections 7, 9 and 10 of the IBC in respect of a default arising on or after March 25, 2020 for a period of three more months from December 25, 2020.

The full text of the Notification can be accessed here.

B. JUDICIAL PRONOUNCEMENTS

i. State Bank of India v. Athena Energy Ventures Private Limited

[Company Appeal (Insolvency) No.633 of 2020 decided on November 24, 2020 by the National Company Law Appellate Tribunal]

Background:

In the present case, State Bank of India ("**Appellant**") had filed an application for initiation of corporate insolvency resolution process ("**CIRP**") before the adjudicating authority against Athena Energy Ventures Private Limited ("**Corporate Debtor**") which was the corporate guarantor for Athena Chattisgarh Power Ltd. ("**Borrower**"). Upon the Borrower committing a default in repayment of financial assistance granted by the Appellant to it, the Appellant had already filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") for initiating CIRP against the Borrower before the adjudicating authority. Thereafter, the Appellant filed the application under Section 7 of IBC seeking initiation of CIRP against Corporate Debtor/corporate guarantor also.

The instant appeal was filed before the Hon'ble National Company Law Appellate Tribunal ("**NCLAT**") under Section 61(1) of the IBC against the impugned order dated March 04, 2020 passed by the adjudicating authority wherein the adjudicating authority had declined to admit the application against the Corporate Debtor/corporate guarantor as it was on same set of facts, claim and default for which CIRP was already initiated and was in progress against the Borrower and the claim of the Appellant had already been admitted.

Findings of the Court:

The Hon'ble NCLAT has adjudicated on the issue of whether CIRP can be initiated against a borrower and its corporate guarantor simultaneously. The Hon'ble NCLAT after referring to the provisions of Section 60(2) and Section 60(3) of the IBC, the report of the Insolvency Law Committee of February 2020 and its earlier judgment dated September 20, 2019 in *Edelweiss Asset Reconstruction Company Ltd. v. Sachet Infrastructure Ltd. and Ors.* has held that CIRP can be initiated simultaneously against the Borrower and Corporate Guarantor. While arriving at this decision, the Hon'ble NCLAT has diverged from its earlier judgment dated January 08, 2019 in *Dr. Vishnu Kumar Agarwal vs. Piramal Enterprises Ltd.* where it was held that once a petition under Section 7 of the IBC is filed against the principal debtor/co-guarantor and CIRP has been initiated, the Financial Creditor cannot file another application on the very same set of claim.

Further, it has also held that where principal borrower and surety are undergoing CIRP, the creditor should be able to file claims in the CIRP of both the matters and if the Creditor receives a portion of the debt due from the borrower/Guarantor in the respective CIRP then the same should be taken note of and adjusted in the other CIRP. The Hon'ble NCLAT has further observed that said adjustment can be conveniently done when insolvency resolution professional/ resolution professional in both the CIRPs is the same and has therefore observed that the Insolvency and Bankruptcy Board of India may have to lay down regulations to guide IRP/RPs in this regard.

ii. Venus Recruiters Private Limited v. Union of India

[Writ Petition (C) No.8705 of 2019 decided on November 26, 2020 by the High Court of Delhi at New Delhi]

Background:

The Resolution Professional of M/s Bhushan Steel Limited ("**Corporate Debtor**") filed an application under Section 43 of the IBC for avoidance ("**Avoidance Application**") of a number of "suspect" transactions between the Corporate Debtor and various third parties, including Venus Recruiters Pvt. Ltd. ("**Venus**") during the corporate insolvency resolution process ("**CIRP**") but prior to approval of the resolution plan submitted by M/s Tata Steel Limited ("**Tata Steel**") by the Hon'ble National Company Law Tribunal (Principal Bench), New Delhi ("**NCLT**"). The resolution plan of Tata Steel was subsequently approved by the Hon'ble NCLT but no specific order on the Avoidance Application was passed. Thereafter, the Hon'ble NCLT issued notice to the counterparties in the Avoidance Application, directing them to file their responses to the Avoidance Application.

The Writ Petition was filed before the Hon'ble High Court of Delhi at New Delhi ("**HC Delhi**") by Venus who was a party to one such alleged suspect transaction with the Corporate Debtor. Venus sought for quashing of the Avoidance Application pending before Hon'ble NCLT.

The Hon'ble HC Delhi has examined whether an application for avoidance of preferential transactions filed under Section 43 of Insolvency and Bankruptcy Code, 2016 can survive beyond the conclusion of the CIRP and the role of the resolution professional in filing/pursuing such applications.

