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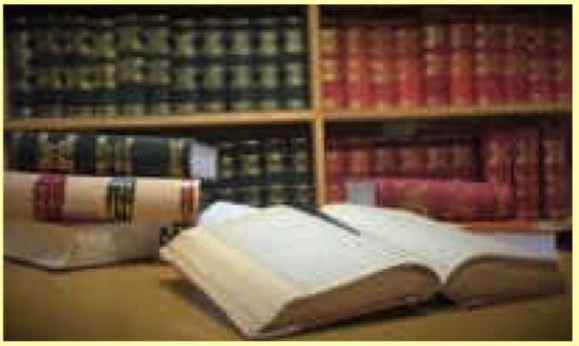

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INSIGHTS

CYBER SECURITY THREATS AND THE CYBER SECURITY LEGAL FRAMEWORK IN INDIA - AN OVERVIEW

As businesses face ever-increasing complexities in their digital assets with a hybrid workforce, cybersecurity threats are on the rise. Cybercrime is at an all-time high with businesses, as the digital footprint expands across websites, apps, workstations, mobiles, laptops and infrastructure. Good cyber hygiene is recommended for every organization.

In this article, we cover the top 5 (five) cybersecurity threats to businesses today and also discuss the framework surrounding cybersecurity laws in India.

Phishing:

Phishing is a scheme used by hackers, usually via e-mail to trick users into downloading harmful messages or sharing confidential information. Phishing e-mails appear like legitimate e-mails containing logos, branding etc., of business names which may persuade the recipient to act upon such e-mail, such as clicking a link which may redirect the recipient to a form that requires details such as credentials, credit card details or downloading an attachment, etc.

Businesses are vulnerable to being exposed by their workforce by accidentally clicking and following instructions through phishing e-mails. Confidential information such as user login credentials to the corporate network, credit card details, third-party login credentials to various payment software, finance related applications and sites, human resource data, cloud and accounting systems are a few amongst others which may be vulnerable to phishing and hacking. This type of crime is causing tremendous damage to businesses, in the form of loss of credentials, data, and business secrets.

Compromised Passwords:

Often paired with phishing, a fake website designed to appear legitimate, is used to mislead users to provide their credentials such as usernames and passwords, as they click submit. Commonly used passwords and reusing the same password across multiple sites makes it easy for hackers to gain access to such usernames and passwords, across multiple cloud platforms, making businesses that utilize them vulnerable.

Businesses must plan for a complex password policy and use multifactor authentication, where a mobile device can be used for an additional passcode or one-time-password for an additional layer of security.

Unpatched devices and servers:

Unpatched operating systems on servers, out-of-date devices and unpatched software can pose a massive risk for businesses, due to computer codes containing known security weaknesses. Businesses run software provided by a variety of vendors, such as Microsoft, Google, Apple, and more specialized software like SAP, and even custom code that their internal software developers have commissioned. Usually, software vendors write additions to their code, known as “patches”, which fixes application vulnerabilities to secure these weaknesses.

Often businesses overlook a good patching regime for their servers, desktops, laptops and mobile phones used by their workforce. Unpatched vulnerabilities result in weaknesses that allow attackers to leverage a known security bug that has not been patched by running malicious code.

Data breaches:

A data breach is the theft of data including sensitive data from a system without authorization from the system owner. Confidential user information can include but isn't limited to credit card numbers, social security numbers, names, home addresses, e-mail addresses, usernames, passwords etc.

Breaches may be implemented through point-of-sale systems or a network attack. A network attack is likely to occur when cybercriminals identify a weakness in a company's online security system and use the weakness to invade the system. Social attacks are also prevalent, where hackers fool employees into granting access to an organization's network, such as tricking them to download a harmful attachment or accidentally giving out login credentials.

Encryption of data, maintenance of data policies, security standards and proper firewalls, anti-virus software, and anti-spyware software are important tools to defend business against data breaches.

Malicious insiders:

Malicious insiders refer to employees, ex-employees, contractors or any personnel who work or have worked within a business organization. These insiders have access to the networks of the organization which may have sensitive and confidential information. This sensitive and confidential information, ranging from security protocols to customer databases or even financial files, could be potentially misused or leaked by them. Compromise of such important information poses a huge threat to any organization.

Since these are individuals have access to the organization's networks, the usual security measures prove to be ineffective. Using artificial intelligence and machine learning to prioritize security alerts, monitoring database activity, user behaviors, encryption, user rights management can help in keeping business data and information safe from malicious insiders.

Cybersecurity Framework in India:

The Information Technology Act, 2000 ("**IT Act**") and the rules framed thereunder (collectively referred to as "**IT Rules**"), contain provisions for the protection and privacy of electronic data. The IT Act penalises 'cyber contraventions' under Section 43 and section 43A, and 'cyber offences' under Sections 66, 66A, 66B, 66C, 66D and 72A and 67 of the IT Act.

The IT Rules focuses on and regulates specific areas of collection, transfer and processing of data, and includes the following:

- **Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011**, which require entities holding users' sensitive personal information to maintain certain specified security standards;

- **The Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021**, which prohibits content of a specific nature on the internet, and governs the role of

intermediaries, including social media intermediaries, in keeping personal data of their users safe online; and

- **The Information Technology (The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013**, as amended by Directions dated April 28, 2022, which *inter-alia* deal with information security practices, procedure, prevention, response and reporting of cyber incidents for Safe & Trusted Internet.

Additionally, other legislations and rules, as amended and as may be in force from time to time, such as the Indian Penal Code, 1860, the Copyright Act, 1957, the Patents Act, 1970, the Code of Criminal Procedure, 1973, the Companies Act, 2013 and the Consumer Protection Act, 1986, may also sometimes apply in dealing with cybercrimes. The Indian Penal Code contains provisions in respect of theft, fraud, identity theft and intentional causation of damage, which broadly also applies to cyber offences.

Section 43 of the IT Act covers contraventions and penalises cybercrimes, such as unauthorised access/ hacking/ infection of IT systems, with malware etc. Section 43 of the IT Act *inter-alia* provides for penalties and compensation in respect of damage caused to a computer, computer system, computer network or computer resource on account of unauthorised access, unauthorised downloads, copies or extraction of any data, information or computer database, introduction of any computer contaminant or computer virus, providing assistance to facilitate access to a computer, computer system or computer network in contravention of the provisions of the IT Act and any manipulation or tampering that causes services availed by one person to be charged to another. Section 43 of the IT Act also includes within its ambit, stealing, concealment, destruction, or alteration (or causing any person to do any of the foregoing) of any computer source code used for a computer resource with an intention to cause damage. This section provides for award of compensation to the person so affected. Those found guilty of offences under Section 66 of the IT Act are punishable by imprisonment for a term of up to 3 (three) years (non-cognizable offence) a fine of Rs. 5,00,000/- (Rupees five lakhs only), or both which *inter-alia* provides for penalties for computer related offences.

Although the IT Act does not reference phishing specifically by name. However, phishing is also impersonation by different mode and technique. In the case of *National Association of Software and Services Companies v. Ajay Sood* (2005 (30) PTC 437 (Del)), the Delhi High Court defined phishing as "a form of internet fraud involving a deliberate misrepresentation or theft of identity in order to perpetrate theft of data". Section 43, 66, 66C and 66D of the IT Act broadly covers actions within this definition, which may be categorised as phishing attacks. Penalties for contravention of the same have been discussed above.

Additionally, Section 66C of the IT Act states that whoever fraudulently or dishonestly makes use of the electronic signature, password, or any other unique identification feature of any other person, would be punished with imprisonment of up to 3 (three) years, and will also be liable to a fine of up to Rs. 1,00,000/- (Rupees one lakh only). Section 66D of the IT Act prescribes the same penalties for whoever, by means of any communication device or computer resource cheats by personation. Anyone dishonestly receiving stolen computer resource or communication device is liable to be punished with imprisonment of either description for a term which may extend to 3 (three) years or with fine which may extend to Rs. 1,00,000/- (Rupees one lakh only) or with both in terms of Section 66B of the IT Act.

The IT Act requires body corporates (defined as any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities) handling sensitive

personal data or information to be liable to pay damages for any loss caused by their negligence in implementing and maintaining reasonable security practices and procedures. While the IT Act does not prescribe specific measures to be taken for monitoring, detection, prevention or mitigation of cybercrime incidents, however, these are prescribed by Indian Computer Emergency Response Team from time to time under section 70B. 'Reasonable security practices and procedures' are provided under the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ("**Rules**"). It requires body corporates to have a security policy and also obtain consent when collecting or transferring sensitive personal data or information, and to inform data subjects of recipients of such collected data. Rule 8 of the Rules lists 'Reasonable Security Practices and Procedures' and *inter-alia* requires body corporates to:

- have a comprehensive documented information security programme and information security policies that contain managerial, technical, operational and physical security control measures that are commensurate with the information assets being protected with the nature of business;

- following the international standard IS/ISO/IEC 27001 on "Information Technology – Security Techniques –Information Security Management System – Requirements"; and

- getting the codes of best practices being followed, duly approved and notified by the Central Government for effective implementation in case IS/ISO/IEC codes of best practices are not being followed for data protection.

- while there is no specific requirement for the designation of a chief information security officer, Rule 5(9) of the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 mandates that all discrepancies or grievances reported to data controllers must be addressed in a timely manner. Corporate entities must designate grievance officer for this purpose, and the names and details of the grievance officer must be published on the website of the corporate entity. The grievance officer must redress respective grievances within a month from the date of receipt of the grievances. The Companies (Management and Administration) Rules, 2014, framed under the Companies Act, 2013, also require that the board of a company shall appoint a person in the company responsible for the management, maintenance and security of electronic records. Any failure by such person to do so would result in a breach of their duties of care under the law.

Cyber Security Incidents:

Under Section 70B of the IT Act, the government has constituted the Indian Computer Emergency Response Team ("**CERT-In**"). CERT-In is a nodal agency responding to computer security incidents as and when they occur and deals with threats like hacking and phishing. The Information Technology (The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013 ("**CERT-In Rules**") provide for the functioning of CERT-In. Rule 12 of the CERT-In Rules requires the operation of a 24-hour incident response helpdesk by them. Any individual, organisation or corporate entity affected by cybersecurity incidents may report the incident to CERT-In.

Rule 12 of the CERT-In Rules also requires service providers, intermediaries, data centres and body corporates to report cybersecurity incidents to CERT-In within a reasonable time in order to facilitate timely action. The CERT-In website provides methods and formats for reporting cybersecurity incidents and provides information on vulnerability reporting and incident response procedures.

The Central Government, pursuant to the powers granted to it under the IT Act, has also issued the Directions dated April 28, 2022 under sub-section (6) of section 70B of the IT Act **("CERT-In Directions**") which amongst others, provides for reporting of cyber incidents within a specific time frame.

In terms of the CERT-In Directions, all service providers, intermediaries, data centers, body corporate and Government organizations shall:

- connect to the Network Time Protocol ("**NTP**") Server of National Informatics Centre ("**NIC**") or National Physical Laboratory **("NPL")** or such servers as provided for synchronisation of all their Information and Communications Technology **("ICT")** systems clocks.

- mandatorily report cyber incidents to CERT-In within 6 (six) hours of noticing such incidents or being brought to notice about such incidents.

- designate a point of contact to interface with CERT-In. The Information relating to a point of contact shall be sent to CERT-In. They shall take action or provide information or any such assistance to CERT-In, for the purposes of cyber incident response, protective and preventive actions.

- mandatorily enable logs of all their ICT systems and maintain them securely for a rolling period of 180 (one hundred and eighty) days and the same shall be maintained within or outside the Indian jurisdiction. These logs/ information however, should be provided to CERT-In along with reporting of any incident or when ordered / directed by CERT-In.

These Directions have come into effect/ force from June 28, 2022. As regards the VPN Service Providers, as per the frequently asked questions document issued in May, 2022 by the Ministry of Electronics and Information Technology, Government of India **("MEITY")** on the CERT-In Directions ("**FAQs**"), for the purpose of the direction to register and maintain the information as aforesaid, VPN Service provider refers to an entity that provides "Internet proxy like services" through the use of VPN technologies, standard or proprietary, to general Internet subscribers/users. The FAQs clarify that the obligation is not applicable to Enterprise/ Corporate VPNs.

The enforcement of directions pertaining to VPN services and providers will come into force by end of September 2022.

