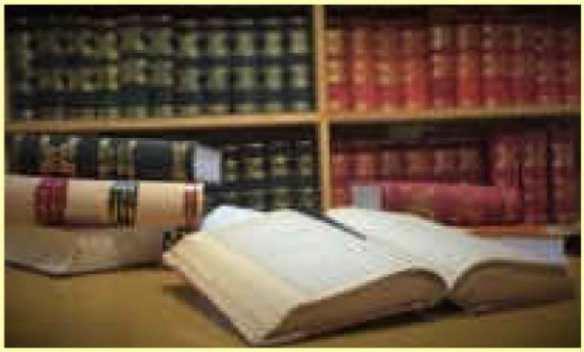
DUA ASSOCIATES
THE BRIEFCASE
Quarterly Newsletter: Vol.20, April 2021



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UPDATES

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i. Foreign Exchange Management (Export of Goods and Services) (Amendment) Regulations, 2021

The Reserve Bank of India ("**RBI**") by way of Notification No. FEMA 23(R)/(4)/2021-RB dated January 08, 2021("**Notification**") amended the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 ("**Principal Regulations**").

In terms of the Notification, Sub regulation (ea) of Regulation 4 of the Principal Regulations has been substituted to include the re-export of leased aircraft/helicopter and/or engines/auxiliary power units either in completely or partially knocked down condition and also the termination or cancellation of the lease agreement between the lessor and lessee.

The full text of the Notification can be accessed here.

ii. Remittances to International Financial Services Centres (IFSCs) in India under the Liberalised Remittance Scheme

The RBI by way of A.P. (DIR Series) Circular No. 11 dated February 16, 2021 ("**Circular**") has reviewed the extant guidelines on Liberalised Remittance Scheme ("**LRS**"). Pursuant to the Circular, the RBI has permitted the resident individuals to make remittances under LRS to International Financial Services Centres ("**IFSC**") set up in India under the Special Economic Zone Act, 2005, subject to satisfaction and compliance with specified conditions.

The full text of the Circular can be accessed here.

iii. Investment by Foreign Portfolio Investors in Defaulted Bonds

The RBI by way of A.P. (DIR Series) Circular No. 12 dated February 26, 2021 ("**Circular**") has announced that investment by Foreign Portfolio Investors ("**FPI**") in defaulted corporate bonds will be exempted from the short-term limit and the minimum residual maturity requirement under the medium term framework.

The full text of the Circular can be accessed here.

iv. Investment by Foreign Portfolio Investors in Debt

The RBI has, by way of A.P. (DIR Series) Circular No. 31 dated June 15, 2018 as updated on February 26, 2021 ("**Circular**"), made various revisions / changes to minimum residual maturity requirement, security-wise limit, online monitoring of investments in G-sec and SDL Categories, concentration limit, single/group investor-wise limits in corporate bonds, pipeline investments in corporate bonds and that other changes where FPI shall not invest in partly paid debt instruments.

The full text of the Circular can be accessed here.

v. Review of FDI policy on downstream investments made by Non -resident Indians ("NRI")

The Ministry of Commerce and Industry Department for Promotion of Industry and Internal Trade by way of Press Note No.1 (2021 Series) dated March 19, 2021 ("**Press Note**") has amended the extant FDI Policy ("**FDI Policy**") in relation to the investments made by Indian companies owned and controlled by NRIs and to provide clarity on downstream investments.

In terms of the Press Note, a new clause (c) has been inserted to Para 1.2 (ii) of Annexure 4 of the FDI Policy by virtue of which the investments by NRIs made on a non-repatriation basis as per Schedule IV of the Foreign Exchange Management (Non- Debt Instruments) Rules 2019 are deemed to be domestic investments and the same shall be treated at par with investments made by the residents. Further, the investments made by the Indian entities which are owned and controlled by NRI(s) on a non- repatriable basis shall not be considered for calculation of indirect foreign investment.

Please note that the above will take effect from the date of notification under Foreign Exchange Management Act.

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

II. CORPORATE

i. Clarification on spending of CSR Funds

The Ministry of Corporate Affairs ("**MCA**") has, by way of General Circular No. 01/2021, dated January 13, 2021, clarified that the spending of funds, for carrying out awareness campaigns/ programmes or public outreach campaigns on the Covid-19 vaccination programme, will be an eligible CSR activity, in terms of Item No. (i) (*promotion of health care, including preventive health care and sanitisation*), Item No. (ii) (*promoting education*) and Item No. (xii) (*disaster management*) of Schedule VII to the Companies Act, 2013.

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

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

The MCA has, by way of Notification No. S.O. 325 (E), dated January 22, 2021 ("**Notification I**"), 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**").

Notification I has brought into force, Sections 2, 11, 18(c), 22(ii), 25, 27, 53, 55, 58 to 60 (both inclusive), 62, 64 and 65 of the Amendment Act. Some of the key amendments are stipulated below:

- A proviso to the definition of 'listed company', in Section 2(52) of the Act, has been included which stipulates that certain class or classes of companies, which have listed or intend to list such class of securities, as would be set out in the applicable rules, would not be considered as 'listed companies'. A consequent amendment has been made to the Companies (Specification of Definitions Details) Rules, 2014, which sets out the details as aforesaid.

- Section 62(1)(a)(i) of the Act, which relates to a 'rights offer', has been amended to permit a company to reduce the number of days, below 15 (fifteen) days, within which an offer for subscription of the shares should be accepted, failing which the offer will be deemed to be declined. The lesser number of days would

be as per the details set out in the applicable rules and a consequent amendment has been made to the Companies (Share Capital and Debentures) Rules, 2014, the details of which have been set out herein below.

- Section 89 of the Act which relates to the declaration in respect of beneficial interests in any share, has been amended to provide the Central Government with the power to exempt any class or classes of persons, from complying with the requirements of Section 89 of the Act.

- The requirement to file agreements and resolutions, with the with the Registrar of Companies, in terms of Section 117 of the Act, has been amended, whereby the exemption provided to certain kinds of companies from filing a resolution passed in pursuance of Section 179(3) of the Act, has been expanded and made specific to only those companies, as listed in the substituted provision.

- Section 446B of the Act, prior to its amendment, related to specific offences committed by a One Person Company and a small company, and their officers in default. Section 446B has now been substituted and is made applicable to a One Person Company, a small company, a start-up company and/ or a Producer Company, or any of its officers in default, or such other person. The penalty for the commission of an offence by any of the aforementioned companies, will not exceed one half of the penalty specified in the Act for that offence, subject to a maximum of Rs. 2,00,000/- (Rupees two lakh only), and a maximum of Rs. 1,00,000/- (Rupees one lakh only), for an officer who is in default, or any other person.

- In terms of Section 452 of the Act, an officer or employee of a company, who wrongfully withholds or obtains any property of the company, may be ordered by the Court, to deliver up or refund, any such property or cash, and in default of the same, may be imprisoned. In terms of the amendment, such officer or employee, would not be imprisoned, if the court is satisfied that the company has not paid to that officer or employee, any statutory amounts, such as in relation to the provident fund, pension fund, gratuity fund, etc.

- In relation to a default in the filing of the annual return under Section 92(4) of the Act and the financial statement under Section 137(1) of the Act, an amendment has been made to Section 454(3) of the Act, which now stipulates that no penalty would be imposed, and all proceedings would be deemed to be concluded, in the event that the default has been rectified either prior to, or within 30 (thirty) days, from the issue of a notice by an adjudicating officer.