The Hon'ble HC Delhi has formulated and considered three dimensions to the question before it as follows:

- Whether a RP can continue to act beyond the approval of the Resolution Plan?
- Whether an avoidance application can be heard and adjudicated after the approval of the Resolution Plan? and
- Who would get the benefit of an adjudication of the avoidance application after the approval of the Resolution Plan?

Findings of the Court:

The Hon'ble HC Delhi observed that the role of the resolution professional is to manage the affairs of the corporate debtor during CIRP and not thereafter. Further, whilst referring to proviso of Section 23 under the IBC, it has been observed that resolution professional shall manage the affairs of the corporate debtor either till approval of resolution plan or till the appointment of the liquidator. Therefore, it has held that the role of the resolution professional cannot exceed beyond the order of approval passed by the adjudicating authority and the resolution professional cannot be permitted to pursue avoidance applications as the *'Former RP'* of a corporate debtor, which is no longer in existence.

Additionally, the Hon'ble HC Delhi has held that once the resolution plan is approved and the new management takes over, it is completely up to the new management to decide whether to continue a transaction or agreement or not. Moreover, in case the committee of creditors or the resolution professional

are of the view that any transaction is objectionable in nature then the order in respect thereof would have to be passed prior to the approval of the resolution plan.

The Hon'ble HC Delhi has also held that an avoidance application for any preferential transaction is meant to give some benefit to the creditors of the corporate debtor and the benefit is not meant for the corporate debtor in its new avatar after approval of the resolution plan unless stated so in the resolution plan.

Further, the Hon'ble HC Delhi has also held that once a resolution plan stands approved by the Hon'ble NCLT and the management of the corporate debtor is handed over to the successful resolution applicant, there is no further jurisdiction on Hon'ble NCLT to adjudicate, except on issues pertaining to the resolution plan itself (if any). The Hon'ble HC Delhi has therefore held in the present case that since the resolution plan was approved by the Hon'ble NCLT on May 15, 2018, the CIRP came to an end on that date, the Hon'ble NCLT lacked jurisdiction to adjudicate upon the avoidance application.

iii. Tharakan Web Innovations Private Limited v. Cyriac Njavally

[Insolvency Bankruptcy Application bearing No. IBA/34/KOB/2020 order passed on December 01, 2020 by the National Company Law Tribunal Kochi Bench, Kerala]

Background:

In the present case, an application was filed under Section 9 of the Insolvency and Bankruptcy Code 2016 ("**IBC**") by an Operational Creditor for institution of corporate insolvency resolution process ("**CIRP**") alleging non-payment of a sum of Rs. 31,33,595/- (Rupees thirty one lakhs thirty three thousand five hundred and ninety five only) by the Corporate Debtor even after expiry of ten days from the date of delivery of a demand notice in Form 3. The Corporate Debtor contended that since the application was filed even before expiry of ten days from the date of delivery of the demand notice the application was not maintainable. It was further contended by the Corporate Debtor that since the application was filed subsequent to the coming into force of the Notification bearing no. S.O. 1205(E) dated March 24, 2020 under Section 4 of the IBC specifying Rupees One Crore as the minimum amount of default for filing an application for institution of CIRP ("**Notification dated March 24, 2020**") and the amount of default claimed in the present application was under Rupees One Crore, the application was not maintainable.

Findings of the Court:

The Hon'ble NCLT Kerala on verification from the registry noted that the application under Section 9 of the IBC was dated March 07, 2020, however, the same was filed on September 25, 2020 and hence was filed after expiry of ten days from the date of service of the demand notice.

Further, the Hon'ble court after examining the Notification dated March 24, 2020 and the judgment of the Hon'ble NCLAT dated October 12, 2020 in *Madhusudhan Tantia vs. Amit Choraria and another* has held that the Notification dated March 24, 2020 is prospective in nature and not retrospective or retroactive. It has further held that the Notification dated March 24, 2020 does not safeguard corporate debtors from the initiation of CIRP especially in cases wherein defaults towards creditors have occurred before the pandemic and the resultant financial crisis. It has also held that such an interpretation would be contrary to the intention of the executive in exercise of its power of delegated legislation and that if the intention was to provide for a blanket protection to corporate debtors from being dragged to the adjudicating authority

irrespective of when or what extent a default has taken place, it would necessarily require a legislative amendment and that a mere issuance of the notification would not suffice.

N.B. *The Hon'ble High Court of Kerala at Ernakulam has vide its order dated December 11, 2020 in W.P. (C) No. 27636/2020 (D) – Tharakan Web Innovations Pvt. Ltd. vs. National Company Law Tribunal, Kochi Bench and anther, stayed all further proceedings in IBA/34/ KOB/2020 pending before the National Company Law Tribunal, Kochi.*

V. LITIGATION & ARBITRATION

i. UMC Technologies Private Limited v. Food Corporation of India and Anr.