The CERT-In Directions also provide for certain obligations regarding Know Your Customer (KYC) records and records of financial transactions for virtual asset service providers, virtual asset exchange providers and custodian wallet providers

Proposed Legal Framework to address data breaches – Looking ahead:

The "PDP Bill 2019", a substantive framework, had introduced a specialised regulatory approach for the protection and privacy of data in any form (digital or non-digital) in India. The proposed legal framework was set to be applicable to processing, storage, and transfer of any form of personal and non-personal data across cross sectors of the economy, academia, industry, and the society

The Personal Data Protection (PDP) Bill, 2019, which was pending in the Parliament, has been recently withdrawn. It appears that it will now be replaced with a new bill having a comprehensive framework and contemporary digital privacy laws, as announced by the government.

In a landmark judgment delivered by the Hon'ble Supreme Court of India in the case of Justice K. S. Puttaswamy and Anr. v. Union of India and Ors. ((2017) 10 SCC 1). In this case the Hon'ble Supreme Court of India unanimously held that the right to privacy was an intrinsic element of the promise of the right to life and personal liberty protected under Article 21 of the constitution, and that it included, at its core, a negative obligation to not violate the right to privacy and a positive right to take all actions necessary to protect the right to privacy. Puttaswamy challenged the existing privacy law in India and the interpretation of the existing privacy rules. The Court recognised 'informational privacy' as an important aspect of the right to privacy that can be claimed against state and non-state actors, but such a right is not an absolute right and may be subject to reasonable restrictions.

It may be mentioned that currently, different High Courts are dealing with data protection privacy issues from a post Puttaswamy perspective and though a clear judicial trend is difficult to establish, it appears that data collection and processing efforts in India are evaluating and anticipating the impact of Puttaswamy and further developments in the law are bound to follow.

- *This article has been authored by the Guest Author, Mr. Jeremy Taylor, with inputs from the applicable laws in India from Ms. Tavishi Garg (tavishi@duaassociates.com) and expert comments from Mr. Gulshan Rai (grai@duaconsulting.com).*

UPDATES

I. FEMA & FDI

i. The Foreign Exchange Management (Non-debt Instruments) Rules, 2019: Amended

The Ministry of Finance by way of the Notification No. S.O. 1802(E), dated April 12, 2022, amended the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 ("**NDI Rules**") and has notified the Foreign Exchange Management (Non-debt Instruments) (Amendment) Rules, 2022 ("**Amendment Rules 2022**").

The Amendment Rules 2022 provides for an extension of the minimum mandatory conversion period of convertible notes issued by a startup company from 5 (five) years to 10 (ten) years.

The Amendment Rules 2022 has substituted the explanations provided to the definitions of the terms "Equity Instruments" and "Foreign Investment" and has also amended definitions of the terms "Indian Company" and "Real Estate Business".

The Amendment Rules 2022 has further introduced the definitions of the terms "Subsidiary" and "Share Based Employee Benefits" and in this regard has substituted Rule 8 of the NDI Rules in relation to the issue of Employees Stock Option, Sweat Equity Shares and Share Based Employee Benefits to persons resident outside India.

The Amendment Rules 2022 for the specific conditions for acquisition of shares under the scheme of merger/ demerger/ amalgamation, has broadened the same to include therein a scheme of compromise or arrangement or merger or amalgamation of 2 (two) or more Indian companies or reconstruction by way of

demerger or otherwise of an Indian company, or transfer of undertaking of one or more Indian companies, as approved by the National Company Law Tribunal or the authority competent to do so by law and has substituted Rule 19 of the NDI Rules.

In terms of the Amendment Rules 2022, foreign direct investment upto 20% (twenty percent) has been permitted in the Life Insurance Corporation of India under the automatic route, subject to the conditions provided therein.

The Amendment Rules 2022 has also revised the conditions applicable for investment into Indian insurance companies and intermediaries or insurance intermediaries.

The full text of the Amendment Rules 2022 can be accessed here.

ii. Circular - Discontinuation of Return under the Foreign Exchange Management Act, 1999

The Reserve Bank of India has, by way of A.P. (DIR Series) Circular No. 05 dated June 09, 2022, discontinued the return pertaining to the reporting by the Authorized Dealer Category-I banks of non-resident guarantees issued and invoked in respect of fund and non-fund based facilities, between 2 (two) persons resident in India with effect from the quarter ending June 2022.

To reflect the above changes, the Master Direction - External Commercial Borrowings, Trade Credits and Structured Obligations dated March 26, 2019, and the Master Direction – Reporting under Foreign Exchange Management Act, 1999 dated January 1, 2016, have also been suitably amended.

The full text of the Circular can be accessed here, the full text of the Master Direction - External Commercial Borrowings, Trade Credits and Structured Obligations dated March 26, 2019 can be accessed here and the full text of the Master Direction – Reporting under Foreign Exchange Management Act, 1999 dated January 1, 2016 can be accessed here.

iii. Circular - Investment by Foreign Portfolio Investors in Debt – Relaxations

The Reserve Bank of India, by way of A.P. (DIR Series) Circular No.7 dated July 7, 2022 and referring therein to the A.P. (DIR Series) Circular No. 31 dated June 15, 2018, has decided that investments by Foreign Portfolio Investors ("**FPI**") in government securities and corporate bonds made between July 8, 2022 and October 31, 2022 (both dates included) shall be exempted from the limit of 30% (thirty percent) of the total investment of that FPI in any category, on short-term investments till maturity or sale of such investments.

Moreover, FPI investments in corporate bonds were subject to a minimum residual maturity requirement of 1 (one) year. The Reserve Bank of India has now decided to allow FPIs to invest in commercial papers and non-convertible debentures with an original maturity of up to 1 (one) year, during the period between July 8, 2022, and October 31, 2022 (both dates included). These investments shall be exempted from the limit on short-term investments till maturity or sale of such investments.

These directions issued by the Reserve Bank of India shall be applicable with immediate effect.

The full text of the Circular can be accessed here.

II. CORPORATE

i. Companies (Management and Administration) Rules, 2014: Amended

The Ministry of Corporate Affairs has by way of Notification No. G.S.R. 279(E), dated April 6, 2022, brought into force with immediate effect, the Companies (Management and Administration) Amendment Rules, 2022 ("**Amendment Rules**"), which have the effect of amending the Companies (Management and Administration) Rules, 2014 ("**Management and Administration Rules**").

The Amendment Rules have inserted Rule 14(3) in the Management and Administration Rules, in terms of which the particulars of the members of a company, in relation to: (i) the address or registered address (in case of a body corporate); (ii) email ID; (iii) unique identification number; and (iv) PAN number; as set out in the register or index or return, should not be made available for inspection under Section 94(2) of the Companies Act, 2013 ("**Act**") or for taking extracts or copies under Section 94(3) of the Act.

The full text of the Amendment Rules can be accessed here and the full text of the Management and Administration Rules, can be accessed at the website of the Ministry of Corporate Affairs.

ii. Companies (Incorporation) Rules, 2014: Amended

The Ministry of Corporate Affairs has by way of Notification No. G.S.R. 291(E), dated April 8, 2022, brought into force with immediate effect, the Companies (Incorporation) Amendment Rules, 2022 ("**Amendment Rules**"), which have the effect of amending the Companies (Incorporation) Rules, 2014 ("**Incorporation Rules**").

The Amendment Rules have inserted a proviso to Rule 12 of the Incorporation Rules, which is in relation to the application for the incorporation of companies. In terms of the Amendment Rules, a company being incorporated as a Nidhi company, is required to obtain the declaration by the Central Government under Section 406 of the Companies Act, 2013, prior to the commencement of its business and submit a declaration in relation to the aforesaid, at the stage of incorporation of the Nidhi company.

The full text of the Amendment Rules can be accessed here and the full text of the Incorporation Rules, can be accessed at the website of the Ministry of Corporate Affairs.

iii. Nidhi Rules, 2014: Amended

The Ministry of Corporate Affairs has by way of Notification No. G.S.R 301(E), dated April 19, 2022, brought into force with immediate effect, the Nidhi (Amendment) Rules, 2022 ("**Amendment Rules**") which have the effect of amending the Nidhi Rules, 2014 ("**Nidhi Rules**").

The Amendment Rules have *inter alia* made various amendments, insertions and substitutions to Rules 3, 3A, 4(1), 5, 6, 8, 9, 10, 12, 14, 15, 18, 20 and 23A of the Nidhi Rules, in relation to the inclusion of the term 'Branch', the raising of deposits or providing of loans to members, the qualifying requirements for a public company to be declared as a Nidhi company, the equity share capital to be held, power to enforce compliances, etc.

The full text of the Amendment Rules can be accessed here and the full text of the Nidhi Rules, can be accessed at the website of the Ministry of Corporate Affairs.

iv. Companies (Registration of Charges) Rules, 2014: Amended

The Ministry of Corporate Affairs has by way of Notification No. G.S.R 320(E), dated April 27, 2022, brought into force with immediate effect, the Companies (Registration of Charges) Amendment Rules, 2022 ("**Amendment Rules**"), which have the effect of amending the Companies (Registration of Charges) Rules, 2014 ("**Registration of Charges Rules**").

The Amendment Rules have inserted Rule 3(5) in the Registration of Charges Rules, which states that nothing contained under Rule 3 of the Registration of Charges Rules, which is in relation to the registration or creation or modification of charges, would be applicable to any charge required to be created or modified by a banking company under Section 77 of the Companies Act, 2013 in favour of the Reserve Bank of India, when any loan or advance has been made to it under Section 17(4)(d) of the Reserve Bank of India Act, 1934.

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

v. Companies (Share Capital and Debentures) Rules, 2014: Amended

The Ministry of Corporate Affairs has, by way of Notification No. G.S.R. 335(E), dated May 4, 2022, brought into force with immediate effect, the Companies (Share Capital and Debentures) Amendment Rules, 2022 ("**Amendment Rules**"), which have the effect of amending the Companies (Share Capital and Debentures) Rules, 2014 ("**SCD Rules**").

The Amendment Rules have inserted a declaration to Form No. SH-4, whereby transferees of securities are now required to provide a declaration in relation to whether Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019, prior to the transfer of shares, is required to be obtained or not, and that the approval if required to be obtained, is enclosed with Form No. SH-4, as applicable.

The full text of the Amendment Rules can be accessed here and the full text of the SCD Rules, can be accessed at the website of the Ministry of Corporate Affairs.

vi. Circulars – Clarifications on the holding of annual general meetings, through video conference or other audio-visual means

The Ministry of Corporate Affairs has by way of General Circular No. 2/2022, dated May 5, 2022 ("**Circular**"), extended the timeline for companies whose annual general meetings are due to be held in the year 2022, to hold the same in accordance with the requirements laid down in the previous circulars issued on the subject, on or before December 31, 2022. The Circular further clarifies that the said extension provided therein, should not be construed as an extension of time for holding the annual general meetings in terms of the Companies Act, 2013 ("**Act**") and that the companies that have not adhered to the relevant timelines would be liable to legal action, under the appropriate provisions of the Act.

The full text of the Circular can be accessed here and the full text of the previous circulars issued on the subject, can be accessed at the website of the Ministry of Corporate Affairs.

vii. Circulars – Clarifications on the passing of ordinary and special resolutions by companies, on account of Covid 19

The Ministry of Corporate Affairs has by way of General Circular No. 3/2022, dated May 5, 2022 ("**Circular**"), extended the timeline for companies to conduct their extraordinary general meetings through video conferencing or other audio-visual means, or to transact items through postal ballot, in accordance with the framework provided in the previous circulars issued on the subject till December 31, 2022. Further, all of the terms and conditions, as set out, in the previous circulars would have to be adhered to.

The full text of the Circular can be accessed here and the full text of the previous circulars issued on the subject, can be accessed at the website of the Ministry of Corporate Affairs.

viii. Companies (Prospectus and Allotment of Securities) Rules, 2014: Amended

The Ministry of Corporate Affairs has by way of Notification No. G.S.R. 338(E), dated May 5, 2022, brought into force with immediate effect, the Companies (Prospectus and Allotment of Securities) Amendment Rules, 2022 ("**Amendment Rules**"), which have the effect of amending the Companies (Prospectus and Allotment of Securities) Rules, 2014 ("**PAS Rules**").

The Amendment Rules have inserted a fifth proviso to Rule 14(1) of the PAS Rules, whereby no offer or invitation of any securities would be allowed to be made to a body corporate incorporated in, or a national of, a country which shares a land border with India, through private placement. The same, however, would not be applicable, if the body corporate or national has obtained the specified Government approval under the Foreign Exchange (Non-debt Instrument) Rules, 2014, and has attached the same with the private placement offer cum application letter. The consequent changes have also been made to Form PAS-4.