Further, the MCA has, by way of Notification No. S.O. 644(E), dated February 11, 2021 ("**Notification II**"), brought into force Section 52 and Section 66 of the Amendment Act, which has the effect of amending the Act as follows:

- Section 52 of the Amendment Act, has introduced Chapter XXIA of the Act, which sets out various provisions in relation to 'producer companies', their incorporation, registration, manner of functioning, etc. The objects of producer companies have been set out to include matters such as the production, harvesting, procurement, grading, pooling, handling, marketing, selling, export of primary produce of the members of the company or import of goods or services for the benefit of the members, processing including preserving, drying, distilling, brewing, vinting, canning and packaging of produce of its members, rendering technical services, consultancy services, training, research and development and all other activities for the promotion of the interests of its members, etc.; and

- Consequently, the first proviso to Section 465 of the Act, which stipulated that provisions of Part IXA of the Companies Act, 1956, would be applicable, mutatis mutandis, to a Producer Company, as though the Companies Act, 1956, had not been repealed, has been omitted by Section 66 of the Amendment Act.

The full text of the Notification I and Notification II can be accessed here and here and the full text of the Amendment Act can be accessed here.

iii. Amendments to Section 135 of the Companies Act, 2013 – Enforced

The MCA has, by way of Notification No. S.O. 324 (E) ("**Notification No. I**") and Notification No. S.O. 325 (E) ("**Notification No. II**"), dated January 22, 2021, brought into force with immediate effect, Section 21 of the Companies (Amendment) Act, 2019 ("**Amendment Act 2019**"), and Section 27 of the Companies (Amendment) Act, 2020 ("**Amendment Act 2020**"), respectively. Notification I and Notification II have the effect of amending Section 135 of the Act.

A company, that is required to constitute a Corporate Social Responsibility Committee, in terms of Section 135 of the Act, is required to spend a minimum amount, every financial year, on its corporate social responsibility ("**CSR**") activities, based on the average net profits of the company, made during the 3 (three) immediately preceding financial years. The amendment to Section 135(5) of the Act now takes into consideration those companies that have not completed a period of 3 (three) years, from the date of its incorporation, however, are required to constitute a Corporate Social Responsibility Committee, and such companies should calculate the amount required to be spent on its CSR activities, based on the average net profits made during the immediately preceding financial years.

In terms of the amendments to Section 135(5) and Section 135(6) of the Act, all unspent CSR amounts are required to be transferred to a Fund that is specified in Schedule VII of the Act, within a period of 6 (six) months from the date of expiry of the said financial year, unless such amount relates to an ongoing project. The unspent amount, in relation to an ongoing project, is required to be transferred to a special account opened by the company in a scheduled bank, called the 'Unspent Corporate Social Responsibility Account', within a period of 30 (thirty) days from the end of the financial year. This amount is required to be spent by the company, towards its obligations under its CSR Policy, within a period of 3 (three) financial years, from the date of such transfer, failing which, the amount shall be then transferred to a Fund specified in Schedule VII of the Act, within a period of 30 (thirty) days from the date of completion of the third financial year.

Further, a company which spends in excess of the statutory requirements, in relation to its CSR, is now being recognised, whereby such company is permitted to set off the excess amount against the requirement to spend, as specified, for such number of succeeding financial years and in the manner, as would be set out in the applicable rules. In addition, the amended Section 135 of the Act, provides a relaxation to those companies, in relation to which the total amount required to be spent on corporate social responsibilities does not exceed Rs. 50,00,000/- (Rupees fifty lakh only), whereby such companies are not required to constitute the Corporate Social Responsibility Committee, and the duties and functions of the Committee could be discharged by the board of directors.

The full text of the Notification I and Notification II can be accessed here and here, respectively and the full text of the Amendment Act 2019 and the Amendment Act 2020 can be accessed here and here.

iv. The Companies (Corporate Social Responsibility Policy) Rules, 2014 – Amended

The MCA has, by way of Notification No. G.S.R. 40 (E), dated January 22, 2021, introduced the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021 ("**Amendment Rules**"), which has the effect of amending the Companies (Corporate Social Responsibility Policy) Rules, 2014 ("**CSR Rules**"). The Amendment Rules have been brought into force on January 22, 2021, itself, unless specified otherwise therein.

The Amendment Rules have substituted the entire Rule 2 of the CSR Rules, which sets out the definitions of various terms, which have been used in the CSR Rules. The amended definitions such as in relation to CSR, takes into consideration the current Covid-19 pandemic, and specifies those activities which could be considered as activities related to the CSR and expressly also discusses those activities which would not be considered as CSR activities.

Rule 4 of the CSR Rules that required a company to undertake its CSR activities in accordance with its CSR Policy, and such other requirements, as specified, has also been substituted by the Amendment Rules. The Amendment Rules, now clearly stipulate that the CSR activities, may be undertaken by the company, either itself, or through entities, such as those established under an Act of Parliament or a State legislature, companies established under Section 8 of the Act, or a registered trust or society established by the Central Government or State Government, etc., wherein such entities are required to register themselves with the MCA, by filing the required forms. Rule 4 also provides other details in relation to the manner in which the CSR activities may be undertaken.

The Amendment Rules have further amended Rule 5 of the CSR Rules, which relates to the constitution of a CSR Committee. The amendment now requires the CSR Committee to formulate an annual action plan, in pursuance of the CSR policy of a company, and specifies what the action plan should relate to.

The Amendment Rules also substitutes Rule 7 of the CSR, which earlier simply stated what the CSR expenditure would be. The amended Rule 7 of the CSR Rules now sets out, in detail, what the CSR expenditure would include, and the manner in which certain funds, etc., have to be dealt with, as a part of the CSR expenditure. Rule 8 of the CSR Rules has been amended wherein specific details have been set out on the manner in which CSR reporting should be undertaken, in contrast to the broad and general requirements, as were earlier set out.

In addition to disclosing the CSR Policy, on the website, if any, companies will now, also be required to display the details of their CSR Committee, and the CSR projects that are approved by the Board, for public access.

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

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

The MCA has, by way of: (i) Notification No. G.S.R. 44 (E), dated January 25, 2021, brought into force with immediate effect, the Companies (Incorporation) Amendment Rules, 2021 ("**First Amendment Rules**"); and (ii) Notification No. G.S.R. 91 (E), dated February 1, 2021, brought into force, with effect from April 1, 2021, the Companies (Incorporation) Second Amendment Rules, 2021 ("**Second Amendment Rules**"). The First Amendment Rules and the Second Amendment Rules, both have the effect of amending the Companies (Incorporation) Rules, 2014 ("**Incorporation Rules**").

The First Amendment Rules has omitted Rule 41(6)(d) of the Incorporation Rules, which relates to the conversion of a public company into a private company. The specific provision which now has been omitted, earlier provided that where no order for approval or resubmission or rejection has been made by the Regional Director, in relation

to an application for conversion of a public company into a private company, the application will be deemed as 'approved', and an approval order would automatically be issued to the applicant.

The First Amendment Rules while re-numbering the existing Rule 41, sub-rules 9, 10 and 11 of the Incorporation Rules, as sub-rule 7, 8 and 9, respectively, has also substituted Rule 41(7) of the Incorporation Rules. Rule 41(7) of the Incorporation Rules sets out the procedure that would be followed by the Regional Director when any objection has been received by the Regional Director, for the conversion of a public company into a private company, or when the Regional Director itself has an objection to such conversion.

The Second Amendment Rules has made certain amendments to Rule 3 of the Incorporation Rules, in relation to the eligibility of persons for the incorporation of a 'One Person Company' and has removed the restriction, of 2 (two) years from the date of the incorporation of the One Person Company, for the conversion of such a company to any other type of company. Accordingly, Rule 6 of the Incorporation Rules has also been substituted and this rule now sets out the detailed procedure that should be adopted for the conversion of a One Person Company to a public or a private company. The consequent and applicable changes have been made to Rule 7 of the Incorporation Rules.

