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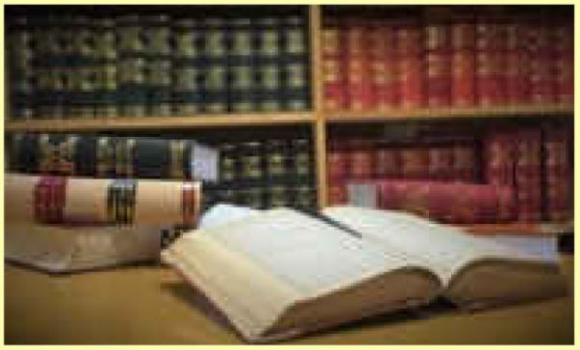

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UPDATES

I. FEMA & FDI

i. 'Voluntary Retention Route' for Foreign Portfolio Investors investment in debt

The Reserve Bank of India ("**RBI**") has by way of A.P. (DIR Series) Circular No. 22 dated February 10, 2022, ("**Circular**") increased the investment limit in debt for Foreign Portfolio Investors ("**FPIs**") under the 'Voluntary Retention Route' ("**VRR**") from Rs. 1,50,000 crores to Rs. 2,50,000 crores with effect from April 1, 2022.

The RBI, in consultation with the Government of India and Securities and Exchange Board of India ("**SEBI**"), introduced the VRR, to enable FPIs to invest in debt markets in India. Investments through the VRR are free of the macro-prudential and other regulatory norms applicable to FPI investments in debt markets, subject to FPIs voluntarily committing to retain a required minimum percentage of their investments in India for a period.

Some of the features of VRR are:

- Any FPI registered with SEBI is eligible to invest through VRR.
- FPIs are eligible to invest in any Government Securities under VRR-Govt, in any instrument listed under Schedule 1 to Foreign Exchange Management (Debt Instruments) Regulations under VRR - Corp and in repo transactions and reverse repo transactions.
- Investment under VRR is in addition to the General Investment Limit. Investment under VRR is capped at Rs. 2,50,000 crores or higher and may be released in one or more tranches.
- Allocation of investment amount to FPIs under VRR shall be made on tap or through auctions.
- No FPI (including its related FPIs) shall be allotted an investment limit greater than 50% (Fifty Percent) of the amount offered for each allotment by tap or auction in case there is a demand for more than 100% (One Hundred Percent) of amount offered.
- The minimum retention period shall be 3 (Three) years or as decided by RBI for each allotment by tap or auction.

The full text of the Circular can be accessed here.

ii. Transactions in Credit Default Swap by Foreign Portfolio Investors – Operational Instructions

The Reserve Bank of India has, by way of A.P. (DIR Series) Circular No. 23 dated February 10, 2022 ("**Circular**") laid down necessary directions to Authorised Persons that are eligible to deal with Foreign Portfolio Investors ("**FPIs**") for transacting in Credit Derivatives, in terms of the Foreign Exchange Management (Debt Instruments) Regulations, 2019 *vide* Notification No. FEMA. 396/2019-RB dated October 17, 2019 ("**Notification**"), A.P. (DIR Series) Circular No.31 dated June 15, 2018 ("**Original Circular 1**"), A.P. (DIR Series) Circular No. 05 dated May 31, 2021 ("**Original Circular 2**") and Master

Direction – Reserve Bank of India (Credit Derivatives) Directions, 2022 dated February 10, 2022 (hereinafter collectively referred to as "**Credit Derivatives Directions**"), with effect from May 09, 2022. FPIs are categorised as non-retail users and are allowed to buy and sell Credit Default Swap ("**CDS**") protection under the Credit Derivatives Directions.

Selling of CDS protection by all FPIs shall be subject to an aggregate limit of 5% (Five Percent) of the outstanding stock of corporate bonds. FPIs shall not sell any CDS protection once aggregate limit is utilised.

Debt instruments received by FPIs as deliverable obligation and debt instruments purchased by FPIs for meeting deliverable obligation in physical settlement of CDS contracts shall be reckoned under the investment limits for corporate bonds.

The notional amount of protection sold by FPIs, and the debt instruments received as deliverable obligation as well as debt instruments purchased for meeting deliverable obligation by FPIs in physical settlement of CDS contracts shall not be subject to minimum residual maturity requirement/short-term limit, concentration limit or single/group investor-wise limits applicable to FPI investment in corporate bonds.

The full text to the Circular can be accessed here. The Foreign Exchange Management (Debt Instruments) Regulations, 2019 can be accessed here. The Original Circular 1 can be accessed here.

The Original Circular 2 can be accessed here. The Master Direction – Reserve Bank of India (Credit Derivatives) Directions, 2022 can be accessed here.

II. CORPORATE

i. Companies (Accounts) Rules, 2014: Amended

The Ministry of Corporate Affairs ("**MCA**"), has by way of Notification No. G.S.R. 235(E), dated March 31, 2022, brought into force with immediate effect, the Companies (Accounts) Second Amendment Rules, 2022 ("**Amendment Rules**"), which have the effect of amending the Companies (Accounts) Rules, 2014 ("**Accounts Rules**").

The Amendment Rules have amended the proviso to sub-rule (1) of Rule 3, whereby the timeline for companies that use accounting software for maintaining their books of accounts, has been extended from April 1, 2022 to April 1, 2023, for them to include a feature of recording the audit trail of each and every transaction and a creation of an edit log, along with the date when changes are made, etc. The Amendment Rules have further amended the proviso to sub-rule (1B) of Rule 12, whereby every company that is required to form a Corporate Social Responsibility Committee in terms of Section 135(1) of the Companies Act, 2013 is required to furnish the Corporate Social Responsibility Report to the Registrar, for the financial year (2020–21) in Form CSR-2, separately on or before May 31, 2022, after filing the requisite form AOC–4, AOC–4 XBRL or AOC–4 NBFC (Ind AS), as the case may be.