The full text of the Amendment Rules can be accessed here and the full text of the PAS Rules, can be accessed at the website of the Ministry of Corporate Affairs.

ix. Companies (Compromises, Arrangements and Amalgamation) Rules, 2016: Amended

The Ministry of Corporate Affairs has by way of Notification No. G.S.R 401(E), dated May 30, 2022, brought into force with immediate effect, the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2022 ("**Amendment Rules**") which have the effect of amending the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 ("**CAA Rules**").

The Amendment Rules have inserted Rule 25A(4) in the CAA Rules, whereby in case of a compromise or arrangement or merger or demerger between an Indian company, and a company or body corporate that is incorporated in a country sharing a land border with India, a declaration in Form CAA-16 is required to be submitted as a part of the application to the Tribunal under Section 230 of the Companies Act, 2013. The Form CAA-16 has consequently been included in the CAA Rules.

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

x. Companies (Accounts) Rules, 2014: Amended

The Ministry of Corporate Affairs has by way of Notification No. G.S.R. 407(E), dated May 31, 2022, brought into force with immediate effect, the Companies (Accounts) Third Amendment Rules, 2022 ("**Amendment Rules**"), which have the effect of amending the Companies (Accounts) Rules, 2014 ("**Accounts Rules**").

The Amendment Rules have inserted a proviso to Rule 12(1B) of the Accounts Rules, which requires companies to file Form CSR-2, for the financial year 2021-2022, separately on or before March 31, 2023, after filing the requisite financial statements.

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

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

The Ministry of Corporate Affairs has by way of Notification No. G.S.R. 410(E) dated June 1, 2022, bought into force with immediate effect the Companies (Appointment and Qualification of Directors) Amendment Rules, 2022 ("**First Amendment Rules**") and has by way of Notification No. G.S.R. 439 (E), dated June 10, 2022, brought into force with immediate effect the Companies (Appointment and Qualification of Directors) Second Amendment, Rules, 2022 ("**Second Amendment Rules**"), which have the effect of amending the Companies (Appointment and Qualification of Directors) Rules, 2014 ("**Directors Rules**").

The First Amendment Rules have inserted a second proviso to Rule 8 of the Directors Rules, whereby those persons, being nationals of a country, which shares a land border with India who are seeking appointment to hold the office of a director, would be required to attach, along with the consent under Rule 8, the necessary security clearance from the Ministry of Home Affairs, Government of India. Additionally, the First Amendment Rules have also inserted a proviso to Rule 10(1) of the Directors Rules, which states that no application number would be generated for those persons applying for a director identification number, who are nationals of a country sharing a land border with India, unless the necessary security clearance from the Ministry of Home Affairs, Government of India, is attached as a part of the application for the director identification number. The consequent changes have also been made to Form DIR-2 and Form DIR-3.

The Second Amendment Rules have further inserted Rule 6(5) in the Directors Rules, whereby those individuals whose names have been removed from the databank under Rule 6(4), could apply for the restoration of their names on the payment of the requisite fee and the same would be restored subject to compliance with certain conditions, i.e., the requirement to pass the online proficiency self-assessment test, etc., within 1 (one) year from the date of restoration of his/ her name. The failure to do so, would, however, result in the individuals name being removed from the data bank, and the individual would be required to apply afresh under Rule 6(1) of the aforesaid rules, for the inclusion of his/ her name in the data bank.

The full text of the First Amendment Rules and Second Amendment Rules can be accessed here and here and the full text of the Directors Rules can be accessed at the website of the Ministry of Corporate Affairs.

xii. Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016: Amended

The Ministry of Corporate Affairs has by way of Notification No. G.S.R. 436(E), dated June 9, 2022, brought into force with immediate effect the Companies (Removal of Names of Companies from the Register of Companies) Amendment Rules, 2022 ("**Amendment Rules**"), which have the effect of amending the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 ("**Removal of Names of Companies Rules**").

The Amendment Rules have inserted Rule 4(4) to the Removal of Names of Companies Rules. In terms of the aforesaid, the Registrar has been given the powers to call for additional information in the event that he finds it necessary or if any document annexed to the form of application for the removal of the name of the company, i.e., Form STK-2, is defective or incomplete, to be corrected, completed and re-submitted within 15 (fifteen) days from the date of obtaining such information from the Registrar. In the event that such information is not provided or corrected, etc., the Form will be treated as invalid in the electronic record and the applicant will be informed.

In the event, however, that further defects or incomplete information is found, after the re-submission of the form, the Registrar would give the applicant an additional period of 15 (fifteen) days to remove such defects and complete the form, and the failure to do so would result in the said Form being treated as invalid in the electronic records, and the same would be intimated to the applicant.

The full text of the Amendment Rules can be accessed here and the full text of the Removal of Names of Companies Rules can be accessed at the website of the Ministry of Corporate Affairs.

xiii. National Financing Reporting Authority Rules, 2018: Amended

The Ministry of Corporate Affairs has, by way of Notification No. G.S.R. 456(E), dated June 17, 2022, brought into force with immediate effect, the National Financing Reporting Authority Amendment Rules, 2022 ("**Amendment Rules**"), which have the effect of amending the National Financing Reporting Authority Rules, 2018.

The Amendment Rules have substituted Rule 13 of the National Financing Reporting Authority Rules, 2018, which sets out the punishment in cases of non-compliance with the aforesaid rules. The penalty for contravention, would include a fine not exceeding Rs. 5,000/- (Rupees five thousand only) and a further fine not exceeding Rs. 500/- (Rupees five hundred only), for a continuing contravention, for every day after the first, during which such contravention continues.

The full text of the Amendment Rules can be accessed here and the full text of the National Financial Authority Rules, 2018, can be accessed at the website of the Ministry of Corporate Affairs.

xiv. Circular – Clarification on spending of CSR funds for 'Har Ghar Tiranga'

The Ministry of Corporate Affairs has by way of General Circular No. 8/ 2022, dated July 26, 2022 ("**Circular**"), in view of the celebration of 75 (seventy five) years of India's Independence, clarified that the spending of corporate social responsibility ("**CSR**") funds towards the activities in relation to the Central Government's 'Har Ghar Tiranga' campaign, launched under the aegis of the 'Azadi Ka Amrit

Mahotsav', such as mass scale production of Indian flags, outreach and amplification efforts, etc., would be classified as eligible CSR activities under item no (ii) of Schedule VII to the Companies Act, 2013.

The Circular further clarifies that such CSR activities should be in consonance with the Companies (Corporate Social Responsibility) Policy Rules, 2014 and the related circulars/ clarifications, issued.

The full text of the Circular can be accessed here.

III. COMPETITION

A. REGULATORY UPDATES

i. Revision of the Long Form for Merger & Acquisition Procedures

The Competition Commission of India ("**CCI**"), under the powers conferred by Section 64 of the Competition Act, 2002 ("**Competition Act**") has notified the revised format of Form II by way of Notification No. CCI/CD/Amend/Comb. Regl./2022 dated March 31, 2022 for the long form of a merger notification.

This amendment revises the content and format of information required to be filed by the parties to a combination, under Section 6(2) of the Competition Act, where the post-combination market share reaches 15% (fifteen percent) in situations of horizontal overlap and 25% (twenty five percent) in cases of vertical interface. In general, these are the circumstances that necessitate a thorough investigation to determine the potential impact of the merger on competition in India.

This modification is one of a series of changes adopted by the CCI to alleviate the burden of compliance on the parties and aims to eliminate duplication and limit information requirements, by appropriately clustering information on common subjects and streamlining the flow of information. The revised Form II has come into effect from May 1, 2022.

B. JUDICIAL PRONOUNCEMENTS

i. Competition Commission of India finds soil testing companies guilty of indulging in bid-rigging

[Order of the Hon'ble Competition Commission of India dated April 4, 2022, in the Suo Motu Case No. 01 of 2020]

Matter in Dispute: Bid Rigging

Background:

The present suo moto case stemmed from a general complaint received by the Competition Commission of India ("**CCI**") alleging bid-rigging in tenders invited by the Department of Agriculture, Government of Uttar Pradesh, for soil sample testing. It was alleged that for soil sample testing to determine its nutrient content, composition and other characteristics, such as acidity and pH level, the participating bidders acted in a concerted manner and resorted to bid-rigging in contravention of provisions of Section 3(1) read with Section 3(3)(d) of the Competition Act, 2002 ("**Competition Act**"), but the tender inviting authorities preferred to ignore these aspects. It was also alleged that the participants had also resorted to the production and submission of fake invoices and grant of false certificates for making some parties eligible for

participating in the bid process, so as to effectively act as a cover for bidders in respect of the winning bidders.

Conclusion:

The CCI agreed with the finding of the Director General and penalised 9 (nine) companies, including their office bearers for indulging in a bid-rigging and cartelisation regarding the e-tenders floated by the Department of Agriculture, Government of Uttar Pradesh for soil sample testing in the years 2017 and 2018 (Tenders), in contravention of Section 3(3) of the Competition Act, 2002.

The CCI noted that the soil testing companies provided fake and fabricated documents to ensure their technical eligibility and submitted cover bids in favour of M/s. Yash Solutions. They also formed a consortium by entering into a memorandum of understanding, showcasing that the said companies were not independent entities, but related concerns acting in association with each other, in furtherance of their common object. The CCI, however, took a lenient view while determining the penalty as the soil testing companies are micro, small and medium enterprises and imposed a nominal penalty at the rate of 5% (five percent) of their average relevant turnover.

ii. Competition Commission of India orders probe against Zomato and Swiggy for indulging in alleged anticompetitive practices

[Order of the Hon'ble Competition Commission of India dated April 4, 2022
in Case No. 16 of 2021]

Matter in Dispute: Anti-competitive clauses in vertical agreements

Background:

The National Restaurant Association of India ("**NRAI**") filed a complaint under Section 19(1)(a) of the Competition Act, 2002 ("**Competition Act**") alleging that the practices of Zomato and Swiggy are in violation of Section 3(4) read with Section 3(1) of the Competition Act. The complainant *inter alia* alleged that the platforms are engaging in bundling, by forcing the restaurant partners to take the delivery services with the listing services and are engaging in data masking and were using such data to their advantage. The NRAI also submitted that these companies are enforcing price parity clauses in their respective agreements with restaurant partners, which prohibit the restaurant partners from offering lower prices or offering better discounts on other platforms or their own websites.

Thus, the NRAI alleged contravention under Section 3(4) as well as Section 4 of the Competition Act and submitted that a party (although not declared dominant) with sufficient market power can cause an appreciable adverse effect on competition ("**AAEC**") by entering into anticompetitive vertical agreements, as an analysis under Section 3(4) is lower than that required under Section 4 of the Competition Act.

Conclusion:

The CCI rejected the allegation of bundling, since delivery and listing services of the food delivery platforms appear to be a composite service and appears to be in alignment with interest of the user and preference of availing a hassle-free 'one stop' service. The CCI, however, noted that Zomato and Swiggy are prominent online food delivery platforms, and their conduct is prima facie anti-competitive as they have

a conflict of interest which may prevent them from acting as neutral platforms, given their commercial interest in the cloud kitchens. The CCI also found that Zomato and Swiggy enforce price parity clauses on their restaurant partners, which appear to indicate wide restrictions on them as they are not allowed to maintain lower prices or provide higher discounts to any of their own supply channels or to any other aggregator. Accordingly, the CCI referred the matter to the Director General for investigation.

iii. DLF Commercial Complexes Limited is not a dominant enterprise in developing commercial spaces in Kolkata

[Order of the Hon'ble Competition Commission of India dated May 25, 2022, in Case No. 10 of 2011]

Matter in Dispute: Abuse of dominance

Background:

The Informants, a registered society and its president, approached the Hon'ble Competition Commission of India ("**CCI**") by filing Information under Section 19(1)(a) of the Competition Act, 2002 ("**Competition Act**"), alleging contravention of Section 4 of the Competition Act by DLF Commercial Complexes Limited (**"DLF"**). The primary aim of the society is to ensure the well-being of the intended purchasers of commercial units in the Rajarhat area. The primary objection of the Informants was that the intending purchasers did not have the power to negotiate the conditions put forth by DLF due to disparity in the bargaining power (alleging that DLF is in a dominant position).

Conclusion:

The CCI held that the Informants had failed to establish that DLF has a dominant position in the commercial spaces in the metropolis of Kolkata. Relying on publicly available information, the CCI observed that there are other players present in the market as well and that DLF does not have a position of strength in the relevant market. The CCI held that no prima facie case has been made out for ordering an investigation in the matter.