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

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

The MCA has, by way of Notification No. G.S.R. 93 (E), dated February 1, 2021, introduced and brought into force, with immediate effect, the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2021 ("**Amendment Rules**"), which has the effect of amending the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 ("**Compromises, Arrangements and Amalgamations Rules**").

The Amendment Rules inserts Rule 25(1)(A) in the Compromises, Arrangements and Amalgamations Rules, which stipulates that a scheme of merger or amalgamation, under Section 233 of the Act, may be entered into, between any of the following classes of companies, namely:

(i) 2 (two) or more start-up companies; or

(ii) 1 (one) or more start-up company with 1 (one) or more small company.

The Amendment Rules also provide an explanation to define a 'start-up company', to mean a private company that has been incorporated under the Act, or the erstwhile Companies Act, 1956, and is recognised, as such, in terms of the Notification No. G.S.R. 127 (E), dated February 19, 2019, issued by the Department for Promotion of Industry and Internal Trade.

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

vii. The Producer Companies Rules, 2021 – Introduced

The MCA has, by way of Notification No. G.S.R. 112(E), dated February 11, 2021, brought into force with immediate effect, the Producer Companies Rules, 2021 ("**Rules**"), which has the effect of superseding the Producer Companies (General Reserve) Rules, 2003.

The Rules specify certain provisions in relation to 'producer companies', such as the permitted investments that may be made out of the general reserves of the company and the rules that would be applicable to the change of place of the registered office of such a company from one State to another.

The full text of the Rules can be accessed here.

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

The MCA has, by way of Notification No. G.S.R. 113(E), dated February 11, 2021, introduced and brought into force, with effect from April 1, 2021, the Companies (Share Capital and Debentures) Amendment Rules, 2021 ("**Amendment Rules**"), which has the effect of amending the Companies (Share Capital and Debentures) Rules, 2014 ("**Share Capital Rules**").

Section 62(1)(a) of the Act permits a company, proposing to increase its subscribed capital, to issue further shares to persons who are already holders of the equity shares of the company. The provision states that the offer will be deemed to be declined, if not accepted, within a period of 15 (fifteen) to 30 (thirty) days from the date of the offer, or within such lesser number of days 'as may be prescribed'. The Amendment Rules have now prescribed this time period to be not less than 7 (seven) days from the date of the offer, within which time the acceptance should be provided.

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

ix. The Companies (Specification of Definitions Details) Rules, 2014 – Amended

The MCA has, by way of: (i) Notification No. G.S.R. 92 (E), dated February 1, 2021; and (ii) Notification No. G.S.R. 123 (E), dated February 19, 2021, introduced and brought into force, with effect from April 1, 2021, the Companies (Specification of Definitions Details) Amendment Rules, 2021 ("**First Amendment Rules**"), and the Companies (Specification of Definitions Details) Second Amendment Rules, 2021 ("**Second Amendment Rules**"), respectively. The First Amendment Rules and the Second Amendment Rules have the effect of amending the Companies (Specification of Definitions Details) Rules, 2014 ("**Specification of Definitions Details Rules**").

Section 2(85) of the Act, defines a 'small company', as a company, other than a public company, whose paid up share capital does not exceed Rs. 50,00,000/- (Rupees fifty lakhs only), or such higher amount as may be 'prescribed', with a maximum of Rs. 10,00,00,000/- (Rupees ten crores only), and whose turnover, as per the profit and loss account for the immediately preceding financial year, does not exceed Rs. 2,00,00,000/- (Rupees two crores only) or such higher amount as may be 'prescribed', with a maximum of Rs. 1,00,00,00,000/- (Rupees one hundred crores only). The First Amendment Rules, now, in relation to Section 2(85) of the Act, has inserted clause (t) in Rule 2(1) of the Specification of Definitions Details Rules, clarifying that the paid up share capital

of a small company should not exceed Rs. 2,00,00,000/- (Rupees two crores only) and the turnover of a small company should not exceed Rupees 20,00,00,000/- (Rupees twenty crores only).

The Second Amendment Rules have inserted Rule 2A, which lists out the classes of companies, that would not be considered as listed companies, as defined in Section 2(52) of the Act, such as, private companies which have listed their non-convertible debt securities on the basis of a private placement on a recognized stock exchange in terms of the SEBI (Issue and Listing of Debt Securities) Regulations, 2008, etc.

The full text of the First Amendment Rules can be accessed here, and the full text of the Second Amendment Rules, can be accessed here.

x. The Companies (Management and Administration) Rules, 2014 – Amended

The MCA, has by way of Notification No. G.S.R. 159 (E), dated March 5, 2021, introduced and brought into force with immediate effect, the Companies (Management and Administration) Amendment Rules, 2021 ("**Amendment Rules**"), which has the effect of amending the Companies (Management and Administration) Rules, 2014 ("**Management and Administration Rules**").

The Amendment Rules have substituted Rule 12 of the Management and Administration Rules, wherein the requirement to attach an extract of the annual return to the Board's Report, in Form No. MGT-9, has been removed. Companies are now only required to file a copy of the annual return with the Registrar, along with the prescribed fees. In addition, in terms of the substituted Rule 11(1) of the Management and Administration Rules, One Person Companies and Small Companies are required to file the annual return in Form No. MGT-7A, from the financial year 2020-2021 onwards.

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

xi. Amendments to Section 149 and Section 197 of the Companies Act, 2013 – Enforced

The MCA, has by way of Notification No. S.O. 1255 (E), dated March 18, 2021, brought into force with immediate effect, Section 32 and Section 40 of the Companies (Amendment) Act, 2020 ("**Amendment Act**"), which has the effect of amending Section 149(9) and Section 197(3) of the Act, respectively.

In terms of the Act, an independent director is entitled to receive remuneration, by way of a fee, subject however to the provisions of Section 197 and Section 198 of the Act. Section 197 of the Act relates to the maximum remuneration that may be payable, in the absence or in the case of an inadequacy of profits, for a company. Section 149(9) of the Act has now been amended, whereby it has been stated that where a company has no profits or its profits are inadequate, an independent director may receive remuneration, in accordance with the provisions of Schedule V to the Act, which shall be exclusive of any fees payable under Section 197(5) of the Act. Section 197(5) of the Act relates to the fees that may be paid to a director, for attending meetings of the Board, etc. Further, Section 197(3) of the Act has been amended to state that when a company, in a financial year, has no profits or inadequate profits, it should not pay its directors, including managing or wholetime directors, or managers, or any other non-executive directors, including independent directors, any remuneration, subject to the fees required as per Section 197(5) of the Act, except in accordance with Schedule V.

In addition to the above, consequent changes have been made to Schedule V to the Act.

The full text of the Notification and the Amendment Act can be accessed here and here, respectively.

III. COMPETITION

i. Competition Commission of India dismisses case of leveraging against Google in India

The Competition Commission of India ("**CCI**") has dismissed allegations of abuse of dominance against internet major Google in relation to alleged leveraging of its dominance position in the E-mail services market to enter/strengthen its position in the video conferencing application market in India.

In a case filed by a law student, it was alleged that Google is dominant in the E-mail services market in India through its email service "Gmail". It was alleged that Google has leveraged its dominance to enter into or strengthen its position in the specialized video conference ("**VC**") market by incorporating its VC service ("**Google Meet**") into the email services. Such conduct was alleged as violation of Section 4(2)(e) of the Competition Act, 2002 ("**Act**").

The CCI noted that regardless of the dominance of Google in the primary market, its conduct does not appear to be in violation of Section 4(2)(e) of the Act on account of mere integration of the VC facility in the email service. Consumers are not forced to use the VC facility and can use any other competing VC services of their choice. Further, to use the Google VC service, the user need not be a user of Gmail services either. Thus, as Google Meet is available as an independent app outside the Gmail ecosystem also, the CCI held that the conduct cannot be held to be an abuse.

