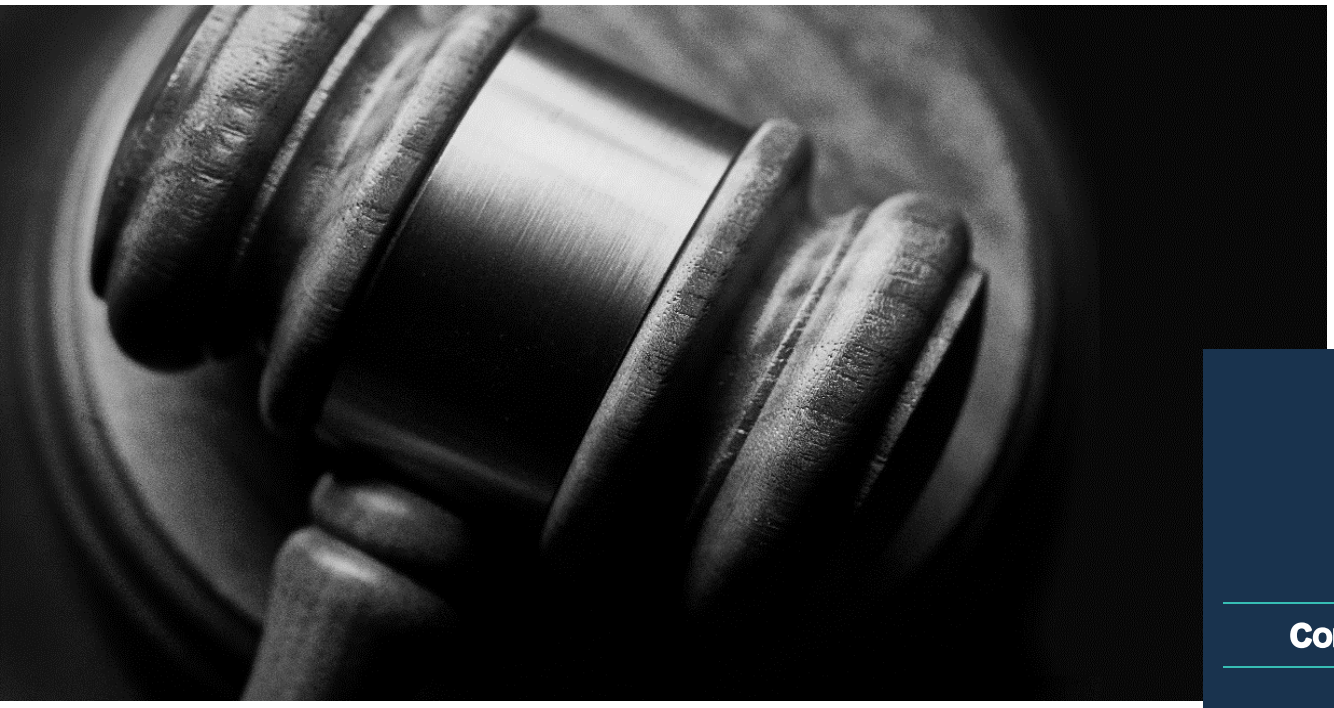
HSA ADVOCATES
HEMANT SAHAI ASSOCIATES

DISPUTE RESOLUTION AND ARBITRATION

Monthly Update | March, 2020

DISPUTE RESOLUTION AND ARBITRATION UPDATE



CONTRIBUTIONS BY

Rajdeep Choudhury
Partner

Faranaaz Kharbhari
Counsel

Kshitiz Khera
Associate Partner

Jutishna Saikia
Associate

Ishwar Ahuja
Associate

Kanika Kumar
Associate

HOT TOPIC – DECONSTRUCTING FORCE MAJEURE CLAUSE IN CONTRACTS[1]

- In light of the economic slowdown and supply chain disruption brought about by the COVID-19 outbreak, the possibility of invoking Force Majeure to avoid liability from delayed, interrupted or otherwise failed performance of contracts is being widely debated. In this context, it becomes imperative to understand certain nuances pertaining to Force Majeure, so that businesses may take informed decisions.

What is Force Majeure?

- A creature of contractual innovation, Force Majeure refers to the principle that upon the occurrence of an event or circumstance that is not reasonably within the control of and would not have been avoided or overcome by a party, and which prevents or delays that party from performing some or all of its contractual obligations, that party will be relieved from liability which might otherwise arise as a result of that party's failure to perform those affected obligations.
- The intention of a Force Majeure clause is to relieve the affected party from the consequences of something over which it has no control. Its provisions do not suspend the requirement for performance and typically require the affected party to continue to perform its obligations to the extent not prevented by the event of Force Majeure.
- Availability of Force Majeure relief cannot be implied into a contract under Indian law. It must be expressly provided for under the provisions of the contract and the nature of protection afforded will depend on the precise language of the provision.

Securing Force Majeure relief

- The following are key considerations for affording a party force majeure relief:
  - **Burden of proof:** The affected party carries the burden of proving the validity of its claim through supporting evidence that an event of force majeure has indeed occurred.

[1] A detailed commentary on this topic 'Coronavirus: The Fallacy of Forcing Force Majeure' authored by Rajdeep Choudhury was published on Bar and Bench. To read the full article click here.