The CCI observed that a procurer, as a consumer, can stipulate certain technical specifications/ conditions/ clauses in the tender document as per its requirements which cannot be deemed anticompetitive if they appear to be commercially justifiable. If any stipulation made by a dominant procurer is found to be unfair or anticompetitive in any manner, appropriate action against such procurer can be initiated as per the scheme of the Competition Act.

iv. National Company Law Appellate Tribunal upholds penalty on Amazon

[Order of the Hon'ble National Company Law Appellate Tribunal dated June 13, 2022, in Competition Appeal (AT) No. 01 of 2022]

Matter in Dispute: Amazon-Future Group Dispute: Disclosures while applying for combination approval

Background:

Future Coupons Private Limited ("**FCPL**") filed an application before the Competition Commission of India ("**CCI**"), dated March 25, 2021, alleging that Amazon has taken a contradictory stand in the arbitration and constitutional court proceedings as compared to the representations and submissions made by them before the CCI in relation to transfer of assets of Future Retail Limited ("**FRL**"), a company in which FCPL holds 9.82% of the shareholding. On consideration of the application, the CCI issued a show-cause notice to Amazon as they were of a prima facie view that: (a) Amazon failed to identify and notify the FRL Share Holders Agreement ("**SHA**"), as a part of the combination, in terms of Regulation 9(4) and Regulation 9(5) of the Combination Regulations; (b) Amazon had concealed its strategic interest over FRL; and (c) Amazon had made false and incorrect representations and concealed/ suppressed material facts in contravention of the provisions of the Competition Act, 2002 ("**Act**").

The primary issue before the CCI was whether Amazon had indulged in misrepresentation, making false statements and/ or suppression of material facts in relation to the scope and purpose of the combination; and failed to identify and notify the FRL SHA as an inter-connected part of the combination, in terms of Regulations 9(4) and 9(5) of the Combination Regulations.

The CCI observed that the facts, particulars and documents required to be furnished under Form I, including for the purpose of the combination (Item 5.3), inter-connected transactions (Item 5.1.2) and documents considered by boards of the parties or key managerial personnel (Item 8.8), are essential to have a full, clear and complete picture of the notified combination. The CCI concluded that Amazon's suppression of relevant information amounted to having obtained consent by fraud. Hence, the CCI suspended its order of approval granted by way of the Order dated November 28, 2019, and directed Amazon to request for approval by filing Form II (Long Form) and imposed penalty of Rs. 202,00,00,000/- (Rupees two hundred and two crores only) on it as well.

Amazon had challenged this order before the National Company Law Appellate Tribunal ("**NCLAT**").

Conclusion:

The NCLAT upheld the order of the CCI and directed Amazon to deposit the penalty within 45 (forty five) days and comply with order as passed by the CCI.

v. Competition Commission of India warns Amateur Baseball Federation of India

[Order of the Hon'ble Competition Commission of India dated June 3, 2022, in Case No. 03 of 2022]

Matter in Dispute: Abuse of dominance

Background:

The Confederation of Professional Baseball Softball Clubs ("**CPBSC**") filed a complaint against Amateur Baseball Federation of India ("**ABFI**") for abusing its dominant position, by issuing a letter to the Presidents/ Secretaries of State Baseball Associations throughout the country prohibiting the State Baseball Associations from dealing with bodies and leagues not recognised by it and threatening them with disciplinary action if any of the players took part in the leagues and tournaments not recognised by it.

Conclusion:

The Competition Commission of India ("**CCI**") held that the ABFI was enjoying a dominant position in "the market for organising baseball leagues/events/tournaments in India". It noted that "once an entity is found to be dominant, it is immaterial whether the impugned restrictions were implemented or not, as the very fact of imposition of such unfair and restrictive condition by a dominant undertaking stands captured within the framework of Section 4 of the Competition Act, 2002 which proscribes abuse of dominant position". Accordingly, the CCI held that ABFI had abused its dominant position. Since, however, ABFI had retracted its letter, the CCI decided against imposing any penalty.

vi. Competition Commission of India dismisses Information against Atos India Private Limited

[Order of the Hon'ble Competition Commission of India dated June 3, 2022, in Case No. 07 of 2022]

Matter in Dispute: Abuse of dominance

Background:

Hexa Communications Private Limited ("**Hexa**"), an independent service provider in universal communication solutions market, filed an Information before the Competition Commission of India ("**CCI**") alleging that Atos India Private Limited ("**Atos**") was abusing its dominant position and imposing vertical restraints by restricting availability of spare parts for its products to independent service providers and preventing its consumers from taking services from independent service providers.

Conclusion:

Dismissing the Information, the CCI recognised a manufacturer's right to protect its distribution route and brand. The CCI noted that Atos's hardware, software, and services were partially interchangeable and that it had not prohibited sale of spare parts to independent service providers or prohibited consumers from taking supplements. The CCI also rejected Hexa's allegation that Atos' refusal to deal with Hexa would have foreclosure consequences.

vii. Firms penalised for bid rigging in Indian Railways Tender

[Order of the Hon'ble Competition Commission of India dated June 9, 2022, in Suo Moto Case No. 06 of 2022]

Matter in Dispute: Bid rigging

***Background*:**

The matter was initiated by the Competition Commission of India ("**CCI**") pursuant to receipt of an application under Section 46 of the Competition Act, 2002 ("**Competition Act**") read with Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 (LPR), on behalf of Jai Polypan Private Ltd. (including its individuals), for alleged cartelisation in the supply of protective tubes to the Indian Railways.

Conclusion:

The CCI noted that a Section 3(3) agreement i.e., an anti-competitive agreement between competitors, is presumed to have an appreciable adverse effect on competition ("**AAEC**") in India. The CCI relied on the Hon'ble Supreme Court of India's decision in Rajasthan Cylinders and Containers Ltd. v. Union of India and Others, (2018 (13) SCALE 493) holding that the CCI need not investigate an agreement under Section 3(3) of the Competition Act, if it falls into one of the four categories. The CCI concluded that the accused firm's basic modus operandi amounts to bid rigging in violation of Section 3(3)(d) of the Competition Act, and that the accused firm's claim that Indian Railways is a monopolist with the power to set pricing and quantities is pointless. Accordingly, the CCI imposed penalties under Section 27 of the Competition Act.

viii. Competition Commission of India initiates investigation against bookmyshow.com

[Order of the Hon'ble Competition Commission of India dated June 16, 2022, in Case No. 46/ 2021]

Matter in Dispute: Abuse of dominance

Background:

Big Tree Entertainment Private Limited operates BookMyShow, an online movie ticketing portal. A social activist and the founder of Showtyme alleged that BookMyShow was abusing its dominant position in the market.

Conclusion:

The Competition Commission of India ("**CCI**") prime facie concluded that the relevant market in this case was internet movie ticket booking in India, and that BookMyShow's services were available pan-India and experienced comparable competitive restraints and competition conditions. BookMyShow's exclusive agreements with cinemas/multiplexes demonstrate its strength, and its deals with cinemas/multiplexes demonstrate its better bargaining power in deciding the contractual conditions. These facts seem to support BookMyShow's dominant position in the Indian online cinema ticket market. The CCI noted that BookMyShow's agreement with a vast number of theatres/multiplex chains ban cinemas and moviegoers from using alternative ticketing systems. Further, BookMyShow has reserved the right to acquire, own, and store data without the cinemas having any right, title, or interest in such data, even though the agreements provide for data exchange.

Directing an investigation into the conduct of BookMyShow, the CCI noted that exclusivity relating to data ownership can increase the bargaining power of the platform over time. Data further strengthens and entrenches the network effects limiting inter platform competition. Moreover, exclusivity arrangements by BookMyShow may result in softening of competition and therefore bolster the market power of BookMyShow without any incentive for it to lower convenience fees in future.

ix. Competition Commission of India warns National Association of Container Freight Stations, Chennai

[Order of the Hon'ble Competition Commission of India dated July 20, 2022, in Case No. 04 of 2018]

Matter in Dispute: Anti-competitive behaviour-price fixing

Background:

A complaint was filed by the Chennai chapter of the National Association of Container Freight Stations, which had alleged that the associations had imposed certain restrictions with respect to movement of trailers. The trailer owners had set a cap of 20 (twenty) trailers that each container freight station (CFS) could own and operate. They also forced unsustainable freight rates on the CFS's, which are an important constituent of an elaborate logistics supply chain in a manufacturing process.

Conclusion:

The Competition Commission of India ("**CCI**") examined the role of trade associations and the legitimacy of actions taken by them under the Competition Act, 2002 ("**Competition Act**"). The CCI also took note of submissions made by the Informant that the Opposite Parties (**"Ops"**) were using strikes and lock-outs as a means to make the members of the Informant agree to their illegal demands. Further, the Chennai Port was following a practice of issuing passes for the entry of trailers and drivers only when such passes were endorsed by one of the trailer associations (OPs), members of the Informant had no option but to agree to the demands of the OPs. Rejecting the OPs submissions on the participation of Informant and the Chennai Port Trust, the CCI held that the same did not alter the characterisation of an otherwise collusive conduct/practice by OPs. The CCI concluded that fixing price and restricting the provision of services under the aegis of trade associations cannot be held as a legitimate activity under the Competition Act. Accordingly, the CCI held that the OPs conduct was in contravention of the provisions of Section 3(3)(a) and Section 3(3)(b) read with Section 3(1) of the Competition Act, and directed to OP's to cease and desist in respect of the anti-competitive conduct committed by them.

x. Competition Commission of India dismisses Information against Parle Products Private Limited

[Order of the Hon'ble Competition Commission of India dated July 6, 2022, in Case No. 28 of 2021]

Matter in Dispute: Anti-competitive behaviour-entry barriers

Background:

The matter was initiated by the Competition Commission of India ("**CCI**") pursuant to the receipt of a complaint that alleged that Parle refused to engage in negotiations with the Informant in contrast to other distributors in the market. It was alleged that owing to Parle's high consumer demand in the market and "Must have" stock for distributors and retailers, the Informant was forced to procure the same from Parle's existing distributors in the open market (secondary market) or risk the chance of rapidly losing out its retailers. This conduct of Parle was in contravention of Section 3(4)(d) and Section 4(2)(c) of the Competition Act, 2002 ("**Competition Act**").

Conclusion:

The CCI placing reliance upon its recent decision in the matter of Hiveloop Technology Pvt. Ltd. and Britannia Industries Ltd. Case No. 18 of 2021 (decided on June 16, 2022) concluded that the relevant market in the instant case would be 'market for biscuits in India'. The CCI also concluded that even though Parle has a market share of approximately 27% (twenty seven percent) in the overall biscuits category, the

existence of other big competitors like Britannia, ITC, Cremica, Patanjali, etc. who also offered products similar to that of Parle, posed competitive restraints on it. The CCI observed that the type and nature of distributors or manufacturers desire to partner with it is an essential part of the autonomy of its business and that the CCI cannot *ipso facto* substitute its regulatory wisdom to that of the commercial wisdom of the businesses unless the commercial wisdom is palpably in the face of the provisions of the Competition Act. Moreover, the CCI noted that there were no barriers to entry either in the manufacturers' market or in the distributors' market, considering the presence of a large number of biscuit manufacturers in upstream as well as the presence of Parle's distributors in downstream. Accordingly, the CCI dismissed the case by passing an order under Section 26(2) of the Competition Act.

C. COMBINATION ORDERS

i. Assets and turnover of the target group are to be calculated on a consolidated basis for assessing Section 5 thresholds

[Order of the Hon'ble Competition Commission of India dated May 2, 2022 in proceedings against Allcargo Logistics Limited]

Matter in Dispute: Consolidated accounts to be considered while assessing Target Exemption

Background:

Allcargo Logistics Limited and GATI Ltd. are public listed companies in India. The primary activity of Allcargo along with its subsidiaries is providing integrated logistics solutions whereas the primary activity of GATI is express distribution (surface, air and rail parcel), supply chain management solutions, value-added transportation solutions, ecommerce logistics, and operation of fuel stations. The Competition Commission of India ("**CCI**") was apprised from information available in the public domain that Allcargo had acquired a 46.86% of the equity share capital of GATI without giving a notice to the CCI in terms of Section 6(2) of the Competition Act, 2002 ("**Competition Act**").

Confirming the acquisition, Allcargo submitted that the transaction was not notified as it was exempted under the target exemption. However, Allcargo had only considered the assets and turnover of the target on a standalone basis and not taken into consideration assets and turnover of the target group, as required in terms of the definition of 'Enterprise' in the Competition Act. Subsequently, the CCI issued a show cause notice under Section 20(1) and 43A of the Competition Act read with Regulation 8(2) of the Combination Regulations, 2011 and Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**CCI General Regulations**").