The full text of the Amendment Rules can be accessed here. The full text of Accounts Rules can be found at the website of the Ministry of Corporate Affairs.

ii. Companies (Accounts) Rules, 2014: Amended

The Ministry of Corporate Affairs, has by way of Notification No. G.S.R. 107(E), dated February 11, 2022, brought into force with immediate effect, the Companies (Accounts) Amendment Rules, 2022 ("**Amendment Rules**"), which have the effect of amending the Companies (Accounts) Rules, 2014 ("**Accounts Rules**").

The Amendment Rules have inserted sub-rule 1(B) to Rule 12 of the Accounts Rules, whereby every company having a net worth of Rupees Five Hundred Crores or more, or a turnover of Rupees One Thousand Crores or more, or a net profit of Rupees Five Crores or more, who is required to constitute a Corporate Social Responsibility Committee, in terms of Section 135(1) of the Companies Act, 2013, is to furnish a report on Corporate Social Responsibility to the Registrar of Companies, in the requisite form (Form CSR-2) for the preceding financial year 2020-2021 and onwards, as an addendum to Form AOC-4 or AOC-4 XBRL or AOC-4 NBFC (Ind AS). The Amendment Rules have further made amendments to the said applicable forms.

The full text of the Amendment Rules can be accessed here. The full text of Accounts Rules can be found at the website of the Ministry of Corporate Affairs.

iii. Companies (Registration Offices and Fees) Rules, 2014: Amended

The Ministry of Corporate Affairs, has by way of Notification No. G.S.R. 12(E), dated January 11, 2022, brought into force from July 1, 2022, the Companies (Registration Offices and Fees) Amendment Rules, 2022 ("**Amendment Rules**"). The Amendment Rules have the effect of amending the Companies (Registration Offices and Fees) Rules, 2014 ("**Registration Rules**").

The Amendment Rules have amended sub-item B in Item I (Fee for filings under Section 403 of the Companies Act, 2013), under the Annexure to Rule 12 of the Registration Rules. The Amendment Rules have substituted the aforementioned sub-item B to include a table of additional fees and higher additional fees (in certain cases), applicable for the delay in filing of certain forms, other than for the increase in nominal share capital or forms under Section 92 or Section 137 of the Companies Act, 2013, or forms for filing of charges.

The full text of the Amendment Rules can be accessed here. The full text of Registration Rules can be found at the website of the Ministry of Corporate Affairs.

iv. Amendment to Section 403(1) of the Companies Act, 2013: Enforced

The Ministry of Corporate Affairs ("**MCA**"), has by way of Notification No. S.O. 147(E), dated January 11, 2022 ("**Notification 1**"), brought into force, however, with effect from July 1, 2022, the second and third proviso of Section 80(i) of the Companies (Amendment) Act, 2017 ("**Amendment Act 1**"). The MCA has further, by way of Notification No. S.O. 148(E), dated January 11, 2022 ("**Notification 2**"), also brought into force with effect from July 1, 2022, Section 56 of the Companies (Amendment) Act, 2020 ("**Amendment Act 2**"). The aforementioned provisions of the Amendment Act 1 and Amendment Act 2, *inter alia* have the effect of amending Section 403(1) of the Companies Act, 2013 ("**Companies Act**").

In terms of the Companies Act, any document that is required to be submitted, filed, registered or recorded, or that information, which is required to be authorised under the Companies Act is to be submitted, filed, registered or recorded within the time specified thereunder, and on the payment of the requisite fees, subject to certain conditions. Section 403(1) of the Companies Act, in view of the above, has now been amended, more particularly the provisos to Section 403(1), whereby it has been stated that the documents, such as the annual returns/ financial statements or documents in any other case when not submitted, filed, registered or recorded, within the specified periods, would be permitted to be submitted, filed, registered or recorded, after the expiry of the specified period, subject to the payment of additional fees as may be prescribed thereunder. Further, in the event that there is a default on two or more occasions in submitting, filing, registering or recording of such document, fact or information, as prescribed, the same could, without prejudice to any other legal action or liability under the Companies Act, be submitted, filed, or registered on the payment of the higher additional fees, as may be prescribed.

The full text of Notification 1 and the Amendment Act 1 can be accessed here and here. The full text of Notification 2 and the Amendment Act 2 can be accessed here and here.

III. COMPETITION

A. REGULATORY UPDATES

i. De minimis exemption extended till 2027

The Ministry of Corporate Affairs, *vide* notification dated March 16, 2022, has extended the *de minimis* exemption for a period of 5 (Five) years till 2027. Vide the said notification, transactions involving target enterprise, with asset value of less than Rs. 350,00,00,000/- (Rupees Three Hundred and Fifty Crores) or turnover of less than Rs. 1000,00,00,000/- (Rupees One Thousand Crores), do not need prior approval of the Competition Commission of India. As per earlier notification dated March 27, 2017, issued by the Ministry of Corporate Affairs, the *de minimis* exemption was valid up to March 27, 2022 (*which has been extended up to 2027 vide the new notification*).

Additionally, the said notification also clarifies the asset and turnover value to be taken into account when a portion or division of an enterprise is being acquired. Per the notification, where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it, shall be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under Section 5 of the Competition Act, 2002.

The full text of the 2022 Notification can be accessed here. The earlier notification dated March 27, 2017 can be accessed here.

ii. Competition Commission of India orders investigation against Google for abusing position

[Order of the Hon'ble CCI dated January 7, 2021 in Case No. 41 of 2021]

Background:

The Indian Newspaper Society ("**INS**") had approached the Competition Commission of India ("**CCI**") alleging that Google's parent Alphabet Inc, Google LLC, Google India Private Limited, Google Ireland Limited and Google Asia Pacific Pte Ltd were abusing their dominant position in their news referral and related advertisement service in violation of Section 4 of the Competition Act, 2002. The INS alleged that the producers/publishers of news were not being compensated fairly for the content they were putting out on digital platforms for customers who searched for news items using the Google platform. INS also alleged that the news media houses were being kept in the dark on the total advertising revenue collected by Google and the actual percentage of the amount being transferred to media organisations.