The full text of the order can be accessed here.

ii. CCI dismisses case of alleged abuse of dominance by General Insurance Corporation of India ("GIC")

The CCI has dismissed a case of alleged abuse of dominance by state-owned reinsurer GIC. The case was filed by Automotive Tyre Manufacturers Association, alleging that the excessive increase of reinsurance premiums by GIC has resulted in increased premium payout by the members of the association to their insurers. Such allegedly arbitrary and exorbitant increase in prices by GIC was stated by the informant to be in violation of Section 4(2) of the Act.

It was also alleged that GIC has directed insurance companies to exclude coverage for infectious/contagious diseases from all continuing insurance policies. Failure to do so on part of the insurance companies would result in GIC waiving its reinsurance coverage. This 'take it or leave it' practice of GIC was alleged to be 'refusal to deal' under the provisions of Section 3(4)(d) of the Act.

The CCI held that setting of premium rates for reinsurance polices would be based on many factors and without proper evidence being furnished, the allegations of 'excessive pricing / unfair pricing' cannot be analysed.

The CCI also noted that the refusal of GIC to offer reinsurance to policies involving indemnity against contagious diseases is a commercial decision of GIC and does not prevent insurers from offering policies for such contingencies. As such the conduct of GIC cannot be held as violative of Section 3(4)(d) of the Act.

The full text of the order can be accessed here.

iii. CCI closes case of cartelization in procurement of surgical disposal items by AIIMS

The CCI has closed a case of alleged cartelization by two bidders in procurement / tender for purchase of surgical disposal items on two-year contract basis by All India Institute of Medical Studies (**AIIMS**). The alleged cartel members were Romsons Scientific & Surgical Industrial Pvt. Ltd. and BSN Medical Pvt. Ltd.

For a tender for procurement of surgical items in 2016, it was noticed by AIIMS that Romsons and BSN had quoted identical prices upto last two decimals. It was noted by the CCI that the two firms were located in different areas of the country and had vastly different costs, including transportation and procurement costs, etc. As such, identical prices indicated collusion between the two firms. A detailed investigation was ordered by the CCI based on its own research.

The investigation by the Director General concluded that quoting of price for the tendered items in two different patterns (OP-1 quoting rate per box and OP-2 quoting rate per piece) appeared to be a pre-decided strategy to win the bid and consequently to share the quantity. The investigation opined that input factors of both the OPs were so varied that the question of identical prices did not arise. Accordingly, the investigation concluded that OP-1 and OP-2 colluded and acted in contravention of provisions of Section 3(3)(a) and Section 3(3)(d) read with Section 3(1) of the Act.

While analysing the Director General's investigation report, the CCI noted that mere price parallelism is not enough to establish a contravention of the Act. The CCI concluded that apart from analysing the identical prices, the investigation has not adduced any cogent evidence to establish that identical prices were the outcome of collusion amongst OP-1 and OP-2. The CCI accordingly closed the case.

The full text of the order can be accessed here.

iv. CCI closes case of abuse of dominance against Haryana Urban Development Authority ("HUDA")

The CCI has closed a case of alleged abuse of dominance against HUDA in relation to sale/allotment of institutional plots in Gurgaon, Haryana. The case was filed by an association of plot owners who had been sold institutional plots on free hold basis in Gurgaon by HUDA. However, it was alleged that when the allottees approached HUDA for execution of conveyance deeds, HUDA allegedly imposed additional illegal terms and conditions for execution of conveyance/ sale deed in favour of the allottees. It was stated that HUDA imposed an ex-facie illegal and void condition manipulating the terms and conditions of the allotment which was contrary to the statutory provisions, thereby restricting the rights of the allottees to further sell, mortgage, lease out the plots

purchased and buildings constructed by them, allegedly in violation of the provisions of Sections 4(2)(b), 4(2)(c), 4(2)(d) and 4(2)(e) read with Section 4(1) of the Act.

The investigation concluded that HUDA is dominant in the 'market for provision of services for development and sale of institutional plots in the State of Haryana' and enjoyed a 78% market share.

The investigation also concluded that imposition of certain conditions by HUDA in the conveyance deeds which are drawn from statutory framework did not put any absolute restriction on transfer of institutional plots and were neither unfair nor discriminatory in terms of Section 4 of the Act. However, the restriction on transfer of institutional plots by allottees was deemed unfair and abusive conduct by HUDA.

The CCI agreed with the findings of the investigation in relation to relevant market and assessment of dominance of HUDA. However, on the issue of abuse, the CCI disagreed with the investigation report.

It was noted that the purpose of allotment of institutional plots, in the facts and circumstances of the present case, was not to allow the allottees to transfer them subsequently, with a view to earn profits out of the same. The plots have been statutorily barred from alienation/transfer by allottees as such plots have been earmarked for a specific institutional purpose.

The CCI also noted that, post the final hearing in the matter, HUDA had permitted transfer of ownership of institutional plots, by specifying certain conditions therein. Consequently, the CCI closed the case.

The full text of the order can be accessed here.

v. CCI approves minority investment of Total SE into Adani Green Energy Limited ("AGEL")

The CCI has unconditionally approved the acquisition of minority shareholding in AGEL by Total SE through its wholly owned subsidiary Total Renewables SAS.

Total SE is the ultimate parent entity in the Total Group. Total SE (along with its subsidiaries and affiliates) ("**Total Group**") is an international integrated energy producer with operations in every sector of the oil and gas industry. Total Group is also involved in the renewable energy and power generation sectors.

AGEL is a public listed company incorporated in India. AGEL is engaged in power generation through renewable energy in India (i.e., through solar and wind energy). AGEL is also engaged in the business of development of solar parks.

The percentage of shareholding being acquired has not been specified. 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 can be accessed here.

vi. CCI India penalizes publishers' and booksellers' association for cartelisation

The CCI has penalized the Federation of Publishers' and Booksellers' Associations in India ("**FPBAI**") for cartelization in restricting discounts to be provided to Indian subscribers of print journals and e-resources.

The case was filed by a subscription agent engaged in the business of procuring various foreign and Indian journals from national and international publishers and supplying the same to its clients in India.

It was alleged that FPBAI issued directions to its members who deal in print journals and e-resources, to not give discounts on the publishers' prices to the Indian subscribers. It was also alleged that FPBAI threatened to take coercive actions against those members who failed to comply with its such directions by expelling them from FPBAI.

The detailed investigation revealed that FPBAI indirectly determined sale prices of books, journals, etc., sold by FPBAI members which is in contravention of the provisions of Section 3 (3) (a) read with Section 3 (1) of the Act. FPBAI also prohibited its members from participating in advertisements in certain cases in violation of Section 3(3)(b) of the Act.

The CCI noted that FPBAI issued circulars and memorandums to its members to refrain from participating in tenders/advertisements which did not comply with FPBAI's rules. The CCI held that such advisories were not recommendatory but coercive in nature.

Such conduct was held violative of Section 3(3)(a) and Section 3(3)(b) of the Act. A penalty of INR 2,00,000/- on FPBAI as well as INR 1,00,000/- each on its two office bearers was imposed by the CCI.

The full text of the order can be accessed here.

vii. CCI closes case of cartelization in airlines industry

The CCI has closed an investigation into alleged cartelization against airlines including Jet Airways (including Jet Lite), Indigo, Spice Jet, Go Air and Air India. The case emanated upon receipt of a letter dated January 31, 2014 from Lok Sabha Secretariat with a request to examine whether there is any evidence of cartelization in the airlines sector.