[Civil Appeal No. 3687 of 2020 before the Supreme Court of India, decided on November 16, 2020]

Show Cause Notice issued without specifying blacklisting, not valid for debarment

Background:

In the present case, Food Corporation of India ("**FCI**") issued a tender inviting bids for appointment of a recruitment agency to conduct the process of recruitment. The Appellant was also one of the bidders and was appointed for a period of 2 (two) years. Later while conducting the examination process, the question paper was leaked. FCI issued a show cause notice to Appellant and after due deliberation, passed an order blacklisting the agency from undertaking FCI projects for the period of next 5 (five) years. The Appellant approached the High Court of Madhya Pradesh challenging his blacklisting and his petition was dismissed. Aggrieved by this, the Appellant challenged the order of the High Court before the Supreme Court of India.

Findings of the Court:

The Hon'ble Supreme Court, after considering facts of the instant case including the show cause notice issued, the blacklisting order and the terms of the agreement between the parties quashed the order of blacklisting. It was held that a clear notice is essential for ensuring that the person against whom the penalty of blacklisting is intended to be imposed, has an adequate, informed and meaningful opportunity to show cause against his possible blacklisting. However, in the present case, the action of blacklisting was neither expressly proposed nor could have been inferred from the language employed by the FCI in the show cause notice. It was further held that there was nothing in show cause notice which could have given the Appellant the impression that the action of blacklisting was being proposed. The Supreme Court was of the view that mere existence of the clause in the agreement cannot satisfy the mandatory requirement of a clear mention of the proposed action in the show cause notice. It was further observed that as the show cause notice was completely silent about blacklisting, the same did not fulfil the requirement of the valid show cause notice and hence the order of blacklisting could not be sustained.

Observations and Analysis:

It was observed by the Supreme Court that blacklisting a company has some inherent social stigma attached which may eventually lead to a civil death of the Appellant. Further, as Appellant was not given reasonable opportunity to defend himself; the same was held to be in violation of principles of natural justice. It was further held that show cause notice must specifically spell out the intention of blacklisting.

ii. Today Homes and Infrastructure Private Limited v. Ajay Nagpal and Ors

[Special Leave to Appeal (C) No 2386/2019 before the Supreme Court of India, decided on December 2, 2020]

RERA Does Not Bar Consumer Fora From Entertaining Complaints By Allottee

Background:

In the instant case, the issue before the Court was whether the proceedings under the Consumer Protection Act, 1986 can be commenced by home buyers (or allottees of properties in proposed real estate development projects) against developers, after the commencement of the Real Estate (Development and Regulation) Act, 2016 ("**RERA Act**").

Findings of the Court:

It was reiterated by the Hon'ble Supreme Court whilst relying upon its earlier judgment passed in the matter of Pioneer Urban Land and Infrastructure Limited and Anr. v. Union of India [(2019) SCC Online SC 1005] and in Imperia Structures Limited v. Anil Patni and Anr. [Civil Appeal Nos. 3581-90/ 2020 and Civil Appeal no. 3591/20], that Section 79 of the RERA Act would not in any way bar the Commission or Forum under the provisions of the Consumer Protection Act, 1986 to entertain any complaint on behalf of an allottee.

Observations and Analysis:

The remedies applicable to the parties under Consumer Protection Act 1986 and Real Estate (Development and Regulation) Act, 2016 are concurrent with each other.

iii. Shashikant Raghunath Naik Patil v. Ptubhai Narsinh Naik (since deceased) through Legal Heirs

[Special Leave to Appeal (C) No. 5793/2020 before the Supreme Court of India, decided on October 26, 2020]

Revision Petition before the NCDRC against an order passed by the State Commission in an appeal arising out of execution proceedings is not maintainable

Background:

In this case, the Hon'ble National Consumer Dispute Redressal Commission ("**NCDRC**") dismissed a revision petition filed against an order of the Hon'ble Maharashtra State Consumer Dispute Redressal Commission ("**State Commission**"), which was in appeal against the District Forum order in an Execution Petition. The Hon'ble NCDRC had said that its revision jurisdiction is only exercisable when the order of the State Commission in any consumer dispute is not in an execution petition.

Findings of the Court:

The Hon'ble Supreme Court, whilst relying upon its own judgment passed in the matter of Karnataka Housing Board v. K.A. Nagamani [(2019) 6 SCC 424] held that the Hon'ble NCDRC was correct in concluding that a revision would not be maintainable under Section 21 of the Consumer Protection Act, 1986, against an order which was passed in appeal by the Hon'ble State Commission arising out of execution proceedings.