It is interesting to note that the European Publishers Council had also filed a competition complaint against Google alleging that Google has achieved end to end control of the ad tech value chain, thus abusing its dominant position.

Conclusion:

The CCI, while ordering an investigation into Google's conduct, said that it needs to be examined whether the use of snippets by Google is a result of bargaining power imbalance between Google and the news publishers on the other, and whether it affects the referral traffic to news publisher websites, and thus their monetizing abilities. CCI also observed that, 'In a well-functioning democracy, the critical role played by news media cannot be undermined, and it needs to be ensured that digital gatekeeper firms do not abuse their dominant position to harm the competitive process of determining a fair distribution of revenue amongst the stakeholders.

iii. Competition Commission of India dismisses predatory pricing claims against Shopee

[Order of the Hon'ble CCI dated March 3, 2022 in Case No. 08 of 2022]

Background:

Praveen Khandelwal, the general secretary of the Confederation of All India Traders ("**CAIT**"), had submitted information to the Competition Commission of India ("**CCI**") claiming the company sells various products at extremely low prices with the intention to eliminate competition from small retailers. In his complaint, Khandelwal alleged Shopee's deep discounting tactics, including flash sales of products for Re. 1/- (Rupee One), Rs. 9/- (Rupees Nine) and Rs. 49/- (Rupees Forty Nine), were aimed at attracting a large base of customers and consumer preference data which the company could use to its advantage. CAIT had also alleged that Shopee incorporated a company SPPIN India Private Limited for operations in India in violation of FDI rules that mandate prior government approval for investment from countries that share a land border with India.

Conclusion:

Dismissing the Information, The CCI concluded in its analysis that Shopee did not hold significant market power as it is a relatively new entrant in a market with well-established players. CCI noted that "though the allegation is that Shopee is following similar discounting practices as allegedly done by Amazon and Flipkart, it does not appear to the Commission that Shopee possesses significant market power, much less dominance, at this stage".

iv. Competition Commission of India orders probe against Star India for alleged abuse of dominant position

[Order of the CCI dated February 28, 2022 in Case No. 09 of 2022]

Background:

Asianet Digital Network (P) Limited had approached the Competition Commission of India ("**CCI**") against Star India alleging that it was providing a bouquet of channels to the competitor of the informant at lesser prices resulting into denial of market access and also amounting to unfair/discriminatory pricing. According to the Information, Star India chose an indirect way to provide these discounts to circumvent the New Regulatory Framework of TRAI by way of promotion and advertisement payments to informant's competitor through high valued advertising deals, the complaint alleged.

Conclusion:

The CCI concluded that prime facie, the relevant market was the "market for provision of broadcasting services in the State of Kerala". Further, on the basis of market share, dependence of consumers, size and resources of the enterprise (being part of global media conglomerate), vertical integration of the enterprise and countervailing power, CCI concluded that Star India enjoyed dominant position.

Directing an investigation by the Director General, the CCI held that the alleged discriminatory conduct of price discrimination between different multi-system operators of Star India has resulted into significant loss in the consumer base of Asianet Digital Network (P) Limited. and therefore prima facie appears to be in violation of the provisions of Section 4 of the Competition Act, due to discriminatory pricing and denial of market access.

v. Competition Commission of India clears Amazon's proposal to buy Catamaran's stake in Cloudtail parent

[Order of the CCI in Combination Regn. No. C-2021/12/893]

The Competition Commission of India ("**CCI**") has cleared Amazon's proposal to acquire Catamaran Ventures' entire stake in Prione Business Services Pvt. Limited, the joint venture between Infosys co-founder N R Narayana Murthy's Catamaran Ventures and the US-based e-commerce giant. Prione Business Services houses Cloudtail, one of the largest retailers on the e-commerce firm's Indian platform.

Last year in December, Amazon had said that Prione Business Services will be acquired by Amazon, subject to the requisite regulatory approvals. On August 09, 2021, the partners had announced their decision to not continue the JV beyond the end of its current term in May 2022.

The businesses of the JV continued under the leadership of the current management and once the regulatory approvals come through, the board of Prione and Cloudtail (owned by Prione) was expected to complete the transaction in compliance with the applicable laws in India.

While the detailed order of the CCI is awaited, CCI announced its decision through a tweet.

vi. Competition Commission of India dismisses Information against Amazon Seller Services Private Limited

[Order of the CCI dated March 3, 2022 in Case No. 29 of 2020]

Background:

In its complaint filed in August 2020, AIOVA Sellers Association alleged that Amazon Seller Services had entered into anti-competitive arrangements with Amazon Wholesale, Amazon Retail, Cloudtail, Prione Business Services, which resulted in deep discounting and lack of platform neutrality. Inter alia, AIOVA had alleged that Amazon's business-to-business (B2B) arm, Amazon Wholesale, buys goods in large quantities directly from manufacturers, and then sells them at a loss, unlike other wholesalers, who would sell at a profit, to Amazon Retail and Cloudtail, both of which are sellers on the Amazon marketplace platform. Amazon Retail and Cloudtail, in turn, sell their products to consumers at massive discounts, which other sellers selling similar categories of goods cannot match. This anti-competitive arrangement amongst Amazon and its affiliate entities is driving existing and independent sellers out of the marketplace, resulting in the foreclosure of competition, AIOVA submitted. AIOVA also alleged that Amazon charges independent sellers higher platform fees compared to what it charges Amazon Retail and Cloudtail.