Conclusion:

The CCI rejected Allcargo's contention that the acquisition did not have any appreciable adverse effect on competition or prejudiced the interest of consumers or affected freedom of trade in Indian markets. The CCI reiterated that the mandatory regime for notifying a proposed combination to the CCI is applicable, irrespective of whether the combination causes any appreciable adverse effect on competition in India or not. Allcargo made an erroneous assumption as it considered the assets and turnover of the target group on a standalone basis i.e., without considering assets and turnover of its subsidiaries on a consolidated basis as required under the Competition Act. However, the CCI took a lenient view while imposing the penalty

of Rs. 20,00,000/- (Rupees twenty lakhs only) as it has discretion to consider the conduct of the parties and the circumstances of the case.

ii. Hostile takeover not a defence to gun-jumping

[Order of the Hon'ble Competition Commission of India dated May 17, 2022 in Proceedings against Veolia Environnement S.A.]

Matter in Dispute: Gun-jumping-is hostile take-over an exception?

Background:

Veolia and Suez are companies headquartered in France and listed on the Euronext Stock Exchange in Paris. The former provides optimized resource management along with water, waste, and energy management solutions, whereas Suez only provides water and waste management solutions. The companies have their subsidiaries present in India and operate through them. Suez filed an application under Section 20(1) and Section 33 of the Competition Act, 2002 ("**Competition Act**"), wherein Suez stated that Veolia proposed to carry out its takeover in 2 (two) steps: (i) acquisition of 29.9% shares of Suez from Engie S.A. who is an existing public shareholder and, subsequently; and (ii) the acquisition of the remaining shares, via a public takeover bid, i.e., a public offer and that such transaction was notifiable to the CCI as it was not exempted via the target exemption.

Conclusion:

Veolia accepted that the threshold specified in Section 5(A) of the Competition Act regarding the value of the worldwide assets exceeded solely by the value of assets of Veolia (both worldwide and in India). Due to the hostile nature of the acquisition, Veolia incorrectly assessed the applicability of the de minimis exemption as Veolia only had publicly available information regarding the turnover of Suez. The CCI held that lack of accurate information cannot be a defence for non-filing of notification. The CCI held that Veolia had violated Section 6(2) of the Competition Act and imposed a penalty of Rs. 1,00,00,000 (Rupees one crore only) on Veolia.

IV. INSOLVENCY & BANKRUPTCY

A. REGULATORY UPDATES

i. The Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Amendment) Regulations, 2022

The Insolvency and Bankruptcy Board of India ("**Board**") by way of the Notification dated April 5, 2022, bearing No. IBBI/2022-23/GN/REG081, has published the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Amendment) Regulations, 2022 ("**Amendment Regulations**") to amend the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 ("**Voluntary Liquidation Regulations**"), with effect from April 5, 2022. The Amendment Regulations have the effect of *inter alia* inserting/ substituting the following regulations in the Voluntary Liquidation Regulations:

- **Substitution of the figures "3(4)" with "3(3)" in clause (c) in sub-regulation (1) of Regulation 2 of the Voluntary Liquidation Regulations** - The liquidation commencement date for corporate persons should be calculated from the date of receipt of approval from the creditors of the corporate person, if any, representing two-thirds in value of the debt of the corporate person.

- **Substitution of the word "three" with the word "seven" in sub-regulation (2) of Regulation 5 of the Voluntary Liquidation Regulations** - The time period for the insolvency professional to intimate the Board of his appointment, as a liquidator, has been increased to 7 (seven) days.

- **Insertion of a proviso after sub-regulation (2) of Regulation 30 of the Voluntary Liquidation Regulations –** The liquidator is required to prepare the list of stakeholders within 15 (fifteen) days from the last date for receipt of claims, if no claim from the creditor(s) has been received and within 45 (forty five) days from the last date for receipt of claims, in case there are claims from the creditor(s). Prior to the amendment, irrespective of the receipt of claims or not the liquidator had a time period of 45 (forty five) days to prepare the list of stakeholders.

- **Substitution of the words "six months" with the words "thirty days" in sub-regulation (1) of Regulation 35 of the Voluntary Liquidation Regulations –** The liquidator is required to distribute the proceeds from the realization of assets within 30 (thirty) days from the receipt of the amount from the stakeholders.

- **Substitution of sub-regulation (1) of Regulation 37 of the Voluntary Liquidation Regulations –** The time-limit for completion of the liquidation process of the corporate person in cases where the creditors have approved the resolution plan has been reduced from 12 (twelve) months to 270 (two hundred and seventy) days from the liquidation commencement date. In all other cases, where the approval of the creditors is not required, it would start from 90 (ninety) days from the liquidation commencement date.

- **Insertion of Form-H (Compliance Certificate Form) after Form-G in Schedule I and substitution of sub-regulation (3) of Regulation 38 of the Voluntary Liquidation Regulations:** A liquidator is required to file a compliance certificate form along with the Final Report and the application for the dissolution of the corporate person to be filed before the Adjudicating Authority. The compliance certificate form is inserted as Form-H and contains several particulars (like the details of the voluntary liquidation process, details of the corporate person, details of the realisation during voluntary liquidation process and other such particulars).

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

ii. The Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2022

The Insolvency and Bankruptcy Board of India ("**Board**") by way of the Notification dated April 28, 2022, bearing No. IBBI/2022-23/GN/REG082, has published the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2022, to amend the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("**Liquidation Process Regulations**").

By this amendment, an explanation has been inserted after Regulations 2A, 21A, 31A and 44 clarifying that the requirements of Regulations 2A, 21A, 31A and 44 would only apply to liquidation processes

commencing on or after the date of the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019, i.e., July 25, 2019.

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

iii. The Insolvency and Bankruptcy Board of India (Engagement of Research Associates and Consultants) (Amendment) Regulations, 2022

The Insolvency and Bankruptcy Board of India ("**Board**") by way of the Notification dated June 1, 2022, bearing No. IBBI/2022-23/GN/REG083, has published the Insolvency and Bankruptcy Board of India (Engagement of Research Associates and Consultants) (Amendment) Regulations, 2022 ("**Amendment Regulations**"), to amend the Insolvency and Bankruptcy Board of India (Engagement of Research Associates and Consultants) Regulations, 2017 ("**2017 Regulations**"). The Amendment Regulations have the effect of *inter alia* inserting/ substituting the following regulations in the 2017 Regulations:

- **Insertion of proviso after sub-regulation (3) in Regulation 5 and substitution of Schedule-II of the 2017 Regulations:** The chairperson is now empowered to amend the consolidated remuneration of the Research Associates and Consultants given in Schedule-II, for reasons to be recorded in writing. The remuneration for the Research Associates and Consultants has also been revised through this amendment.

- **Substitution of sub-regulation (1) of Regulation 8 of the 2017 Regulations:** The period of appointment of a selected candidate as a Research Associate and Consultant on a contractual basis has been extended to be for not less than a period of 1 (one) year and up to 3 (three) years, which can also be extended 1 (one) year at a time, for a maximum total of 5 (five) years.

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

iv. The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2022

The Insolvency and Bankruptcy Board of India ("**Board**") by way of the Notification dated June 14, 2022, bearing No. IBBI/2022-23/GN/REG084, has published the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2022 ("**Amendment CIRP**"), to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**"), by inserting Regulations 2B, 2C, 4(3), 7(2)(b)(v), 35(1)(b), 35A(4), 36(3A) and 38(2)(d).

- **Regulations 2B and 7(2)(b)(v) of the CIRP Regulations** require the operational creditor to furnish relevant extracts of the Form GSTR-1 and Form GSTR-3B and a copy of the e-way bill, wherever applicable. This will not be applicable to those operational creditors who do require registration, and to those goods and services which are not covered under any law relating to goods and service tax.

- **Regulation 2C of the CIRP Regulations** provides that the financial/ operational creditor should furnish details such as the PAN and email-ID while making an application under Sections 7 or 9 of the Insolvency and Bankruptcy Code, 2016.

- In order to improve the transparency and accountability of the insolvency resolution process, **Regulations 4(3), 35A(4) and 36(3A)** of the CIRP Regulations collectively require the financial/ operational creditor to provide to the insolvency resolution professional, information in respect of assets and liabilities of the corporate debtor, such as financial statements, relevant extracts from the stock audit, transaction audit, forensic audit, etc.

- **Regulation 35(1)(b) of the CIRP Regulations** provides that the insolvency resolution professional may appoint a third registered valuer for an asset class, if the estimates of a value in said asset class are significantly different. The explanation to the Regulation defines "significantly different" as a difference of 25% (twenty five percent).

- **Regulation 38(2)(d) of the CIRP Regulations** stipulates that the resolution plan must provide for the manner in which proceedings in respect of avoidance transactions (such as preferential transactions, undervalued transactions, extortionate credit transactions, etc.) or fraudulent or wrongful trading will be pursued and how the proceeds from such proceedings will be distributed. This requirement, however, is not applicable to resolution plans submitted prior to the notification of the Amendment CIRP.

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

v. The Insolvency and Bankruptcy Board of India (Inspection and Investigation) (Amendment) Regulations, 2022

The Insolvency and Bankruptcy Board of India ("**Board**") by way of the Notification dated June 14, 2022, bearing No. IBBI/2022-23/GN/REG087, has published the Insolvency and Bankruptcy Board of India (Inspection and Investigation) (Amendment) Regulations, 2022 ("**Inspection and Investigation Amendment Regulations**") to amend the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2016 ("**Inspection and Investigation Regulations**"). The Inspection and Investigation Amendment Regulations have the effect of *inter alia* inserting/ substituting the following regulations in the Inspection and Investigation Regulations:

- **Insertion of Clause (k) in Regulation 2 (1) of the Inspection and Investigation Regulations -** The word "stakeholder" has been given the same meaning as the definition in clause (j) of Regulation 2(1) of the Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) Regulations, 2017, which defines stakeholder as a debtor, a creditor, a claimant, a service provider, a resolution applicant and any other person having an interest in the insolvency, liquidation, voluntary liquidation, or bankruptcy transaction under the Insolvency and Bankruptcy Code, 2016 ("**Code**").

- **Insertion of Chapter III-A titled "Investigation during disposal of complaint or grievance" in the Inspection and Investigation Regulations** – This chapter provides that the processing of a complaint or grievance or material available on record under the Code will mean an investigation and the processing papers will mean the investigation report.

- **Insertion of Chapter III-B titled "Interim order on material available on record" in the Inspection and Investigation Regulations -** This chapter empowers the Board to take immediate action, in the event there is a violation of the Code, or the regulations made thereunder by the service

provider, by referring the matter to the Disciplinary Committee for an appropriate action. On consideration of the matter, the Disciplinary Committee may pass an interim order with appropriate directions. The interim order will lapse on the expiry of 90 (ninety) days from the date of the order.

- **Insertion of the words "or on the basis of material otherwise available on record" in Regulation 11(2) of the Inspection and Investigation Regulations** - The Board can now form a prima facie opinion regarding whether sufficient cause exists to take action under Sections 220 or 236 of the Code, by relying on material available on record.

- **Amendment of Regulation 12 of the Inspection and Investigation Regulations - Show-cause notice –**The show-cause notice issued by the Board is now required to contain, in writing, whether any public interest has been allegedly affected and should prescribe the manner in which the service provider is required to respond to the show cause notice and the consequences of failing to respond to the same. The time period for the noticee to make written submission to the show-cause notice has been reduced to 15 (fifteen) days from 21 (twenty one) days. The show-cause notice is required to be served on the service provider in electronic form at the email address provided and a copy should also be sent by registered post.

- **Amendment of Regulation 13 of the Inspection and Investigation Regulations – Disposal of Show-cause notice -** The time period within which a Disciplinary Committee must endeavour to dispose of the show-cause notice has been reduced to 35 (thirty five) days from 180 (one hundred and eighty) days of the date of issuance of the show cause notice. The Disciplinary Committee is also empowered to order suspension or cancellation of authorisation for assignment of an insolvency professional. The order of the Disciplinary Committee has to be served on the service provider, in an electronic form and must also be published on the Board's website. In the event the service provider is an insolvency professional, a copy of the order should be sent to the insolvency professional agency of which he is a professional member and should also be intimated to the Adjudicating Authority and the members of the committee of creditors of the insolvency resolution processes in which he is acting as the resolution professional. The order of the Disciplinary Committee should require the service provider to discharge his pending obligations and continue his functions till such time as directed and to comply with other obligations.

The full text of the Inspection and Investigation Amendment Regulations can be accessed here.

vi. The Insolvency and Bankruptcy Board of India (Information Utilities) (Amendment) Regulations, 2022

The Insolvency and Bankruptcy Board of India ("**Board**") by way of the Notification dated June 15, 2022, bearing No. IBBI/2022-23/GN/REG085, has published the Insolvency and Bankruptcy Board of India (Information Utilities) (Amendment) Regulations, 2022 ("**IU Amendment Regulations**") to amend the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 ("**IU Regulations**"). The IU Amendment Regulations have the effect of *inter alia* inserting/ substituting the following regulations in the IU Regulations:

- The definition of record of default has been inserted in clause (la) under sub-regulation (1) of Regulation 2 of the IU Regulations, which defines record of default as the status of authentication of default issued in Form-D of the Schedule.