The Hon'ble Supreme Court, in the matter of Karnataka Housing (*supra)* held that the jurisdiction under Section 21(b) of the Consumer Protection Act, 1986 can be exercised by the Hon'ble NCDRC only in case of a "consumer dispute" filed before the State Commission. Execution proceedings and orders passed for enforcement of the final order in the consumer dispute, cannot be construed to be orders passed in the "consumer dispute".

Observations and Analysis:

It was held that there is no remedy provided under Section 21 of the Consumer Protection Act, 1986 to file a revision petition against an order passed in appeal by the State Commission in execution proceedings.

iv. Vidya Drolia & Ors. v. Durga Trading Corporation

[Civil Appeal No.2402 of 2019 before the Supreme of India, decided on December 14, 2020]

Landlord-Tenant Disputes Under Transfer of Property Act are arbitrable except when specific court or forum has been given exclusive jurisdiction

Background:

In the present case, the tenancy agreement contained a dispute resolution clause. On August 24, 2015, the Respondent wrote a letter to the Appellants seeking vacant possession of the property, as the period of lease was expiring on February 1, 2016. The Appellants did not vacate and as such aggrieved by the act of the Appellants, the Respondent invoked the arbitration under the dispute resolution clause provided under the tenancy agreement. On April 28, 2016, the Respondent filed a petition under Section 11 of the Arbitration and Conciliation Act, 1996 ("**A&C Act**") before the Hon'ble Calcutta High Court for appointment of an arbitrator. On September 7, 2016, the Hon'ble High Court passed the impugned order for appointing an arbitrator, after rejecting the Appellants objections on the arbitrability of the dispute. As such, aggrieved by the order, the Appellants had approached the Hon'ble Supreme Court, on the ground that, after the judgment of the Hon'ble High Court was rendered appointing the arbitrator, this Court in Himangni Enterprises v. Kamaljeet Singh Ahluwalia [(2017) 10 SCC 706] had held that where the provisions of the Transfer of Property Act, 1882 ("**TP Act**") applied between the landlord and tenant, the disputes would not be arbitrable. Hence, the Hon'ble Supreme Court has dealt with the issue relating to the "meaning of non-arbitrability and when the subject matter of the dispute is not capable of being resolved through arbitration".

Findings of the Court:

The Hon'ble Supreme Court has over-ruled the judgment passed in *Himangni Enterprises (Supra)* and has observed that no provision in the TP Act negates the arbitrability of disputes governed by the A&C Act. It was held that landlord-tenant disputes are arbitrable and the TP Act does not forbid or foreclose arbitration. It was further observed that however, landlord – tenant disputes would not be arbitrable where specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations.

Such rights and obligations can be decided only by such special courts or forums and not through arbitration.

Observation and Analysis:

Accordingly, whilst dealing with the issue at hand, i.e., the meaning of non-arbitrability and when the subject matter of the dispute is not capable of being resolved through arbitration, the Hon'ble Court has *inter alia* held that:

- Sections 8 and 11 of the A&C Act have the same ambit with respect to judicial interference;
- Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the A&C Act, unless it is a clear case of deadwood;
- The Court, under Sections 8 and 11 of A&C Act, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of a valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding;
- The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above, i.e., 'when in doubt, do refer';
- The scope of the Court to examine the prima facie validity of an arbitration agreement includes only: (i) Whether the arbitration agreement was in writing? or (ii) Whether the arbitration agreement was contained in exchange of letters, telecommunication etc? or (iii) Whether the core contractual ingredients qua the arbitration agreement were fulfilled? or (iv) On rare occasions, whether the subject matter of dispute is arbitrable?.

VI. LABOUR & EMPLOYMENT

i. Government of Maharashtra extends applicability of Employees State Insurance Act, 1948 to certain establishments

The Government of Maharashtra, vide Notification No. ESIS 2015/C.R.150/RAKAVI-2 dated September 29, 2020, has approved the draft notification dated September 10, 2020, by way of which the applicability of Employees State Insurance Act, 1948 has been extended to Shops, Hotels, Restaurants, Road Motor Transport Establishments, Cinema including preview theatres, Newspaper Establishment as defined in Section 2(d) of the Working Journalists (Conditions of Services) and Miscellaneous Provisions Act, 1995, wherein 10 (ten) or more persons are/were employed on any day of the preceding 12 (twelve) months. The draft notification came into effect from October 01, 2020.