Conclusion:

The Competition Commission of India ("**CCI**") dismissed the Information because:

- AIOVA failed to file a certificate under section 65B of the Indian Evidence Act, 1872, in support of the electronic evidence that AIOVA relied upon in filing the complaint; and

- AIOVA failed to file additional information that the CCI sought from it. Moreover, the information filed by AIOVA had discrepancies that AIOVA failed to address, in spite of multiple opportunities given to it by the CCI.

vii. Competition Commission of India orders investigation against Zomato and Swiggy

[Order of the CCI dated April 4, 2022 in Case No. 16 of 2021]

Background:

The National Restaurant Association of India ("**NRAI**") had approached the Competition Commission of India ("**CCI**") against Zomato Limited ("**Zomato**") and Bundl Technologies Private Limited ("**Swiggy**"), inter alia alleging that Zomato and Swiggy were violating Competition Act, 2002 by:

- bundling food delivery services with food ordering services as the restaurant partners who avail listing services are not allowed to self-deliver;

- practicing data masking, keeping the restaurant partners in the dark about the end-consumers, though they are the ones who are held accountable for the services offered by these online food delivery platforms;

- playing a dual role - that of an intermediary as well as a participant, by listing their own cloud kitchens and private labels on their platform;

- imposing price parity terms on the restaurants which, inter alia, prevent them from charging lower prices on their own website or other food aggregator; and

- entering into one sided contracts with restaurants.

Conclusion:

The CCI noted that Zomato and Swiggy had conceded that they do not allow restaurant partners to self-deliver the orders placed through their platforms. The CCI was of the opinion that the integrated service of food ordering and delivery was in the interest of the consumer and had no anti-competitive element to it. However, CCI was of the prima facie view that:

- there is a conflict of interest in case of private labels. It stated that Zomato and Swiggy's commercial interest in the downstream market would impede them from acting as neutral platforms;

- there exists wide restrictions, wherein restaurant partners are not allowed to maintain lower prices and higher discounts on their own supply channel or other aggregators, which causes appreciable adverse effect on competition.

Hence, CCI directed a detailed investigation into the conduct of the two aggregators (i.e., Swiggy & Zomato).

IV. INSOLVENCY & BANKRUPTCY

A. REGULATORY UPDATES

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

The Insolvency and Bankruptcy Board of India ("**Board**") by way of its gazette notification dated February 9, 2022, bearing No. IBBI/2021-22/GN/REG/080 has published the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2022 ("**Amendment CIRP**") to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**Regulations**"). The Amendment CIRP substitutes Regulation 18 - 'Meetings of the Committee' and Regulation 39A - 'Preservation of Records' of the Regulations.

In terms of the substituted Regulation 18 of the Regulations, Resolution Professionals are allowed to place a proposal received from members of the Committee of Creditors ("**CoC**"), representing at least 33% (thirty three percent) of the voting rights, if considered necessary, in a meeting of the CoC.

In terms of the substituted Regulation 39A of the Regulations, the Resolution Professionals or Interim Resolution Professionals are *inter alia* compulsorily required to preserve electronic copies of all records for a minimum period of 8 (eight) years and physical copies for 3 (three) years from the date of

completion of the corporate insolvency resolution process, at a secure place, and are obligated to produce these records whenever required.

The above-mentioned substitutions are applicable to the corporate insolvency resolution processes that are ongoing and those which commence on or after the date of the commencement of the Amendment CIRP i.e., February 9, 2022.

The full text of the Notification can be accessed here.

B. JUDICIAL PRONOUNCEMENTS

i. Amit Katyal v. Meera Ahuja and Others

[Judgment of the Hon'ble Supreme Court of India dated March 3, 2022, in Civil Appeal No.3778 of 2020]

Background:

The present matter was filed by the Appellant (Promoter/ Majority Shareholder of Jasmine Buildmart Private Limited, i.e., the corporate debtor) being aggrieved and dissatisfied with the Order dated November 9, 2020 passed by the National Company Law Appellate Tribunal, New Delhi ("**NCLAT**"). The Order of the NCLAT had dismissed the appeal preferred by the Appellant and had confirmed the Order passed by the National Company Law Tribunal, New Delhi ("**NCLT**"), thereby admitting the petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**Code**").

Jasmine Buildmart Private Limited ("**Corporate Debtor**") commenced a housing project ("**Project**"). The Corporate Debtor could not complete the Project even after a period of 8 (eight) years. Therefore, the Respondent Nos. 1 to 3 ("**Original Applicants**") who were home buyers preferred an application under Section 7 of the Code, before the NCLT for institution of a corporate insolvency resolution process, against the Corporate Debtor. The Original Applicants sought for a refund of Rs. 6,39,02,755/- (Rupees six crores thirty nine lakhs two thousand seven hundred and fifty five only), due to an inordinate delay in the completion of the Project. The NCLT admitted the application under Section 7 of the Code, appointed an interim resolution professional ("**IRP**") and declared a moratorium. The said order of the NCLT was confirmed by the NCLAT. The IRP then issued a public announcement and constituted the Committee of Creditors ("**CoC**").

During the course of arguments before the Hon'ble Supreme Court of India, it was reported that the Original Applicants and 79 (seventy nine) other home buyers had settled their disputes with the Corporate Debtor and a settlement had been entered into. Therefore, it was requested for the Hon'ble Supreme Court of India to record the settlement and permit the Original Applicants to withdraw the corporate insolvency resolution proceedings. Pursuant to the same an application was filed by the Original Applicants under Article 142 of the Constitution of India, read with Rules 11 and 12 of the National Company Law Tribunal Rules, 2016.

The Hon'ble Court considered the issue of whether powers under Article 142 of the Constitution of India could be exercised in the instant matter, allowing the Original Applicants to withdraw the corporate insolvency resolution proceedings, despite Section 12A of the Code requiring 90% (ninety percent) voting share of the CoC to consent.