- **Insertion of sub-regulation 1A in Regulation 2 of the IU Regulations** - By this insertion, the creditor, before filing an application to initiate corporate insolvency resolution process under Section 7 or 9 of the Insolvency and Bankruptcy Code, 2016, is required to file the information of default with the information utility, which would be processed by the information utility to issue the record of default.

- **Insertion of sub-clause (ii) and (iii) in clause (c) of Regulation 21(2) of the IU Regulations** - During the process of authorization of default, the information utility is to deliver the information of default/ reminder, to the address of the debtor, recorded with MCA 21 and the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI) registry as repositories or any other statutory repository as approved by the Board. The information utilities are to record the status of authentication of the information of default in the form of the tables provided therein.

The full text of the IU Amendment Regulations can be accessed here.

vii. The Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) (Amendment) Regulations, 2022

The Insolvency and Bankruptcy Board of India ("**Board**") by way of the Notification dated June 15, 2022, bearing No. IBBI/2022-23/GN/REG086, has published the Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) (Amendment) Regulations, 2022 ("**Amendment Regulations**") to amend the Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) Regulations, 2017 ("**Grievance and Complaint Regulations**"). The Amendment Regulations have the effect of *inter alia* inserting/ substituting the following regulations in the Grievance and Complaint Regulations:

- **Substitution of sub-regulation (5) of Regulation 3 of the Grievance and Complaint Regulations** - A grievance/ complaint is required to be filed with the Board on its dedicated portal, i.e., www.ibbi.gov.in.

- **Substitution of sub-regulation (2), (3) and (4) of Regulation 6 of the Grievance and Complaint Regulations –** An aggrieved party and the service provider now have 7 (seven) days to provide the additional information and documents sought for by the Board, as opposed to the earlier timeline of 15 (fifteen) days. An additional 7 (seven) days may however be granted by the Board on the request of the service provider. The Board is required to dispose a grievance and direct the service provider to redress the same within 30 (thirty) days, as opposed to earlier timeline of 45 (forty five) days each, respectively.

- **Insertion of Regulation 6A of the Grievance and Complaint Regulations** - The Board has the discretion to forward a grievance against an insolvency professional to the insolvency professional agency of which he is a professional member. The grievance must be redressed by the insolvency professional agency in accordance with its bye-laws, within a period of 30 (thirty) days of receipt of the grievance.

- **Substitution of sub-regulation (2), (3), (5) and (7) of Regulation 7 of the Grievance and Complaint Regulations -** While disposing a complaint, the Board may seek certain additional information and records from the complainant and the service provider. The time period for production of this information and records has been reduced to 7 (seven) days. An additional 7

(seven) days may, however, be granted by the Board on the request of the service provider. The Board is required to investigate the information and records and form an opinion whether there exists a prima facie case within 30 (thirty) days of receipt of the complaint. The complainant may request for a review of the decision of the Board, if dissatisfied within 30 (thirty) days. Where the Board is of the opinion that a prima facie case exists, it may issue a show cause notice in terms of Regulation 11 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017, or order an investigation under Chapter III of Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017.

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

viii. The Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2022

The Insolvency and Bankruptcy Board of India ("**Board**") by way of the Notification dated July 4, 2022, bearing No. IBBI/2022-23/GN/REG088, has published the Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2022 ("**IP Amendment Regulations**") to amend the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 ("**IP Regulations**"). The IP Amendment Regulations have the effect of *inter alia* inserting/ substituting the following regulations in the IP Regulations:

- **Substitution of Regulation 11 of the IP Regulations** - The disciplinary proceedings now should be conducted in accordance with the provisions of the Insolvency and Bankruptcy Board of India (Inspection and Investigation), Regulations, 2017.

- **Insertion of Clause 8A, 8D, 15A, 25B, 25C, 27B in the First Schedule to the IP Regulations** – By these insertions, an insolvency professional is required to disclose his relationship, if any, with any debtors, professionals engaged by him, financial creditors, interim finance providers, and prospective resolution applicants of the insolvency professional agency of which he is a member, within 3 (three) days, as specified in the table provided under the regulations. The insolvency professional should also ensure disclosure of their relationship with the insolvency professional within 3 (three) days, as the case may be. The term 'relationship' has also been defined to avoid any confusion. Further, an insolvency professional should prominently state in all his communications to a stakeholder, his name, address, e-mail, registration number and validity of authorisation for assignment, if any, issued by the insolvency professional agency of which he is a member. An insolvency professional will raise bills in his name which should be paid to him through banking channels. The insolvency professional entity or the professional engaged by him should also follow the same system of billing. The insolvency professional while undertaking his assignment is required to take all reasonable care and diligence to ensure that the corporate person complies with the applicable laws and any loss or penalty incurred as a result of non-compliance of the applicable laws cannot be included by the insolvency professional.

The full text of the IP Amendment Regulations can be accessed here.

ix. The Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) (Amendment) Regulations, 2022

The Insolvency and Bankruptcy Board of India by way of the Notification dated July 4, 2022 bearing No. IBBI/2022-23/GN/REG089, has published the Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) (Amendment) Regulations, 2022 to amend the Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016. By this amendment, Regulation 8 has been substituted, which provides that disciplinary proceedings under these Regulations would now be conducted in accordance with the provisions of the Insolvency and Bankruptcy Board of India (Inspection and Investigation), Regulations, 2017.

The full text of the Notification can be accessed here.

x. The Insolvency and Bankruptcy Board of India (Employees' Service) (Amendment) Regulations, 2022

The Insolvency and Bankruptcy Board of India by way of its Notification dated July 6, 2022 bearing No. IBBI/2022-23/GN/REG090, has published the Insolvency and Bankruptcy Board of India (Employees' Service) (Amendment) Regulations, 2022 to amend the Insolvency and Bankruptcy Board of India (Employees' Service) Regulations, 2017.

Schedule -I of these Regulations which provides for the method of recruitment to and eligibility for various grades and positions has been substituted by this amendment. Additional criteria for recruitment and eligibility to officer posts of various cadres has been inserted and a specified number of posts have been allocated for each position. All the posts for the positions mentioned under Schedule-I are on selection basis. The criteria for direct recruitments like age limit, educational and other qualifications have also been incorporated. A probation period of 2 (two) years from the date of appointment has been made applicable to the position of Personal/ General Assistant and Assistant Manager. Further, the scale of pay applicable to various posts have also been incorporated.

The full text of the Notification can be accessed here.

B. JUDICIAL PRONOUNCEMENTS

i. Vidarbha Industries Power Limited v. Axis Bank Limited

[Judgment of the Hon'ble Supreme Court of India dated July 12, 2022, in Civil Appeal No. 4633 of 2022]

The Hon'ble Supreme Court of India has held that the National Company Law Tribunal, has to consider the grounds made out by the corporate debtor against admission of an application for initiation of corporate insolvency resolution process by a financial creditor, and the National Company Law Tribunal can keep the admission in abeyance or even reject the application.

Background:

The present appeal was filed by the Appellant (Vidarbha Industries Limited) under Section 62 of the Insolvency and Bankruptcy Code, 2016 ("**Code**"), being aggrieved by the Order dated March 2, 2021 passed by the National Company Law Appellate Tribunal ("**NCLAT**"), in Company Appeal No.117 of

2021, whereby the NCLAT refused to stay the proceedings initiated by the Respondent (Axis Bank Limited) against the Appellant, for initiation of the Corporate Insolvency Resolution Proceedings ("**CIRP**") under Section 7 of the Code.

The Respondent had filed an application under Section 7(2) of the Code, before the National Company Law Tribunal, Mumbai ("**NCLT**"), for the initiation of CIRP against the Appellant. The Appellant filed a Miscellaneous Application, seeking a stay of the proceedings under Section 7 of the Code, pending disposal of a Civil Appeal by the Hon'ble Supreme Court of India. The Civil Appeal arose out of non-implementation of certain directions of the Appellate Tribunal for Electricity ("**APTEL**"), which would have, as per the contentions of the Appellant, entitled it to a large sum of money. The NCLT and subsequently the NCLAT dismissed the said application for stay of the proceedings before the NCLT. Hence, the present appeal came to be filed under Section 62 of the Code before the Hon'ble Supreme Court of India.

The Appellant submitted that Section 7(5)(a) of the Code uses the word 'may' and not 'shall', which must be interpreted to say that it is not mandatory for the NCLT to admit an application in each and every case, where there is an existence of debt. Further reliance was placed on Rule 11 of the National Company Law Tribunal Rules, 2016 ("**NCLT Rules**"), which provides for the inherent power of the Tribunal to makes orders to meet the ends of justice and prevent the abuse of process of the Tribunal.

The Respondent opposed the appeal on the ground that the Appellant had admitted the default in payment of its dues and that the NCLAT had rightly declined a stay of the proceedings initiated by the Respondent under Section 7(5) of the Code. The object of the Code was to set up an effective legal framework for expeditious and time bound insolvency resolution. Section 7(5)(a) of the Code must, therefore, necessarily be construed as mandatory in the light of the object of the Code.

Findings of the Court:

The NCLT and NCLAT by relying on the judgment of the Hon'ble Supreme Court of India in Swiss Ribbons v. Union of India (2019) 4 SCC 17, held that an application must be necessarily entertained under Section 7(5)(a) of the Code, if a debt existed and the corporate debtor was in default of payment of a debt. In other words, the NCLT found Section 7(5)(a) of the Code to be mandatory. The NCLT was of the view that Section 7(5)(a) of the Code did not admit any other interpretation, with which the NCLAT agreed.

The Hon'ble Supreme Court of India, however, held that both the NCLAT and NCLT had erred in holding that the NCLT was required to only see whether there had been a debt and the corporate debtor had defaulted in making repayment of the debt, and that these 2 (two) aspects, if satisfied, would trigger the CIRP. The Hon'ble Supreme Court of India held that considering that Section 7(5)(a) of the Code uses the word 'may', the legislature intended Section 7(5)(a) of the Code to be discretionary. It further held that there was no cogent reason to depart from the rule of literal construction in interpreting the term 'may' used in Section 7(5)(a) of the Code. The Hon'ble Supreme Court of India also noted that the term 'shall' having been used under Section 9(2) of the Code would indicate that an application of an Operational Creditor for initiation of a CIRP is mandatorily required to be admitted, if the application is complete in all respects. Different terms being used in almost similar provisions clearly indicates that the legislative intent was to never mandate an application under Section 7 of the Code.

The Hon'ble Supreme Court of India has while observing that it is not the object of the Code to penalize solvent companies, temporarily defaulting in repayment of its financial debts, held that the NCLT has to

consider the grounds made out by the corporate debtor against admission of an application for initiation of CIRP by a financial creditor, on its own merits and if facts and circumstances so warrant, the NCLT can keep the admission in abeyance or even reject the application. The Hon'ble Supreme Court of India has also clarified that in case of rejection of an application, the financial creditor is not denuded of the right to apply afresh for the initiation of the CIRP, if its dues continue to remain unpaid.

ii. Jaipur Trade Expocentre Private Limited v. M/s. Metro Jet Airways Training Private Limited

[Judgment of the National Company Law Appellate Tribunal, Principal Bench, New Delhi, dated July 5, 2022, in Company Appeal (AT) (Insolvency) No. 423 of 2021]

The National Company Law Appellate Tribunal has held that the claim of the licensor for payment of a license fee, for the use of the demised premises, for business purposes is an 'operational debt' within the meaning of Section 5(21) of the Insolvency and Bankruptcy Code, 2016.

Background:

The Appeal arose out of an order dated March 4, 2020, passed by the Adjudicating Authority, National Company Law Tribunal, Jaipur Bench ("**NCLT**") in Company Petition No. (IB)/176/9/JPR/2019, whereby the NCLT dismissed the application filed by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("**Code**"), holding that the claim arising out of a grant of license to use immovable property, does not fall in the category of goods or services, in view of which, the amount claimed under the application was not an unpaid operational debt. The Appeal was placed before a bench of 5 (five) members of the National Company Law Appellate Tribunal, Principal Bench, New Delhi ("**NCLAT**"), since the questions framed in the Appeal required consideration of a larger bench. The questions framed in the Appeal were:

- Whether the Judgment of the NCLAT in the matter of Mr. Ravindranath Reddy v. Mr. G Kishan & Ors. in Company Appeal (AT) (Ins.) No. 331 of 2019 lays down the correct law; and

- Whether the claim of the Licensor/ Appellant for payment of a license fee for the use and occupation of immovable premises for commercial purposes, is a claim of 'Operational Debt' within the meaning of Section 5(21) of the Code.