Preliminary research from analysis of four sample major routes indicated that airlines were maintaining some degree of stability in their market shares in both lean and peak seasons during the examined period. Further, almost similar cost structure of the airlines also appeared to facilitate collusion on price to be charged in contrast to differentiated cost structure, where low-cost firms usually compete with high-cost firms on prices to capture greater market share. Also, it was observed that despite differences in base fares and airlines fuel surcharge, the end fares charged by all the airlines for tickets, were almost similar.

However, the detailed investigation found that the monthly market shares of each of the five airlines on all the four sectors during the given period as well as annually had been fluctuating, at times by significant margins, and that the pattern of market share did not indicate any linkage between two or more airlines. The investigation further noted that had there been any cartelization amongst the airlines, the respective cartel members would have

maintained stability in their relative market shares. However, no such behavior of maintaining stable market share was noticed by the DG during the analyzed periods. The investigation also showed that even though price parallelism existed in the industry, there was no evidence of collusion between the airlines.

The CCI noted that parallel conduct is actionable under the Act only when the adaptation to the market conditions is not done independently and is attributable to information exchanged between the competitors or through some other collusive conduct, the object of which is to influence the market. In the present case, no exchange of communication between the airlines could be established. The case has been closed accordingly.

The full text of the order can be accessed here.

viii. CCI approves acquisition of additional minority shareholding in Ecom Express Private Limited by CDC Group, plc.

The CCI has unconditionally approved the acquisition of minority shareholding of 2.78% in Ecom by CDC.

Prior to the transaction, CDC already held certain stake in Ecom and as a result of proposed combination its shareholding in Ecom will increase to 9.81%. CDC already holds the right of representation on the board of directors of Ecom. Additionally, no action can be taken by Ecom without prior consent of CDC in respect of certain reserved matters. The proposed combination did not envisage acquisition of any additional rights relating to the management and affairs of Ecom by CDC.

The CCI held that activities of CDC and Ecom do not exhibit horizontal or vertical overlap and that although portfolio entities of CDC have availed certain services of Ecom but the nature and volume of interfaces is not significant. Moreover, as a result of the proposed combination, CDC is not acquiring any additional rights relating to the management and affairs of Ecom. The CCI has accordingly approved the proposed combination.

The full text of the order can be accessed here.

ix. CCI initiates investigation against Whatsapp for latest privacy policy

The CCI has issued a *suo-moto* investigation against messaging service Whatsapp, Inc. for alleged abuse of dominance in relation to its recently updated privacy policy in relation to data-sharing between Whatsapp and Facebook.

The CCI considered that Whastapp is *prima-facie* dominant in the market for over-the-top messaging apps through smartphones in India. The CCI considered that unlike previous policy updates of Whatsapp, the latest update does not provide the consumers with an option to reject the policy. Instead, users who choose to reject the policy shall be prevented from using Whatsapp from May 15, 2021. The CCI noted that consent to sharing and integration of user data with other Facebook companies for a range of purposes including marketing and advertising, has been made a precondition for availing WhatsApp service.

The CCI was of the *prima-facie* opinion that the 'take-it-or-leave-it' nature of privacy policy and terms of service of WhatsApp and the information sharing stipulations mentioned therein, merit a detailed investigation in view of the market position and market power enjoyed by WhatsApp. The CCI has ordered an investigation against Whatsapp for abuse of dominant position.

The full text of the order can be accessed here.

x. CCI imposes penalty on sewing-machine suppliers for cartelisation

The CCI has imposed a penalty on three suppliers of sewing machine of brand 'Usha' for cartelisation in a tender for procurement of sewing machines issued by Pune Zilla Parishad ("**PZP**"). The sewing machines were meant to be distributed to backward sections of the society.

It was alleged that in a tender issued by PZP in 2015 for procurement of the machines, the three OPs, viz., M/s Klassy Computers, M/s Nayan Agencies, and M/s Jawahar Brothers, had submitted identical bids and they also agreed as to who will submit the lowest bid and determined the common norms to calculate prices and terms of the bids. Further, the price quoted by the OPs was almost double the Maximum Retail Price ("**MRP**") of the same machine marketed and distributed by the manufacturer in the open market.

The detailed investigation report revealed that the OPs were in active collusion and there was meeting of minds between them and thereby, they have violated the provisions of Section 3(3)(d) read with Section 3(1) of the Act. Further, individuals of the OPs were found to be responsible under Section 48 of the Act for their conduct.

The CCI noted that the three OPs had essentially submitted cover-bids for each other where the bids were submitted from a single computer. Klassy Computers had submitted bids from its own account in the name of the other two bidders, and the bids quoted very extremely close to each other. The analysis of the call data records revealed that the management of the companies were in touch with each other.

In light of the above findings, the CCI held that the bidders had indulged in bid-rigging in violation of Section 3(3)(d) of the Act. A penalty of INR 10,00,000/- has been imposed on each of the three bidders. Further, a penalty of Rs. 10,000/- (Rs. Ten Thousand only) has also been imposed upon each of the individuals of Jawahar Brothers as identified by the DG in terms of the provisions of Section 48 of the Act

The full text of the order can be accessed here.

IV. INSOLVENCY & BANKRUPTCY

A. REGULATORY UPDATES

i. Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2021 – Amendment

The Insolvency and Bankruptcy Board of India ("**Board**") *vide* its gazette notification dated March 15, 2021 bearing no. No. IBBI/2020-21/GN/REG070 has published the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2021 ("**Amendment CIRP**") to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 by *inter alia* insertion/substitution of the following regulations:

- Regulation 12A – By virtue of this newly inserted Regulation, every Creditor is required to update its claim as and when the claim is satisfied, either partly or fully, from any source in any manner, after the insolvency commencement date.

- Regulation 40B (1A) – Prior to the insertion of Regulation 40B(1A) by virtue of the Amendment CIRP, Regulation 40B of the CIRP Regulations required an interim resolution professional ("**IRP**") / resolution professional ("**RP**") to file a set of forms (CIRP 1 to CIRP 6) within 7 (seven) days of completion of

specific activities to enable monitoring progress of CIRP. This implied that a Form (CIRP 1 to CIRP 6) would not be filed until the related activity is completed. This made monitoring of progress difficult. Regulation 40B(1A) of the Amendment CIRP requires filing of Form CIRP 7 for each activity described in column (2) of the table therein, which have not been completed within the date specified therein, within 3 (three) days of the said date. Regulation 40B(1A) further requires Form CIRP 7 to be continued to be filed every 30 (thirty) days, until the said activity remains incomplete. Certain guidelines in this regard have been published by the Board on March 18, 2021 which can be accessed *here*.

- Form-C of the Schedule to the CIRP Regulations which provides the format for submission of claim by Financial Creditor has been substituted.

The afore-mentioned insertions and substitutions 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., March 15, 2021.

The full text of the notification can be accessed here.

ii. The Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2021 - Amendment

The Board *vide* its gazette notification dated March 04, 2021 bearing no. IBBI/2020-21/GN/REG069 has published the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2021 to amend the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 by *inter alia* inserting/substituting the following regulations:

- Regulation 31 (2) has been substituted thereby requiring the liquidator to file the list of stakeholders with the Adjudicating Authority within 45 (forty-five) days from the last date for receipt of the claims.

- Regulation 31 (5) (d) has been inserted which requires the liquidator to file the list of stakeholders on the electronic platform of the Board for dissemination on its website. The purpose of this requirement is to improve transparency and to enable stakeholders to ascertain the details of their claims at a central platform.