Finding of the Court:

The Hon'ble Supreme Court considered the fact that out of 128 (one hundred and twenty eight) home buyers, 82 (eighty two) have settled their disputes with the Corporate Debtor, and have no objection if the corporate insolvency resolution proceedings initiated by the Original Applicants are permitted to be withdrawn. It is also noted that immediately after the constitution of the CoC, the Hon'ble Supreme Court had stayed the proceedings and therefore, no further steps were taken by the IRP/ CoC. The Hon'ble Supreme Court also observed that while under section 12A of the Code, which was inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 with retrospective effect, an application under Sections 9/7/10 of Code could be withdrawn, on an application with the approval of 90% (ninety percent) voting share of the CoC, and in the present case only 70% (seventy percent) were willing for the corporate insolvency resolution proceedings to be set aside.

The Hon'ble Supreme Court, however, was of the opinion that this was a fit case for exercising its powers under Article 142 of the Constitution of India, as the same was in the larger interests of the home buyers who were waiting for possession for more than 8 (eight) years, and if the same would not be done, there would be drastic consequences, as the moratorium would bar institution of fresh proceedings against the Corporate Debtor, including proceedings by the home buyers for compensation. Further, it observed that in the event that there was resolution by way of acceptance of a resolution plan, the creditors including home buyers may take a haircut and on the other hand if the Corporate Debtor was thereafter directed to be liquidated, the homebuyers being unsecured creditors would possibly stand to lose all their money.

The Hon'ble Supreme Court while arriving at the above findings has reiterated that the legislative object and purpose of the Code is not to kill a company and stop/ stall a project, but to ensure that the business of the company runs as a going concern. Accordingly, the application for withdrawing the corporate insolvency resolution proceedings was allowed.

ii. Vistra ITCL India Limited v. Satra Properties (India) Limited

[M.A. 180/2020 in Company Petition (IB) No. 1632/MB/2019, NCLT, Mumbai Bench, Order dated February 10, 2022]

Background:

As a result of the difference in opinion on certain issues between the Hon'ble Judicial Member and the Technical Member of the National Company Law Tribunal, Mumbai Bench ("**NCLT**"), arising with regard to a Miscellaneous Application ("**Application**") filed by Sastra Properties (India) Limited ("**Corporate Debtor**"), a reference was made to a third Member as follows: -

"*Whether the Debenture Trust Deed dated March 1, 2014, and the Redeemable Non-convertible Debenture Subscription Agreement dated March 1, 2014, should be impounded and be sent for payment of the requisite stamp duty in accordance with the Maharashtra Stamp Act?*"

A company petition was filed by Vistra ITCL India Limited ("**Financial Creditor**") under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**Code**") against the Corporate Debtor. During the pendency of the company petition, the Corporate Debtor filed the application *inter alia* praying for the impounding

of the Secured Redeemable Non-Convertible Debenture Subscription Agreement and the Debenture Trust Deed, on account of them being insufficiently stamped.

Upon reference, the following issues were framed by the NCLT:

- Whether the pleas of deficit stamp duty and non-payment of stamp duty can be raised by a Corporate Debtor in a Section 7 application, more so when the 'debt' and 'default' are proved, without relying on these documents?

- If so at what stage and before whom?

Finding of the Tribunal:

Upon consideration of the case law and submissions made, the Hon'ble Member observed that under the Code, a petition under Section 7 of the Code can be filed by way of the form prescribed in the Code, even without any pleadings. It was further observed that the debt and default in such matters can be proved through the records maintained by an information utility, without filing any other documents. It was opined that the moment this dual legal requirement is met, the NCLT has no option except to admit the company petition without going into any other technical issued raised by a corporate debtor.

In conclusion, it was held that as, if the debt and default were capable of being proved (as in the instant case) even without looking into the documents sought to be impounded on the ground of insufficiency of stamp duty, the proper course of action would be to dismiss the application/ request for impounding without getting into the issue of stamp duty, which is irrelevant for adjudication of a petition under Section 7 of the Code. Liberty was however granted to the Corporate Debtor to raise the issue of sufficiency of stamp duty before the appropriate authority before whom the Financial Creditor relies on the documents as evidence for enforcing their rights under the documents.

iii. Association of Aggrieved Workmen of Jet Airways (India) Limited v. Jet Airways (India) Limited

[Judgement of the Hon'ble National Company Law Appellate Tribunal, Principal Bench, New Delhi dated January 20, 2022, in Company Appeal (AT)(Insolvency) No. 915 of 2021]

Background:

This judgement arises out of an appeal filed against an order of the National Company Law Tribunal, Mumbai Bench ("**NCLT**") dated June 22, 2021, approving the Resolution Plan submitted by the successful resolution applicant, i.e., Respondent No. 4. The Appellant, an association of aggrieved workmen of Jet Airways (India) Limited ("**Operational Creditor**"), had filed their claims before the Resolution Professional ("**RP**"). As per the Resolution Plan, all the workmen and employees were allotted an amount of Rs. 52,00,00,000/- (Rupees fifty two crores).

More specifically, the judgment dealt with the limited scope of whether the National Company Law Appellate Tribunal ("**NCLAT**") could issue a direction to the RP to produce records, including a copy of the Resolution Plan and its annexes, with a full set of documents relating to corporate insolvency resolution process ("**CIRP**"), of the Corporate Debtor ("**Application**") to the Appellant, who was the operational creditor.

On the above point, the Respondents urged that the Resolution Plan is a confidential document and contains confidential information about the Corporate Debtor and the Successful Resolution Applicant which are not available in the public domain. As such, no information or material can be disclosed to any person without the prior consent of the Resolution Applicant. It was further contended that the requirement of law is to share a copy of the Resolution Plan only with members and participants in the Committee of Creditors ("**CoC**"). The Appellant not being entitled to participate in the CoC cannot claim a copy of the Resolution Plan.

The Respondents also relied on Regulation 39(5A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which contains legislative intendment that only the principle or formulae for payment of debts has to be communicated to the claimant. Further, since the Operational Creditor has a limited interest to the extent of satisfaction of their claims, their role cannot be enlarged by allowing them to scrutinise the contents of the whole Resolution Plan.