Findings of the Tribunal:

The NCLAT overruled the findings of an earlier 3 (three) member bench of the NCLAT in Mr. Ravindranath Reddy v. Mr. G Kishan & Ors. in Company Appeal (AT) (Ins.) No. 331 of 2019 and allowed the Appeal of the Appellant, thereby holding that a claim of a licensor for payment of a license fee, for the use and occupation of immovable premises for commercial purposes is an 'Operational Debt' within the meaning of Section 5(21) of the Code. The full judge bench of the NCLAT, Principal Bench observed that the findings in Mr. Ravindranath Reddy v. Mr. G Kishan & Ors. does not lay down the correct law and that the observations made therein were with regard to the facts of the said dispute. The Tribunal further observed that the judgment does not consider the extent and expanse of the term 'service' used in Section 5(21) of the Code, and has taken a very restricted meaning. The NCLAT, Principal Bench further overruled the Judgment laid down in Promila Taneja v. Surendri Design Pvt. Ltd. in Company Appeal (AT)

(Insolvency) No. 459 of 2020, wherein the coordinate bench reiterated its view taken in Mr. Ravindranath Reddy v. Mr. G Kishan & Ors.

The NCLAT further, examined various clauses of the license agreement involved in the subject matter dispute to interpret whether the claim raised by the Appellant would classify as an 'Operational Debt' under the Code. The NCLAT additionally placed reliance on the judgment of the Apex Court in Keshavlal Khemchand and Sons Private Limited v. Union of India and Ors., (2015) 4 SCC 770, observing that when a statute does not contain a definition of a particular expression employed in it, it becomes the duty of the Court to expound the meaning of the undefined expression in accordance with law with the well-established rules of statutory interpretation. In light of the said observation, the NCLAT referred to the definition of the term 'Service' from 'P Ramanatha Aiyar – Advanced Law Lexicon (6th Edition Volume 4)' and as defined under the central Goods and Services Act, 2017 and the Consumer Protection Act, 2019. In interpreting the said definitions, the NCLAT observed that the license agreement involved in the subject matter dispute has to read to mean that the agreement between the parties was with regard to 'services', within the meaning of Section 5(21) of the Code. The NCLAT also observed that had the agreement not contemplated services, there was no occasion for making the Licensee/ Operational Debtor liable to pay the GST over and above the license fee. The NCLAT further, referred to the Bankruptcy Law Reforms Committee report dated 04.11.2015, which dealt with the subject, 'who can trigger the IRP', wherein the Committee had observed that the lessor that the entity rents out space from is an operational creditor to whom the entity owes monthly rent on a three-year lease.

In view of the above observations, the NCLAT distinguished the facts of the subject matter dispute from Mr. Ravindranath Reddy v. Mr. G Kishan & Ors. and overruled the said judgment and the judgment laid down in Promila Taneja v. Surendri Design Pvt. Ltd. and held that the claim of the licensor for payment of a license fee, for the use of the demised premises, for business purposes is an 'operational debt' within the meaning of Section 5(21) of the Code.

iii. Saraf Chits Private Limited v. KAD Housing Private Limited

[Judgment of the Hon'ble National Company Law Tribunal, New Delhi Bench in (IB)255(ND)/2021 dated May 23, 2022]

The National Company Law Tribunal has held that corporate insolvency resolution process against a corporate debtor cannot be initiated/ triggered solely on the basis of the unpaid amount of interest, where the entire principal amount has already been discharged by the corporate debtor.

Background:

The Applicants filed the present Petition as financial creditors under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**Code**"), read with Rule 4 of the Insolvency and Bankruptcy Rules, 2016, with a prayer to initiate corporate insolvency resolution proceedings ("**CIRP**") against the Respondent/ Corporate Debtor.

During the hearing, the parties submitted the principal amount outstanding of Rs. 1,50,00,000/- (Rupees one crore fifty lakhs only) has already been paid by the Corporate Debtor, and an amount of Rs. 64,00,000/- (Rupees sixty four lakhs only) was left to be paid towards the interest component.

The question that arose for adjudication by the National Company Law Tribunal ("**NCLT**") was "*Whether the CIRP can be initiated/ triggered solely on the basis of the un-paid amount of interest when the entire principal amount of debt has been discharged by the Corporate Debtor*."

The Applicant submitted that the term "financial debt" as defined under Section 5(8) of the Code includes the interest component, while the Corporate Debtor submitted that since the principal amount has been paid, the petition cannot be sustained for the interest component only and needs to be dismissed.

Findings of the Tribunal:

The NCLT referred to the definitions of "Debt", "Financial debt" and "Claim" in the Code and went on to hold that, from a perusal of the said definitions, interest is not included in the term "Debt" per se and that "Interest" can be claimed to be "Financial Debt" only if a "Debt" exists.

Relying on the judgment of the Hon'ble National Company Law Appellate Tribunal in the matter of S.S Polymers v. Kanodia Technoplast Ltd., 2019 SCC OnLine NCLAT 1310, the NCLT dismissed the petition holding that the "interest" component alone cannot be claimed or pursued, in absence of a "Debt", to trigger a CIRP against the Corporate Debtor. Further, it held that the application pursued for realisation of the interest amount alone is against the intent of the Code. Hence, it was held that CIRP against a Corporate Debtor cannot be initiated/ triggered solely on the basis of the unpaid amount of interest, where the entire principal amount has already been discharged by the Corporate Debtor.

iv. S. Chandriah v. Sunil Kumar Agarwal, Resolution Professional of Digjam Limited

[Judgment of the National Company Law Appellate Tribunal, Delhi in Company Appeal (AT) Insolvency No. 22 of 2022 and Company Appeal (AT) Insolvency No. 21 of 2022]

The National Company Law Appellate Tribunal has held that payment of earnest money to a corporate debtor towards the purchase of immovable property would not fall within the ambit of a "Financial Debt" as per Section 5(8) of the Insolvency and Bankruptcy Code, 2016.

***Background*:**

The instant appeals arise from the same factual matrix and pertain to insolvency proceedings initiated against Digjam Limited/ Corporate Debtor. An Appeal was filed against Order dated February 7, 2022 passed by the National Company Law Tribunal, Ahmedabad Bench ("**NCLT**"), whereby an application filed by the Appellant praying for the Appellant's debt to be admitted as a "Financial Debt" and that he be declared to be a "Member of the Committee of Creditors" was rejected. An Appeal was also filed against the Order dated May 27, 2020, passed by the National Company Law Tribunal, Ahmedabad Bench, whereby the Resolution Professional approved the Resolution Plan for the Corporate Debtor.

It was the Appellant's contention that the Appellant had made payment of earnest money to the Corporate Debtor towards the purchase of certain immovable property amounting to Rs. 7,00,00,000/- (Rupees seven crores only) and this earnest money would fall within the ambit of a "Financial Debt" as per Section 5(8) of the Insolvency and Bankruptcy Code, 2016 ("**Code**"). In view of the same, he claimed to be entitled to be a part of the committee of creditors. One of the issues before the NCLAT was "*Whether the payment of earnest money of Rs. 7 Crores by the Appellant to the Corporate Debtor amounts to a "financial debt" within the meaning of Section 5(8) of the Code?*"

Findings of the Tribunal:

The Hon'ble National Company Law Appellate Tribunal ("**NCLAT**") ruled against the Appellant in both appeals.

The NCLAT deliberated upon the meaning of term "Financial Debt" as under Section 5(8) of the Code and placed emphasis on the requirement of the debt having to be disbursed and the disbursement towards consideration involved being for "time value of money" to fall within the definition of "Financial Debt" under the Code. The meaning of the term "Financial Debt" and specifically the phrase "time value of money", as incorporated in the provision of the Code, were interpreted in view of the Hon'ble Supreme Court of India's ruling in Pioneer Urban Land and Infrastructure Ltd. v. Union of India (2019) 8 SCC 416 and Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited and Ors (2020 8 SCC 401). In the instant case, it was held that while there was undoubtedly disbursement of money by the Appellant, this disbursement of money by the Appellant was merely earnest money in furtherance of his offer to purchase surplus land available at the mills premises of the Corporate Debtor at Jamnagar, and was not against "time value of money". The NCLAT opined that this payment merely stood as an advance and was to be adjusted towards the balance sale consideration, if at all the sale was to subsequently be proceeded with. As such, the disbursement would not fall within the ambit of the term "financial debt", on account of the fact that it is not in view of time value of money and does not have the effect of a commercial borrowing. Accordingly, the order of the NCLT was upheld and the Appeal was dismissed.

Further, the NCLAT did not deem it necessary to interfere with the commercial wisdom of the committee of creditors, as laid down in precedents of the Hon'ble Supreme Court of India and dismissed the other Appeal as well.

V. LITIGATION & ARBITRATION

i. National Highways Authority of India v. P. Nagaraju alias Cheluvaiah and Another

[Civil Appeal No. 4671 of 2022 decided on July 11, 2022 by the Hon'ble Supreme Court of India]

Matter in Dispute: Modification of the Arbitral Award by Court, whether permissible

Background:

In the present case, awards dated August 13, 2019 and January 6, 2020 were passed by the Deputy Commissioner and Arbitrator, National Highway - 275 (land acquisition), Ramanagara District. By these awards, the Arbitrator had enhanced the compensation. The said awards were challenged and were subsequently upheld by the Principal District Sessions Judge, Ramanagara and the High Court of Karnataka. The Judgment of the High Court of Karnataka was challenged before the Hon'ble Supreme Court of India by way of a Civil Appeal.

Findings of the Court:

The Hon'ble Supreme Court of India was dealing with the issue that whether the awards passed by the Arbitrator are ex-facie erroneous amounting to patent illegality since the Arbitrator while redetermining the compensation took into consideration the guideline value as provided under the notification dated March 28, 2016 issued by the Department of Stamps and Registration, being the market value fixed on a

date subsequent to the acquisition notification dated February 1, 2016. The Hon'ble Supreme Court of India after placing reliance on the guideline value notification dated March 28, 2016 for considering the market value of the property acquired under the preliminary notification dated February 1, 2016, held that placing reliance on the guideline value notification by itself cannot be accepted to be a patent illegality committed by the Arbitrator.

The Court observed that appropriate reasons have not been indicated by the Arbitrator to arrive at the conclusion to uniformly adopt the value of Rs.15,400/- (Rupees fifteen thousand four hundred only) per sq. m. fixed in respect of lands in a layout which was separately indicated in the notification. The Hon'ble Court also observed that Arbitrator did not indicate sufficient reasons, which to that extent would indicate patent illegality in the awards passed, by the learned Arbitrator, being contrary to Section 28(2) and 31(3) of the Arbitration and Conciliation Act, 1996 ("**the Arbitration Act**").

The Hon'ble Court lastly observed that it would not be open for the court in the proceedings under Section 34 of the Arbitration Act or in the appeal under Section 37 of the Arbitration Act to modify the awards. It further observed that an appropriate course to be adopted in such an event would be to set aside the awards and remit the matter to the Arbitrator in terms of Section 34(4) of the Arbitration Act keeping in view these aspects of the matter even if the notification dated March 28, 2016 relied upon was justified. The appeals were accordingly allowed in part.

ii. M/s. Tirupati Steels v. M/s Shubh Industrial Component and Another

[Civil Appeal No. 2941 of 2022 decided on April 19, 2022]

Matter in Dispute: Pre-Deposit as per the Micro, Small and Medium Enterprises Development Act, 2006 is mandatory

Background:

In the present case, the parties were governed by the provisions of the Micro, Small and Medium Enterprises Development Act, 2006 ("**MSMED Act**"). The Appellant, i.e., M/s Tirupati Steels, filed a claim before the Micro and Small Enterprises Facilitation Council ("**Council**") for the recovery of Rs. 2,72,33,153/- (Rupees two crore seventy two lakhs thirty three thousand one hundred and fifty three only) including principal amount outstanding in the sum of Rs. 1,40,13,053/- (Rupees one crore forty lakhs thirteen thousand and fifty three only) and interest outstanding in the sum of lRs. 1,32,20,100/- (Rupees one crore thirty two lakhs twenty thousand one hundred only). Subsequently, the dispute was referred to arbitration by the Council, and the sole Arbitrator passed an award in favour of the Appellant. Thereafter, an Execution Petition was filed before the District and Sessions Judge, Faridabad.