Pursuant to the above amendments, the Board has made available an electronic platform at **www.ibbi.gov.in** for filing of list of stakeholders as well as updating it thereof. As the liquidator prepares the list of stakeholders after verification of every claim as on the liquidation commencement date, the platform permits multiple filings by the liquidator as and when the list of stakeholders is updated by him. The format of list of stakeholders has been finalized by the Board in consultation with insolvency professional agencies and has been published *vide* Circular No. *IBBI/LIQ/40/2021* dated March 04, 2021 which can be accessed *here*. All insolvency professionals have been advised to file the list of stakeholders in the same format. Further, the Circular directs all insolvency professionals to file the list of stakeholders of the respective corporate debtor under liquidation and modification thereof, in the aforesaid format, within three days of the preparation of the list or modification thereof, as the case may be. The filings due as on the date of circular are required to be filed within 15 (fifteen) days of the circular, i.e., within 15 (fifteen) days from March 04, 2021.

These amendments and the requirements therein are applicable to every liquidation process ongoing as on the date of notification of Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2021, and commencing on or after the said date, i.e., March 04, 2021.

The full text of the notification can be accessed here.

iii. Insolvency and Bankruptcy Board of India (Model Bye- Laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2021

The Board *vide* its gazette notification dated January 14, 2021 bearing no. IBBI/2020-21/GN/REG068 has published the Insolvency and Bankruptcy Board of India (Model Bye- Laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2021 to amend the Insolvency and Bankruptcy Board of India (Model Bye- Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 by *inter alia* inserting/substituting the following regulations:

- Sub-regulation 4A has been inserted under Regulation 5 which requires that the shareholder director should satisfy the eligibility norms, including experience and qualifications, as decided by the Governing Board.

- Clause (b) of Sub-regulation (6) has been substituted under Regulation 5 which requires that an independent director shall be an individual who has expertise in the field of finance, law, economics, accountancy, valuation, management or insolvency. Prior to the amendment, the expertise of the independent director was limited to the field of finance, law, management or insolvency.

- Sub-regulation 14 has been inserted under Regulation 5 which mandatorily requires the director to disclose any order of any authority that affects his character or reputation, to the insolvency professional agency within one week of the issuance of any order appointing him as the director. This order shall be placed on the website of the insolvency professional agency. Further, the director shall forthwith cease to be a director of the insolvency professional agency where the order disqualifies him to be a director of a company.

- Regulation 6 has been inserted requiring the Governing Board to evaluate its performance in a financial year within three months of the closure of the year and the insolvency professional agency is required to publish the self-evaluation report on its website.

- Regulation 7 has been inserted which requires the Insolvency Professional Agency to designate or appoint a Compliance Officer who shall be responsible for ensuring compliance with the provisions of the Insolvency and Bankruptcy Code, 2016 ('**IBC**') and regulations, circulars, guidelines, and directions issued thereunder. The Compliance Officer is required to submit a compliance certificate to the Board annually verifying that the insolvency professional agency has complied with the provisions of the IBC and regulations, circulars, guidelines, and directions issued thereunder. In case of non-compliance, the Compliance Officer is immediately and independently required to report the same to the Board. The appointment or removal of the Compliance Officer can be done by the Governing Board only by means of a resolution passed in its meeting.

The afore-mentioned insertions and substitutions are applicable to the corporate insolvency resolution process that are ongoing and commencing on or after the date of commencement of the aforesaid amendment i.e., January 14, 2021.

The full text of the notification can be accessed here.

iv. Format for Providing a Copy of Application for Initiation of Insolvency Resolution Process of Personal Guarantors as mandated under Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019

Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 mandates an applicant to provide a copy of the application filed under Section 94(1) or Section 95(1) of the IBC for initiation of insolvency resolution process of a personal guarantor to a corporate debtor to the Board.

The Board *vide* its Circular dated February 02, 2021 bearing No. IBBI/II/39/2021 has made available a facility on its website at **https://ibbi.gov.in/intimation-applications/iaaa-personal-one** for providing a copy of the application filed by an Applicant online to the Board. Further, the format for submission of the application for the initiation of insolvency resolution process of Personal Guarantors has been provided at Annexure-A of the Circular. A step-by-step guide for submission of the application is also made available at Annexure-B of the Circular. The Applicant receives an acknowledgment after submitting the application online. The Circular encourages all applicants to avail this facility.

The full text of the Circular can be accessed here.

v. Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2021

The Securities and Exchange Board of India ("**SEBI**") *vide* its gazette notification dated January 08, 2021 bearing No. SEBI/LAD-NRO/GN/2021/02 has published the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2021 ("**SEBI Amendment**") to amend the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**Listing Regulations**") by *inter alia* insertion/substitution of the following regulations pertaining to events in relation to the CIRP of a listed corporate debtor under the IBC:

- Sub-clause (l) in Clause 16 under point A under Part A in Schedule III of the Listing Regulations is substituted wherein the listed entity is required to disclose to the stock exchange all specific features and details of the resolution plan as approved by the Adjudicating Authority under the IBC, not involving commercial secrets, including details such as (i) pre and post net-worth of the company; (ii) details of assets of the company post CIRP; (iii) details of securities continuing to be imposed on the companies' assets; (iv) other material liabilities imposed on the company; (v) detailed pre and post shareholding pattern assuming 100% conversion of convertible securities; (vi) details of funds infused in the company, creditors paid-off; (vii) additional liability on the incoming investors due to the transaction, source of such funding etc.; (viii) impact on the investor – revised P/E, RONW ratios etc.; (ix) names of the new promoters, key managerial persons(s), if any and their past experience in the business or employment. In case where promoters are companies, history of such company and names of natural persons in control; and (x) brief description of business strategy.

- Sub-clause (n) in Clause 16 under point A under Part A in Schedule III of the Listing Regulations is inserted requiring the listed entity to disclose to the stock exchange all proposed steps to be taken by the incoming investor/acquirer for achieving the minimum public shareholding (MPS).

- Sub-clause (o) in Clause 16 under point A under Part A in Schedule III of the Listing Regulations is inserted mandating quarterly disclosure by the listed entity of the status of achieving the MPS.

- Sub-clause (p) in Clause 16 under point A under Part A in Schedule III of the Listing Regulations is inserted requiring the listed entity to disclose the details of the delisting plans, if any approved in the resolution plan.

The afore-mentioned insertions and substitutions are applicable to all listed entities from the date of publication of the aforesaid amendment in the Official Gazette i.e., January 08, 2021.

The full text of the notification can be accessed here.

B. JUDICIAL PRONOUNCEMENTS

i. Arun Kumar Jagatramika v. Jindal Steel and Power Ltd. and Another

[Civil Appeal No. 9664 of 2019, Hon'ble Supreme Court of India, Judgment dated March 15, 2021]

Background:

The Appellate jurisdiction of the Hon'ble Supreme Court of India had been invoked by the Appellant challenging the judgment dated October 24, 2019 of the National Company Law Appellate Tribunal ('**NCLAT**') in Company Appeal (AT) No. 221 of 2018 holding that a person who is ineligible under Section 29A of the Insolvency and Bankruptcy Code, 2016 ('**IBC**') to submit a resolution plan is also barred from proposing a scheme of compromise and arrangement under Section 230 of the Companies Act, 2013 ("**Act**"). The NCLAT had passed the judgment while hearing an appeal against an order passed by the National Company Law Tribunal ('**NCLT**') allowing an Application under Section 230 to 232 of the Act, filed by Mr. Arun Kumar Jagatramka who was a promoter of Gujarat NRE Coke Limited during the liquidation proceedings of Gujarat NRE Coke Limited.

The main contention of the Appellant before the Hon'ble Supreme Court was that Section 230 of the Act does not place any embargo on any person for the purpose of submitting a scheme and in the absence of any disqualification, the NCLAT could not have read the ineligibility under Section 29A of the IBC into Section 230 of the Act.

Findings of the Court:

The Hon'ble Supreme Court after examining the legal framework, the interplay between the proposal of a scheme of compromise and arrangement under Section 230 of the Act and liquidation proceedings initiated under Chapter III of the IBC, the judicial understanding of the provisions of Sections 230 of the Act and Section 29A of the IBC, has upheld the judgment of the NCLAT. The Hon'ble Supreme Court has thereby held that a person who is ineligible under Section 29A of the IBC to submit a resolution plan is also barred from proposing a scheme of compromise and arrangement under Section 230 of the Act.