Therefore, the limited issue before the NCLAT was:

"Whether the Appellant was entitled to a copy of the Resolution Plan or any part of it or does it still continue to be a confidential document, so as to deny access to it?"

Findings of the NCLAT:

The NCLAT while noting the general scheme under the Insolvency and Bankruptcy Code, 2016 ("**Code**") and the regulations thereunder, held that an insolvency professional must ensure that confidentiality of the insolvency resolution process, liquidation or bankruptcy process as the case may be, is maintained at all times. This does not, however, preclude him from disclosing any information with the consent of the relevant parties or as required by law. In this context, Section 24 of the Code permits creditors or their representatives, if the amount of their aggregate dues is not less than 10% (ten percent) of the debt, to receive notices of the meetings of the CoC. Therefore, the said category of creditors including members of the suspended Board of Directors or the partners of the corporate persons who qualify under the said provision are entitled to receive copies of all documents in addition to other members and participants in the CoC.

Secondly, the NCLAT relied on Rule 114(1) of the National Company Law Tribunal Rules, 2016 ("**Rules**") which deals with inspection of documents and provides that parties to any case or their authorised representative may be allowed to inspect the record of the case. Sub-Rule 2 of the Rule 114 of the Rules further stipulates that a person who is not a party to the proceeding may also be allowed to inspect documents pertaining to the proceeding after obtaining permission from the Registrar in writing. The Resolution Plan being a part of the record of the case or proceeding should be available for inspection. Therefore, the right to inspect the Resolution Plan is statutorily provided for.

Thirdly, Section 31(3) of the Code provides that the RP after approval of the Resolution Plan should forward all records relating to the conduct of the resolution insolvency process and the resolution plan to the Board, to be recorded in the database. Further, Section 196(1) of the Code empowers the Board to call for any information and records from the insolvency professional agencies, insolvency professionals and information utilities. The same provision under Sub-Clause (k) also empowers the Board to disseminate information relating to such cases. Therefore, a combined reading of Section 31(3) and Section 196(1) of the Code makes it clear that the powers of the Board not only extended to calling for records for data

research studies, but also for purposes of being published. Thus, the Resolution Plan no longer remains a confidential document, so as to preclude the regulator or other persons from accessing the said document.

Lastly, the Hon'ble Tribunal referred to Section 61(3) of the Code which enumerates the grounds on the basis of which an appeal can be preferred against an order approving a Resolution Plan under Section 31 of the Code. Sub-Section 3 of Section 61 of the Code specifically stipulates that an appeal can be preferred on the ground that '*the debts owed to the operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board*'. A perusal of this ground makes it abundantly clear that unless the Appellant is made aware of the contents of the Resolution Plan, he will be unable to satisfy the appellate court that the ground mentioned in Sub-Section 3 of Section 61 of the Code has been made out. Therefore, for the Appellant to be able to urge this ground, it is imperative for the Appellant to have access to the Resolution Plan.

On the basis of the above observations, the NCLAT was of the opinion that the Resolution Plan is not a confidential document so as to deny the Appellant access to it. In the current factual scenario, however, there were more than 20,000 (twenty thousand) operational creditors and stakeholders making it onerous to provide a copy of the Resolution Plan to all of them. Therefore, the NCLAT directed that a part of the Resolution Plan which deals with the claim of the workmen and employees be provided to the Appellant by the Respondent No. 4.

iv. M/s. Brand Realty Services Limited v. M/s. Sir John Bakeries India Private Limited

[Order dated March 10, 2022 of the Hon'ble National Company Law Appellate Tribunal, Principal Bench, New Delhi in Company Appeal (AT) (Insolvency) No. 958 of 2020]

Background:

The appeal was filed before the National Company Law Appellate Tribunal ("**NCLAT**") challenging the Order dated July 22, 2020 passed by the National Company Law Tribunal, New Delhi Bench ("**NCLT**"), by which the NCLT had rejected the application filed by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("**Code**").

The NCLT was of the view that the default of payment claimed by the Appellant did not come within the definition of 'Operational Debt' under the Code, in view of the nature of the agreement involved. Further, the NCLT observed that the Respondent had waived their right to raise the claim of a pre-existing dispute, as they failed to reply to the statutory demand notice issued by the Appellant under Section 8 of the Code within the stipulated period of 10 (ten) days.

Findings of the NCLAT:

The NCLAT framed 2 (two) issues for consideration:

- Whether the NCLT was correct in its view that an 'Operational Debt' does not cover "default in instalment of a settlement agreement"?

- Whether the Respondent had waived their right to raise the ground of a pre-existing dispute in view of its failure to reply to the statutory demand notice (under Section 8 of the Code) within a period of 10 (ten) days?

With respect to the first issue, the NCLAT observed that the NCLT had erred in observing that the debt was not an 'Operational Debt', as defined under the Code, upon interpreting the nature of the agreements involved.

With respect to the second issue, the NCLAT, while referring to the statutory scheme under Sections 8 and 9 of the Code, observed that merely because the reply to the statutory demand notice (under Section 8 of the Code) was not given within a period of 10 (ten) days, it would not preclude a Corporate Debtor to bring the relevant materials before the NCLT to establish that there is a pre-existing dispute in the proceedings initiated under Section 9 of the Code. The NCLAT further referred to the judgment in *Neeraj Jain v. Cloudwalker Streaming Technologies Private Limited*, (Company Appeal (AT) Ins. No. 1354 of 2019) wherein the NCLAT had observed that, 'mere failure to reply to the demand notice does not extinguish the rights of the Corporate Debtor to show the existence of a pre-existing dispute'.

In view of the above observations, the NCLAT remanded the matter back to the NCLT to consider the Section 9 application afresh in accordance with law after hearing the parties.