The said Award was challenged by the Respondent under Section 34 of the MSMED Act, before the Special Commercial Court, Gurugram. The court while taking note of Section 19 of MSMED Act, directed the Respondent to deposit 75% (seventy five percent) of the amount awarded under the arbitral Award before the application filed under Section 34 of MSMED Act could be heard. This order was challenged before the Punjab and Haryana High Court, which upheld the vires of Section 19 of the MSMED Act. The court however held that the pre-deposit under Section 19 of the MSMED Act was directory in nature and not mandatory. Accordingly, a civil appeal was filed before the Hon'ble Supreme Court of India.

Findings of the Court:

The Hon'ble Supreme Court of India after interpreting Section 19 of the MSMED Act and placing reliance on the case of *Goodyear (India) Ltd. v. Norton Intech Rubbers (P) Ltd., (2012) 6 SCC 345*, observed that the requirement of deposit of 75% (seventy five percent) of the amount in terms of the award as a pre-deposit as per Section 19 of the MSMED Act was mandatory.

The Hon'ble Supreme Court of India however observed that considering the hardship which may be faced before the Appellate Court and if the Appellate Court was satisfied that there would be undue hardship caused to the Appellant to deposit 75% (seventy five percent) of the Awarded amount as a pre-deposit at a time, the court may allow the pre-deposit to be made in instalments. The Hon'ble Court accordingly held that the order passed by the High Court was unsustainable and accordingly quashed the same.

iii. BBR (India) Private Limited v. SP Singla Constructions Private Limited

[Civil Appeal Nos. 4130-4131 of 2022 decided on May 18, 2022 by the Hon'ble Supreme Court of India]

Matter in Dispute: Conducting arbitration proceedings at new place would not shift the seat of the arbitration

Background:

In the present case, the parties had entered into a contract under which BBR (India) Pvt. Ltd. ("**BBR**") was required to supply, install and undertake stressing of cablestrays. The said contract and Letter of Intent ("**LoI**") were executed at Panchkula, Haryana. The corporate office of SP Singla Constructions ("Singla") was also located at Panchkula. The registered office of BBR was in Bengaluru, Karnataka. The arbitration clause contained in LoI was silent on the seat and venue of arbitration.

After dispute arose between the parties, the matter was referred to arbitration, and the Arbitrator, Justice NC Jain (Retd.) held that the venue of arbitration would be at Panchkula, Haryana. Subsequently, Justice Jain recused himself, and Justice (Retd.) T.S. Doabia took over as the sole Arbitrator and passed an order stating that the venue of the proceedings would be at Delhi. Thereafter, arbitration proceedings were held at Delhi and an award was pronounced wherein Singla was awarded a sum of Rs.3,35,86,577/- (Rupees three crore thirty five lakhs eighty six thousand five hundred and seventy seven only) along with interest.

After the passing of the Award, two proceedings were initiated, i.e., an Application for interim orders under Section 9 of the Act which was filed in Panchkula, and a petition under Section 34 of the Act which was filed in Delhi. The Section 9 petition was dismissed on the ground of lack of territorial jurisdiction. Subsequently, the Punjab and Haryana High Court set aside this order. This order of the High Court was challenged before the Hon'ble Supreme Court of India in Civil Appeal.

Findings of the Court:

The Hon'ble Supreme Court of India observed that once the arbitrator had fixed '*the seat*' in terms of Section 20 (2) of the Arbitration Act, the Arbitrator could not change '*the seat*' of the arbitration, except when and if the parties mutually agree and state that the 'seat of arbitration' should be changed to another location, which was not so in the present case. The Court further observed that the subsequent hearings or

proceedings at a different location other than the place fixed by the Arbitrator as the 'seat of arbitration' should not be regarded and treated as a change or relocation of jurisdictional 'seat'.

The Court also observed that the place of jurisdiction or 'the seat' must be certain and static and not vague or changeable, as the parties should not be in doubt as to the jurisdiction of the courts for availing of judicial remedies. In addition, there would be a risk of parties rushing to the courts to get first hearing or conflicting decisions that the law does not contemplate and is to be avoided. The court was of the view that the aspect of certainty as to the court's jurisdiction must be given and accorded priority over the contention that the supervisory courts located at the place akin to the venue where the arbitration proceedings were conducted or substantially conducted should be preferred.

The court while dismissing the appeals filed by BBR, held that before the application under Section 34 of the Arbitration Act was filed, the jurisdictional 'seat' of arbitration had been determined and fixed under Section 20(2) of the Arbitration Act and thereby, the courts having jurisdiction over Panchkula in Haryana, have exclusive jurisdiction. The courts in Delhi would not get jurisdiction as the jurisdictional 'seat of arbitration' is Panchkula and not Delhi.

iv. Cox and Kings Limited v. SAP India Private Limited and Another

[Arbitration Petition (Civil) No. 38 of 2020 decided on May 6, 2022]

Matter in Dispute: Hon'ble Supreme Court of India referred the issue regarding applicability of the 'group of companies' doctrine in arbitration to a larger bench

Background:

In the present case, Cox & Kings had entered into SAP Software End User License Agreement and SAP Enterprise Support Schedule with SAP India Private Limited ("**SAP**"). Disputes arose between the parties and SAP invoked arbitration against Cox & Kings and its parent company, i.e., Respondent No. 2. However, no response was received by SAP, and accordingly SAP filed an Application under Section 11 of the Arbitration Act for appointment of arbitrator before the Hon'ble Supreme Court of India.

Findings of the Court:

The Hon'ble Supreme Court of India was dealing with the issue as to whether the parent company, which was not a signatory to the arbitration agreement, could be directed to arbitrate by SAP. The Hon'ble Court comprising of Justices NV Ramana and AS Bopanna, observed that it would be appropriate to refer the aspect of interpretation of 'claiming through or under' as occurring in amended Section 8 of the Arbitration Act qua the doctrine of group of companies to a larger Bench to provide clarity on this aspect. The Court observed that the law laid down in *Chloro Controls India Pvt Ltd v. Severn Trent Water Purifications Inc & Ors., (2013) 1 SCC 641* and the cases following it, appear to have been based, more on economics and convenience rather than law and this may not be a correct approach. Further, the Bench doubted the correctness of the law laid down in Chloro Control (supra) and cases following it. Accordingly, the bench referred the matter to a larger Bench to expound on the intricacies of the 'Group of Companies' doctrine and answer the following questions:

- Whether phrase 'claiming through or under' in Sections 8 and 11 of the Arbitration Act could be interpreted to include 'Group of Companies' doctrine?

- Whether the 'Group of Companies' doctrine as expounded by Chloro Control Case (supra) and subsequent judgments were valid in law?

In a concurring judgment, Justice Surya Kant observed that the questions that were sought to be referred to a larger bench deserved further elaboration. It was observed that the following substantial questions of law also arose for authoritative determination by a larger bench:

- Whether the 'Group of Companies' doctrine should be read into Section 8 of the Arbitration Act or whether it can exist in Indian jurisprudence independent of any statutory provision?

- Whether the 'Group of Companies' doctrine should continue to be invoked on the basis of the principle of 'single economic reality'?

- Whether the 'Group of Companies' doctrine should be construed as a means of interpreting the implied consent or intent to arbitrate between the parties?

- Whether the principles of alter ego and/or piercing the corporate veil can alone justify pressing the 'Group of Companies' doctrine into operation even in the absence of implied consent?

v. The State of Andhra Pradesh v. Raghu Ramakrishna Raju Kanumuru (M.P.)

[Civil Appeal 4522-4524 of 2022 decided on June 1, 2022]

Matter in Dispute: Tribunals like National Green Tribunal are subordinate to a High Court and conflicting orders will lead to anomalous situation

Background:

In the present case, the Appellant challenged the order dated May 6 2022 passed by the National Green Tribunal, Principal Bench, New Delhi (**"NGT"**) vide which it prohibited the Appellant from undertaking any further construction. The Appellant was in the process of demolishing an existing resort after taking appropriate permission, and a writ petition challenging the said construction, was already pending before the High Court of Andhra Pradesh at Amaravati. After the filing of the Petition, a letter was addressed by the Respondent to the NGT, and the NGT taking cognizance initiated the proceedings. The NGT appointed an expert committee, which found no violation. A second expert committee was appointed, which is yet to give its report. However, without waiting for the report, the NGT directed that no further construction is to be undertaken. An application for vacation of the stay, filed by the Appellant before NGT was rejected. The Appellant filed civil appeals before the Hon'ble Supreme Court of India against the NGT's orders.

Findings of the Court:

The Hon'ble Supreme Court of India placed reliance on the case of *L. Chandra Kumar v. Union of India and Others, (1995) 1 SCC 400* and observed that the Tribunals would be subordinate to the High Court insofar as the territorial jurisdiction of the High Court is concerned. The Court observed that it was not appropriate on the part of NGT to have continued with the proceedings before it, specifically, when it was pointed that the High Court while dealing with the matter and had passed an interim order permitting the construction. The court also observed that the conflicting orders passed by NGT and the High Court would

lead to an anomalous situation, where the authorities would be faced with a difficulty as to which order they are required to follow. The Court further observed that there can be no doubt that in such a situation, it is the orders passed by the constitutional courts, which would be prevailing over the orders passed by the statutory tribunals. The Hon'ble Supreme Court of India accordingly quashed and set aside the proceedings pending before the NGT.

VI. LABOUR & EMPLOYMENT

i. Amendment to the Punjab Shops and Commercial Establishments Rules, 1958 (as applicable to State of Haryana)

The Labour Department, Government of Haryana, by way of Notification No. 14939 dated May 17, 2022, has notified the Punjab Shops and Commercial Establishments (Haryana Amendment) Rules, 2022 ("**Amendment Rules**"). By virtue of the Amendment Rules, 'Logistics and Warehousing' establishments may apply for an exemption for the employment of women during night shifts, i.e., from 7 PM to 6 AM. Prior to the coming into effect of the Amendment Rules, permission to apply for the said exemption was only available for Information Technology establishments, Information Technology enabled Services establishments, banking establishments, 3 (three) star or above hotels, and 100% export-oriented units/ establishments.

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

ii. Haryana Government notifies conditions for establishments applying for exemption for the employment of women during night shifts

The Labour Department, Government of Haryana, by way of Notification No. 17217 dated June 7, 2022, has laid down some conditions to ensure the safety and security of women employed in night shifts in those establishments, permitted to employ such personnel.

Some key conditions for employing women during night shifts are in relation to the employers following all of the requirements and provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, declarations/ consents being obtained from the women employees for working during the night shift, providing adequate and proper lighting within the shop/ establishment, providing separate canteen facilities as well as transportation, and such other related conditions.

The full text of the Notification can be accessed here.

iii. Haryana Government notifies conditions for factories applying for exemption for the employment of women during night shifts

The Labour Department, Government of Haryana, by way of Notification No. 11/6/2022-4Lab dated June 22, 2022, has prescribed some conditions with respect to factories applying for an exemption for employing women during night shifts, i.e., between 7 PM and 6 AM.

Some of the key conditions, which have been prescribed for the security and safety of the women employees, include complying with the provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, ensuring that there is proper lighting within the factory premises, provision of transportation facilities for women employees, obtaining the required declaration/

consent from the women employees to work during the night shift, provision of medical facilities and such other related conditions.

The full text of the Notification can be accessed here.

iv. Government of Tamil Nadu allows Shops & Establishments to remain open on all days of the year

The Government of Tamil Nadu, by way of Notification No. II(2)/LWSD/435(a)/2022 dated June 2, 2022, has exempted all shops and establishments, employing 10 (ten) or more persons, from the provisions of Section 7(1) and Section 13(1) of the Tamil Nadu Shops & Establishments Act, 1947 thereby permitting such shops and establishments to remain open 24x7 on all days of the year, for a period of 3 (three) years, with effect from June 5, 2022.

The exemption, however, has been made subject to the compliance with certain conditions which include the requirement to provide employees one day of a holiday, in a week, on a rotation basis, the payment of the applicable overtime wages, obtaining the written consent of women employees working during the night shifts, providing transportation for such women employees, complying with the provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and such other related conditions.

The full text of the Notification can be accessed here.

v. Government of Delhi introduces an online portal for the Delhi Labour Welfare Board

The Government of Delhi, by way of an Office Order F.No.DLWB/Online Regn./2020-21/764 dated July 1, 2022, has introduced the online portal for the Delhi Labour Welfare Board, which can be found on https://dlabourwelfareboard.delhi.gov.in/index.php. The portal would be used for providing services such as the registration of the employer's establishment, amending/ updating the details of the establishment including the number of employees, deposit or submission of contributions from employers and employees, closure of employer establishment, etc.

The full text of the Office Order can be accessed here.

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