The full text of the Notification dated September 10, 2020 can be accessed here.
The full text of the Notification dated September 29, 2020 can be accessed here.

ii. Haryana Legislature passes the Haryana State Employment of Local Candidates Bill, 2020

The Haryana Legislative Assembly, on November 05, 2020, passed the Haryana State Employment of Local Candidates Bill, 2020 (Bill No. 33–HLA of 2020) ("**Bill**"). Upon its implementation, the Bill would

reserve 75% (seventy five percent) of the jobs in specified private sector posts for local candidates. The Bill will cease to have effect on the expiry of 10 (ten) years from the date of its commencement. Some key features of the Bill are as follows:

- **Applicability:** it will apply to: (i) all companies, societies, trusts, limited liability partnership firms, partnership firms, (ii) any person employing 10 or more persons, and (iii) any entity notified by the government. It will not apply to the central or state government, or any organisation owned by the central or state government.

- **Compulsory Registration**: within 3 (three) months of the coming into force of the Bill, covered employers shall be required to register on Government's designated portal, such employees receiving a gross monthly salary or wages of not more than fifty thousand rupees or as notified by the Government, from time to time.

- **Recruitment of Local Candidates**: every covered employer shall employ 75% (seventy five percent) of the local candidates with respect to such posts where the gross monthly salary or wages are not more than fifty thousand rupees or as notified by the Government. Where an adequate number of local candidates of the desired skill, qualification, or proficiency is not available, the concerned employer may seek exemption from the aforesaid requirement by applying to the Designated Officer, in such form and manner as may be prescribed.

- **Penalties**: non-compliance of the requirement of registration of employees as mentioned above may lead to imposition of a fine, which shall not be less than twenty-five thousand rupees, but which may extend to one lakh rupees. Further, failure to provide 75% (seventy five percent) employment to local candidates (except as otherwise provided for) will attract a penalty, which shall not be less than fifty thousand rupees, but which may extend to two lakh rupees.

The full text of the Bill can be accessed here.

iii. Government of Karnataka notifies the Karnataka Shops and Commercial Establishments (Amendment) Act, 2020

The Government of Karnataka, vide gazette notification dated October 19, 2020, has notified the Karnataka Shops and Commercial Establishments (Amendment) Act, 2020 (Karnataka Act No. 40 of 2020) (**"Amendment Act"**). The Amendment Act amends Section 25 Karnataka Shops and Commercial Establishments Act, 1961 (**"Act"**) relating to employment of women during night shifts. Prior to the amendment, only women working in IT/ITeS establishments were permitted to work during night shifts, subject to certain prescribed conditions. However, pursuant to introduction of the Amendment Act, women employees **willing to work** at night in a shop or commercial establishment will be allowed to do so, subject *inter alia* to the following conditions:

- Provisions under the Act relating to Daily and Weekly Hours, Extra Wages for Overtime Work, Interval for Rest, Spread Over and Weekly Holidays shall continue to apply;

- Willingness of women employees shall be obtained in writing;

- The establishment shall provide transport facilities from the residence of the woman employee to the workplace and back free of cost and with adequate security;

- Employment of women employee shall be on rotation basis;
- Adequate number of security guards shall be posted during night shift;
- Sufficient rest rooms, electricity, latrines lockers, dispensary facility and washing facilities with adequate water supply shall be provided separately;
- The establishment shall bear the cost of crèche obtained by the women employees from voluntary or other organisations;
- The establishment shall obtain bio-data of each driver and conduct pre-employment screening of the antecedents of all drivers employed on their own.
- The company shall provide security guards at workplace and night shift vehicles when women employees are being picked up first or dropped last;
- The Schedule of route of pick-up and drop shall be decided by the supervisory office of the company only;
- An App in mobile may be developed and adopted by the establishment through which the women employee can contact the concerned at the time of emergency.

Failure to comply with the above conditions shall lead to cancellation of the Registration Certificate obtained by the establishment.

The full text of the Notification can be accessed here.

iv. Government of Uttar Pradesh introduces the Factories (Uttar Pradesh Amendment) Act, 2020

The Government of Uttar Pradesh, by way of Notification No. 1897(2)/LXXIX-V-I-20-1(ka)33-20 dated October 20, 2020, has notified the Factories (Uttar Pradesh Amendment) Act, 2020 (**"Amendment Act"**), by way of which, Section 5-A has been inserted in the Factories Act, 1948 (**"Act"**) thereby granting the State Government with the power to exempt a factory from the provisions of the Act in public interest. In terms of the amendment, the State Government may temporarily exempt new factory or class of new factories whose commercial production starts within a period of 1000 (one thousand) days after the commencement of the Amendment Act from all or any provisions of the Act for a period of 1000 (one thousand) days from the date of commencement of production.

The full text of the Notification can be accessed here.

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