V. LITIGATION & ARBITRATION

i. Indian Oil Corporation Limited v. M/s Shree Ganesh Petroleum, Rajgurunagar

[Civil Appeal Nos. 837-838 of 2022 decided on February 1, 2022 by the Supreme Court of India]

Background:

In the present case, the Appellant, i.e., Indian Oil Corporation Limited took a piece of land on lease from the Respondent, i.e., M/s Shree Ganesh Petroleum by a lease deed, which was duly registered, in order to set up a retail outlet for sale of its petroleum products. The Respondent was also appointed a dealer of the said retail outlet and a dealership agreement was executed to this effect.

Subsequently disputes arose between the parties under the dealership agreement and the Appellant terminated the dealership agreement. The said termination was challenged by the Respondent and the Respondent also invoked the arbitration clause under the dealership agreement.

Arbitration was initiated in the matter and in the Statement of Claims filed by the Respondent, an alternative prayer was made for the amendment of the lease agreement to enhance the monthly rent.

In the arbitration, the Arbitral Tribunal held that the termination was legal. However, in the final award, the Arbitral Tribunal enhanced the lease rent.

The Arbitral Award was challenged by the Appellant and subsequently after proceedings in the Hon'ble District Court and the Hon'ble High Court, a Civil Appeal was filed in the Hon'ble Supreme Court of India.

Finding of the Supreme Court:

The Hon'ble Supreme Court set aside the Arbitral Award in so far as the same dealt with disputes with regard to the lease deed, which were not contemplated by the arbitration clause in the dealership agreement.

The Hon'ble Supreme Court held that the decision enhancing the lease rent was patently beyond the scope of the submission to arbitration. In addition, the Hon'ble Supreme Court observed that the lease agreement and dealership agreement were distinct agreements independent of each other.

ii. Shiv Developers v. Aksharay Developers and Others

[Civil Appeal No. 785 of 2022 decided on January 31, 2022 by the Supreme Court of India]

Background:

In the present case, the Appellant, i.e., Shiv Developers (unregistered partnership firm), filed an appeal against Aksharay Developers and others (Respondents) challenging the decision of the Hon'ble High Court of Gujarat. In this case, the Trial Court had rejected the application moved by the Respondents under Order VII Rule 11(d), Order XXX Rules 1 and 2 and Section 151 of the Code of Civil Procedure, 1908 read with 69 of Indian Partnership Act, 1932 ("**Partnership Act**") for rejection of plaint on the ground that the suit filed by and on behalf of an unregistered partnership firm was barred by law. The Trial Court held that on the subject-matter relating to the validity of the sale deed in question, the bar of Section 69(2) of the Partnership Act was not operating against this suit. Subsequently, the Hon'ble High Court took a contrary view and held that the Appellant, being an unregistered firm, would be barred to enforce a right arising out of the contract in terms of Section 69(2) of the Partnership Act.

Finding of the Supreme Court:

The Hon'ble Supreme Court adjudicated upon the issue as whether the subject suit, filed by an unregistered partnership firm, is covered by the bar created by Section 69(2) of the Partnership Act.

The Hon'ble Supreme Court held that bar of Section 69(2) of the Partnership Act was not attracted as the sale deed in question was not executed in the regular business dealings of the firm.

The Hon'ble Supreme Court after placing reliance on the case of *Raptakos Brett & Co. Limited v. Ganesh Property: (1998) 7 SCC 15*, reiterated the settled law that for the bar under Section 69(2) to be attracted, the contract in question must be the one entered into by firm with the third-party Respondent and must also be the one entered into by the plaintiff firm in the course of its business dealings.

The Hon'ble Supreme Court accordingly observed that Section 69(2) of Partnership Act is not a bar to a suit filed by an unregistered firm, if the same is for enforcement of a statutory right or a common law right.

iii. UHL Power Company Limited v. State of Himachal Pradesh

[Civil Appeal Nos. 10341 and 10342 of 2011 decided on January 7, 2022 by the Supreme Court of India]

Background:

In the present case, the appeals arose from a common judgment passed by the Hon'ble High Court of Himachal Pradesh partly allowing an Arbitration Appeal filed by the Appellant, i.e., UHL Power Company Limited, under Section 37 of the Arbitration and Conciliation Act, 1996 ("**the Act**").

In the matter, the Sole Arbitrator had awarded a sum of approximately Rs. 26,08,89,107/- (Rupees Twenty Six Crores Eight Lakhs Eighty Nine Thousand One Hundred and Seven) in favour of the Appellant towards expenses claimed along with pre-claim interest capitalized annually, on the expenses so incurred. Further, compound interest was awarded in favour of the Appellant at 9% per annum till the date of claim and in the event the awarded amount was not realized within a period of six months, future interest was awarded at 18% per annum on the principal claim with interest. Subsequently, in appeal under Section 34 of the Act, the Single Judge had disallowed the entire claim of the Appellant.

Finding of the Supreme Court:

The Hon'ble Supreme Court placed reliance on the case of *Hyder Consulting (UK) Limited v. Governor, State of Orissa through Chief Engineer*, (2015) 2 SCC 189, wherein the three-judge bench of the Hon'ble Supreme Court allowed the grant of post award interest.

The Hon'ble Supreme Court in this case accordingly held that the Arbitral Tribunal had the authority to grant compound interest or interest upon interest.

iv. Atlanta Limited v. Union of India

[Civil Appeal Civil Appeal No. 1533 of 2017 decided on January 18, 2022 by the Supreme Court of India]

Background:

In the present case, the Appellant, i.e., Atlanta Limited had invoked the Arbitration Clause in the contract executed by the parties, due to a termination order. The sole arbitrator had awarded a sum of approximately Rs. 25,96,87,442/- (Rupees Twenty Five Crores Ninety Six Lakhs Eighty Seven Thousand Four Hundred and Forty Two) in favour of the Appellant, inclusive of interest. The Respondent, i.e., Union of India's counter claim was partly allowed. Against this award, the Respondent filed a petition before Hon'ble Madras High Court under Section 30 read with Section 33 of the Arbitration and Conciliation Act, 1940 ("**the Act**"), which was dismissed by the learned Single Judge and a decree was passed in terms of the Award. The said judgment was challenged in an intra-court appeal by the Respondent, and the Division Bench set aside the amount awarded in favour of the Appellant towards idle hire charges and the value of the tools and machineries. In addition, the findings in the Award in respect of the extension of time and illegal termination of the contract on the part of the Respondent, were also set aside.