The Hon'ble Supreme Court has held that the purpose of the ineligibility under Section 29A of the IBC is to achieve a sustainable revival and to ensure that a person who is the cause of the problem either by a design or a default cannot be a part of the process of solution.

The Court has also upheld the constitutional validity of the proviso to Regulation 2B(1) of the IBBI (Liquidation Process) Regulations, 2016 inserted in 2020 prohibiting a person who is not eligible under the IBC to submit a resolution plan for insolvency resolution of the corporate debtor from being a party in any manner to a compromise or arrangement under Section 230 of the Act.

ii. Ramesh Kymal v. M/s Siemens Gamesa Renewable Power Pvt. Ltd.

[Civil Appeal No. 4050 of 2020, Hon'ble Supreme Court of India, Judgment dated February 09, 2021]

Background:

The Appellate jurisdiction of the Hon'ble Supreme Court of India had been invoked by the Appellant challenging the judgment dated October 19, 2020 of the NCLAT whereby it had affirmed the decision of the NCLT dated July 09, 2020. The NCLT had held that in view of the provisions of Section 10A of the IBC, which have been inserted with retrospective effect from June 05, 2020, the Application filed by the Appellant as an Operational Creditor under Section 9 of the IBC though for a default prior to June 05, 2020 but after March 25, 2020 was not maintainable.

The issue which fell for determination before the Hon'ble Supreme Court was whether the provisions of Section 10A stand attracted to an Application under Section 9 of the IBC which was filed before June 05, 2020 (the date on which the provision came into force) in respect of a default which has occurred after March 25, 2020.

Findings of the Court:

The Hon'ble Supreme Court after examining the insertion of Section 10A, the definitions of 'initiation date' and 'insolvency commencement date' under Section 5(11) and Section 5(12) respectively and the extraordinary circumstances in which Section 10A was inserted, has held that it is evident that by virtue of Section 10A of the IBC, the Parliament intended to impose a retrospective bar on the filing of applications for the commencement of the Corporate Insolvency Resolution Process ('**CIRP**') in respect of a Corporate Debtor for a default occurring on or after March 25, 2020.

The Hon'ble Supreme Court has however also clarified that the retrospective bar on the filing of applications for the commencement of CIRP during the stipulated period does not extinguish the debt owed by the corporate debtor or the right of creditors to recover it.

iii. P. Mohanraj and Others v. Shah Brothers Ispat Pvt. Ltd.

[Civil Appeal No. 10355 of 2018, Hon'ble Supreme Court of India, Judgment dated March 1, 2021]

Background:

The appellate jurisdiction of the Hon'ble Supreme Court of India was invoked challenging the order passed by the NCLAT wherein it was held that Section 138 of the Negotiable Instruments Act, 1881 ("**NI Act**"), being a criminal law provision, cannot be held to be a "proceeding" within the meaning of Section 14 of the IBC and thus proceedings under Section 138 of the NI Act would remain unaffected by the moratorium period under Section 14 of the IBC.

The facts leading to the case at hand were that steel products were supplied by the respondent to one M/s. Diamond Engineering Pvt. Ltd. ("**Company**") from September 21, 2015 to November 11, 2016, as a result of which INR 24,20,91,054/- was due and payable by the Company. Cheques were issued by the Company in favour of the respondent towards amounts payable for supplies, all of which were returned dishonored for the reason "funds insufficient". As a result, the respondent issued statutory demand notices under Section 138 read with Section 141 of the NI Act. Since no payment was forthcoming pursuant to the statutory demand notices, two criminal complaints were filed.

Meanwhile, a statutory notice under Section 8 of the IBC was issued by the respondent to the Company. In the application for commencement of CIRP filed by the respondent before the NCLT, an order was passed by the NCLT admitting the application under Section 9 of the IBC, directing commencement of CIRP with respect to the Company and a moratorium in terms of Section 14 of the IBC was ordered. Pursuant thereto the NCLT stayed further proceedings in the two criminal complaints pending before the Magistrate. In appeal the NCLAT set aside this order. The question that arose for consideration before the Hon'ble Supreme Court was whether the institution or continuation of a proceeding under Sections 138/141 of the NI Act can be said to be covered by the moratorium under Section 14 of the IBC.

Findings of the Court:

The Hon'ble Supreme Court after considering the language used in Section 14 of the IBC, the object of Section 14 of the IBC and the nature of proceedings under Chapter XVII of the NI Act has held that a proceeding under Section 138/141 of the NI Act for prosecuting an offence of dishonour of cheque would be a "proceeding" within the meaning of Section 14(1)(a) of the IBC and hence the moratorium would attach to such a proceeding.

The Hon'ble Supreme Court has also clarified that while proceedings against the Corporate Debtor cannot be instituted / continued under Section 138 of the NI Act once the moratorium has been ordered, there is no impediment in instituting / continuing proceedings against the persons mentioned in Section 141 of the NI Act and they would continue to be statutorily liable under Chapter XVII of the NI Act.

V. LITIGATION & ARBITRATION

i. N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. & Ors.

[Civil Appeal Nos. 3802-3803 decided on 11.01.2021 by the Supreme Court of India]

Non-payment of stamp duty on the commercial contract would not invalidate the arbitration clause or render it un-enforceable.

Background

In the present case, Indo Unique Flame Ltd. ("**Indo Unique**"), entered into a sub-contract/work order with N.N. Global Mercantile Pvt. Ltd ("**Global Mercantile**"), dated September 28, 2015. In terms of the work order, Global Mercantile provided a Bank Guarantee to Indo Unique. Clause 10 of the work order contained an arbitration clause.

On December 07, 2017, Indo Unique invoked the Bank Guarantee provided by Global Mercantile, and the same was challenged by Global Mercantile, by filing a civil suit before the Commercial Court, Nagpur. Thereafter,

Indo Unique filed an application under Section 8 of the Arbitration & Conciliation Act 1996 ("**Act**") seeking reference of the disputes to arbitration. The Commercial Court by an order dated January 18, 2018 rejected the application under Section 8 of the Act. The said order was challenged by Indo Unique before the Bombay High Court, in a Writ Petition. The Bombay High Court by its judgment dated September 30, 2020 allowed the reference to arbitration since the existence of the arbitration agreement was not disputed. The Bombay High Court also held that the issue of work order not being stamped can be raised at the stage of Section 11 of the Act or before the Arbitral Tribunal at an appropriate stage. Thereafter civil appeals were filed before the Hon'ble Supreme Court against the judgment dated September 30, 2020.

Findings of the Court

The Supreme Court adjudicated upon the issue as to whether an arbitration agreement would be enforceable and acted upon, even if the work order is unstamped and un-enforceable under the relevant Stamp Act. The Court held that since the arbitration agreement is an independent agreement between the parties, and not chargeable to payment of stamp duty, the non-payment of stamp duty on the commercial contract, would not invalidate the arbitration clause, or render it un-enforceable. Further, the non-payment or deficiency of stamp duty even on the substantive contract does not invalidate it, and the deficiency can be cured on payment of the requisite stamp duty.

In view of the aforesaid observations, the Supreme Court over-ruled its previous judgment in *SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Co. Pvt. Ltd*., (2011) 14 SCC 66 and disagreed with the findings in *Garware Wall Ropes Ltd. Vs. Coastal Marine Constructions and Engineering Ltd.*, (2019) 9 SCC 209 ("**Garware Judgment**"). However, since Garware Judgment had recently been affirmed by a co-ordinate bench of the Supreme Court (*Vidya Drolia Vs. Durga Trading Corporation*, 2020 SCC OnLine SC 1018), the Supreme Court referred the issue to be decided by a larger bench.

The Supreme Court while dealing with the issue as to whether the fraudulent invocation of the Bank Guarantee, is arbitrable, observed that in contemporary arbitration practice, arbitral tribunals are required to traverse through volumes of materials in various kinds of disputes. The ground that the allegation of fraud is not arbitrable is a wholly archaic view, which has become obsolete, and deserves to be discarded. However, the criminal aspect of fraud, forgery, or fabrication, which would entail penal consequences and criminal sanctions can be adjudicated only by a court of law, since it may result in conviction, which is in the realm of public law. The Court held that in the present case, the allegations of fraud with respect to the invocation of the Bank Guarantee are arbitrable, since it arose out of disputes between the parties inter se and was not in the realm of public law.

ii. Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies Pvt. Ltd.

[Civil Appeal No. 791 of 2021 decided on 2.03.2021 by the Supreme Court of India]

An arbitral award takes legal effect only after it is signed by the arbitrators, which gives its authentication and finality to the award.

Background

In this case, a Service Level Agreement dated 2.05.2011 ("**SLA**") was executed by Dakshin Haryana Bijli Vitran Nigam Ltd. ("**DHBVL**") and Navigant Technologies Pvt. Ltd. ("**Navigant**"). Clause 13 of the SLA provided for resolution of disputes through arbitration by a three-member tribunal under the Act. DHBVL terminated the SLA, which led to disputes between the parties and the same was referred to arbitration. The Tribunal orally pronounced

the award [2:1] on April 27, 2014, whereby the claims of Navigant were allowed. A copy of the dissenting opinion was provided by the third arbitrator on May 12, 2018. A signed copy of the arbitral award was provided to both the parties on May 19, 2018.

DHBVL challenged the award by filing a petition under Section 34 of the Act, before Civil Court, Hisar, along with a condonation of delay application. The Civil Court dismissed the condonation of delay application, considering the date of receipt of award as April 27, 2018. It was held that period of limitation starts running from April 27, 2018. The High Court in appeal upheld the observations of the Civil Court.

Findings of the Court

The Supreme Court was dealing with the issue as to whether the period of limitation for filing of the Petition under Section 34 of the Act, would commence from the date on which the draft award dated April 27, 2018 was circulated, or the date on which the signed copy of the award was provided. The Court after referring to Section 31(1) of the Act, held that an award takes legal effect only after it is signed by the arbitrators, which gives its authentication. Further, there can be no finality of the award, except after it is signed, since signing of the award gives legal effect and validity to it. The Court concluded that the date from which the period of limitation for filing objections under Section 34 of the Act would commence would be the date on which the signed copy of the award is received. As regards dissenting opinion, the Court held that the view of the dissenting arbitrator is not an award, but his opinion. However, a party aggrieved by the award, may draw support from the reasoning and findings assigned in the dissenting opinion. The Court accordingly allowed the appeal and held that the period of limitation for filing objections would be the date on which signed copy of the award was made available, i.e. May 19, 2018.

iii. Padia Timber Company (P) Ltd. v. Board of Trustees of Visakhapatnam Port Trust

[Civil Appeal No. 7469 of 2008 decided on 5.01.2021 by the Supreme Court of India]

An acceptance with a variation is no acceptance and would be, in effect and substance, simply a counterproposal which must be accepted fully by the original proposer before a contract is made.

Background

The Respondent Port Trust floated a tender for supply of Wooden Sleepers. Clause 15 and 16 of the tender provided that (i) the purchaser of the wooden sleepers would not separately pay for transit insurance; and (ii) in the event of the supplies being found defective, the Respondent would have the right to reject the materials and recover the freight. In response to the tender, Padia Timber Company (P) Ltd. ("**Appellant**") submitted its offer containing a specific condition that inspection of the sleepers would have to be conducted only at the Appellant's depot. The Appellant did not accept Clause 15 and 16 of the tender and made a counter proposal. The Appellant also deposited a sum towards the earnest deposit, along with its quotation. Subsequently, Appellant agreed to supply sleepers, and reiterated that the Respondent Port Trust could inspect the goods to be supplied, at the factory site. The Respondent accepted the offer of the Appellant and imposed a further condition that the Appellant would have to transport the sleepers to the General Stores of the Respondent by road, at the cost of the Appellant and the final inspection would be made at the General Stores of the Respondent. The Appellant refused to accept the additional condition, rejected the Respondent's proposal and requested the Respondent for release of earnest money. On suits filed by both the parties, the trial court concluded that there was a concluded contract between the parties and the Appellant had committed breach of contract by not supplying the sleepers to the Respondent. The High Court dismissed the appeal filed by the Appellant.

Findings of the Court

The Supreme Court dealt with the issue as to whether the acceptance of conditional offer with a further condition resulted in a concluded contract, irrespective of whether the offeror accepts the further conditions proposed by the acceptor. The Court after referring to Section 7 of Indian Contract Act, 1872 observed that the offer and acceptance of an offer must be absolute. In addition, the offer and the acceptance must be based on three components, i.e. certainty, commitment and communication. The Court held that an acceptance with a variation is no acceptance and would be, in effect and substance, simply a counterproposal which must be accepted fully by the original proposer before a contract is made. The Court observed that when the acceptor puts in a new condition while accepting the contract already signed by the proposer, the contract is not complete until the proposer accepts that condition.

The Court therefore held that in the present case there was no concluded contract. Further, there was no question of breach by the Appellant, or of damages or any risk purchase at the Appellant's cost. The Court held that the Appellant's earnest money is liable to be refunded.

VI. LABOUR & EMPLOYMENT

i. Government of Karnataka allows shops and commercial establishments to remain operational 24x7.

The Government of Karnataka, vide Notification No. E-LD 4 LET 2019(P) dated January 02, 2021, has permitted all Shops and Commercial Establishments in the State employing 10 (ten) or more persons to be operational 24X7 on all days of the year for a period of three (3) years from the date of its publication in the official gazette, subject, *inter alia*, to the following conditions:

- The employer shall be required to appoint additional staff in order to allow every employee to avail 1 (one) day holiday in a week on rotation basis.
- The wages (including overtime) shall be credited to the employees' savings bank account as prescribed under the Payment of Wages Act, 1936.
- No employee shall be allowed to work for more than 8 (eight) hours in any day and 48 (forty eight) hours in any week and the period of work including overtime shall not exceed 10 (ten) hours in any day and 50 (fifty) hours in a period of 3 (three) continuing months.
- Women employees shall not be allowed to work beyond 08:00 PM on any day in normal circumstances. However, a woman employee may be permitted to work between 08:00 PM and 06:00 AM provided the employer obtains her written consent and makes adequate arrangement to protect her dignity and safety.
- The employees shall be provided with restroom, washroom, safety lockers and other basic amenities.
- In case of violation of any statutory provision or any of the above terms and conditions, necessary penal action shall be initiated against the employer/manager as laid down in the Karnataka Shops and Commercial Establishments Act, 1961 ("**Karnataka Shops Act**").

- The above conditions are in addition to those stipulated under the Karnataka Shops Act and Workmen's Compensation Act, 1923.

The full text of the notification can be accessed here.

ii. Central Government notifies the Code on Wages (Central Advisory Board) Rules, 2021

The Ministry of Labour and Employment, by way of Notification No. G.S.R. 143(E) dated March 01, 2021, has notified the Code on Wages (Central Advisory Board) Rules, 2021 which makes provision for matters related to constitution of Board, additional functions of the Board, meetings of Board, quorum, disposal of business of the Board, method of voting, term of office of members of the Board, allowances, cessation of membership, disqualification from being member of the Board etc.

The full text of the notification can be accessed here.

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