Finding of the Supreme Court:

The Hon'ble Supreme Court observed that a consistent view taken in several judicial pronouncements that the Hon'ble Supreme Court does not sit in appeal over an Award passed by an Arbitrator and the only grounds on which it can be challenged are those that have been specified in Sections 30 and 33 of the Act, namely, when there is an error on the face of the Award or when the learned Arbitrator has mis-conducted himself or the proceedings.

The Hon'ble Supreme Court further held that it is also a well-settled principle of law that challenge cannot be laid to the Award only on the ground that the Arbitrator has drawn his own conclusion or failed to appreciate the relevant facts. Nor can the Hon'ble Court substitute its own view on the conclusion of law or facts as against those drawn by the Arbitrator, as if it is sitting in appeal. In addition, as long as the

Arbitrator has taken a possible view, which may be a plausible view, simply because a different view from that taken in the Award, is possible based on the same evidence, would also not be a ground to interfere in the Award.

The Hon'ble Supreme Court observed that the learned Sole Arbitrator had interpreted the clauses of the contract by taking a particular view and had gone to great length to analyse several reasons offered by the Appellant to justify its plea that it was entitled for extension of time to execute the contract, the Division Bench of the Hon'ble High Court ought not to have sat over the said decision as an Appellate Court and seek to substitute its view for that of the learned Arbitrator. The Hon'ble Court held that by going into the minute details of the evidence led before the learned Sole Arbitrator with a magnifying glass and the findings returned thereon, the Appellate Court had clearly transgressed the limitations placed on it. The Hon'ble Court further observed that in any case, it was of the opinion that the reasons offered for taking such a view, were neither justified nor called for interfering with the arbitral Award.

The Hon'ble Supreme Court accordingly held that the impugned judgment passed by the Division Bench of the Hon'ble High Court cannot be sustained and is quashed and set aside, while restoring the judgment passed by the learned Single Judge and upholding the decree granted in favour of the Appellant-claimant in terms of the Award along with interest.

VI. LABOUR & EMPLOYMENT

i. The Haryana Government notifies the Haryana State Employment of Local Candidates Rules, 2021

The Governor of Haryana, by way of Notification No. Lab/1128 dated January 10, 2022, has notified the Haryana State Employment of Local Candidates Rules, 2021 ("**Rules**"). The Rules will come into force with effect from the date of coming into force of the Haryana State Employment of Local Candidates Act, 2020 ("**Act**") [The Act has come into effect on January 15, 2022]. Some of the key features of the Rules are discussed below:

- The Act defines a 'Local Candidate' as a candidate who is domiciled in the State of Haryana. The Rules clarify that a 'domiciled person' would include a bonafide resident of Haryana, satisfying the conditions as may be issued by the Government from time to time and having the Parivar Pehchan Patra (PPP) issued under the Haryana Parivar Pehchan Act, 2021.

- The Rules provide for a unique identification number called Haryana Udhyam Memorandum Identification Number ("**HUM ID**") to be issued to all types of enterprises and businesses operating in Haryana on the Haryana Udhyam Memorandum Portal.

- Every employer is required to use its HUM ID and register its existing employees earning a gross monthly salary of up to Rs. 30,000/- (Rupees thirty thousand only) on the designated portal.

- An employer seeking exemption from the provisions of Section 4 (*Recruitment of Local Candidates*) of the Act, will be required to apply on the designated portal in the prescribed format, furnishing therein reasonable grounds for granting such exemption mentioning the specific requirement of qualification, skill and experience for the said post and availability or otherwise of the Local Candidates possessing such qualification, skill and experience. Any such exemption shall be valid for a maximum period of 1 (one) year.

- Any aggrieved Local Candidate can file a complaint against the employer for violation of any provision of the Act on the designated portal, which is required to be disposed of by the competent authority within 30 (thirty) days.

- Employers are required to furnish a quarterly report with respect to the Local Candidates employed and appointed by the employer in the previous quarter.

The full text of the Notification can be accessed here.

ii. The Haryana Government grants exemptions under the Haryana State Employment of Local Candidates Act, 2020

The Labour Department, Government of Haryana, by way of an Order bearing no. Lab./2022/HSELC/Spl-04-205 dated January 17, 2022, has granted deemed exemptions to certain employers from the purview of the Haryana State Employment of Local Candidates Act, 2020 ("**Act**").

The exemptions are in relation to the following:

- vacancies in new start-ups and in the new Information Technology (IT)/ Information Technology Enabled Services (ITeS) sector for a period of 2 (two) years from the date of the commencement of work/ business. 'New start-ups and new IT/ ITeS will include an employer who has commenced operations within a period of 2 (two) years from the date of commencement of the Act;

- short term employment of less than 45 (forty five) days;

- vacancies under employers who primarily engage in agricultural activities;

- vacancies under employers for domestic work or services in residential homes;

- vacancies which are being filled through promotion, transfer or absorption of surplus staff of any unit of the same employer in Haryana; and

- any class, post, skill and category of employment, as may be notified by the Government where the Local Candidates of desired skill, qualification or proficiency required in such employment are not available.

The full text of the Order can be accessed here.

iii. The Employees' Provident Fund Organisation issues a clarification on 'NEEM trainees'

The Employees' Provident Fund Organisation, by way of Circular No. Compliance/ NEEMscheme/ 2021 dated February 24, 2022, has issued a clarification to the effect that the trainees engaged by an establishment under the All India Council for Technical Education (National Employability Enhancement Mission (NEEM)) Regulations, 2017 will not be exempted from the definition of the term 'employee' under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

The full text of the Circular can be accessed here.

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