- **Scope and interpretation:**
  - Contracts typically identify and list a series of events or circumstances that can legitimately be claimed by a party as an event of Force Majeure. Usually, such events can include an act of god or natural disasters, adverse weather conditions, explosions, fire, war or war-like situations, labour unrest or strikes, epidemics, pandemics, etc.
  - Force Majeure provision may exclude outright certain events such as changes in either party's market factors, a party's inability to finance its obligations under the agreement or the unavailability of funds to pay amounts when due, breakdown or failure of plant or equipment caused by normal wear and tear or by a failure to properly maintain such plant or equipment from constituting events of force majeure.
  - In the context of the ongoing pandemic, courts and tribunals would examine whether in each case, impact of COVID-19 pandemic prevented or delayed the party from performing its contractual obligation. In disputes arising out of complex contracts, they will also carry out a textual natural and ordinary interpretation of the Force Majeure provision in order to ascertain its objective meaning.
- **Causation:** Depending on the specific. provisions, it is for the affected party to demonstrate that an event of Force Majeure delayed performance of the contract or caused the failure in performance of the contract notwithstanding the commercially reasonable efforts of the affected party to overcome or mitigate the effect of the said event.
- **Notification:** A Force Majeure provision commonly contains a time-bound notification requirement, which can operate as a contractual condition precedent to relief. Such provisions are generally enforceable, and so complying fully with all notice requirements will be important for parties seeking to invoke force majeure.

Limitations on securing relief

- The extent of Force Majeure relief will be affected by the following considerations:
  - **Duty to mitigate:** In the unlikely event that an express duty to mitigate is absent, a duty to do so may be implied albeit on commercially reasonable terms, which can be ousted only by clear and unequivocal language. Provisions may specify the extent to which a party declaring Force Majeure must mitigate not only the event of Force Majeure but also its effect.
  - **Certifications:**
    - Force Majeure certificates issued by governmental agencies may aid an affected party's efforts in securing relief, but they may not prove determinative.
    - The categorisation of the outbreak as a 'pandemic' by WHO may be of significant persuasive value in cases where Force Majeure provision contains appropriate language.
    - The Department of Expenditure, Ministry of Finance, Government of India on February 19, 2020 issued a cryptic office memorandum stating that the outbreak that has caused disruptions in the supply chain should be considered as a case of 'natural calamity' and Force Majeure provisions may be invoked 'wherever considered appropriate'. This memorandum may persuade pliant counterparties, but it is debatable whether such certificates have force of law.

Way forward

- There may be businesses in India who have overstated their eligibility for Force Majeure relief. As a negotiated term of contract, the language of the provision and the facts and circumstances of the affected party will determine the prospects of a successful claim.
- Alternatively, parties may wish to circumvent the effect of a restrictive force majeure provision by claiming relief under the doctrine of frustration under Section 56 of the Indian Contract Act, 1872. Owing to the more limited application of this doctrine, however, this may well be more difficult to establish. It may be that counterparties, mindful of nurturing long-term relationships, will choose to be pragmatic and accommodate claims for relief to a limited extent.
- Parties considering a claim for Force Majeure relief need to prepare well. That involves compiling a dossier on the event or circumstance constituting an event of Force Majeure, retaining all relevant documents and complying with notice provisions. Those intending to resist claims for relief should scrutinise whether notice provisions have been complied with and put affected parties on notice about establishing the chain of causation.

RECENT JUDGEMENTS

INTERNET AND MOBILE ASSOCIATION OF INDIA (IAMAI) V. RBI

WRIT PETITION (CIVIL) NO 528 OF 2018

Background facts

- The Reserve Bank of India (**RBI**) had banned financial institutions providing banking services to cryptocurrency businesses on April 6, 2018. The primary reasons ascribed to this were potential of significant losses to investors arising from speculative and volatile pricing of such currencies, usage in money laundering, tax evasion and fraud due to the untraceable nature, legal and financial risks associated with dealing in virtual currencies as the legal status of the exchange platforms established in several jurisdictions was not clear.
- The RBI had on April 6, 2018, said it had repeatedly 'cautioned users, holders, and traders of virtual currencies, including bitcoins, regarding various risks associated in dealing with such virtual currencies. As a follow-up to those warnings, it had barred all entities which are regulated by the RBI from either dealing in virtual currencies or providing services to those dealing in such currencies.
- This was challenged by IAMAI in the Supreme Court.

Issue at hand

- Whether RBI's ban preventing regulated entities from providing banking services to those engaged in the trading or facilitating the trading in virtual currencies was maintainable?

Findings of the Court

- While disposing of the Civil Writ Petition in the case of IAMAI v RBI, Supreme Court on March 04, 2020 set aside the ban which RBI had put on financial institutions providing banking services to cryptocurrency businesses on the grounds that the RBI's measure violated Article 19 (1) (g) for virtual currency exchanges,.
- As part of the proceedings, the RBI accepted the fact that it never implemented a ban on Bitcoin but rather 'instructed' banks to simply refrain from dealing with cryptocurrency exchanges. The RBI's core defence included arguments claiming that cryptocurrencies pose a significant threat to the nation's monetary system and overall stability, and that digital currencies were being used mainly by bad actors for money laundering, tax evasion, financing of terrorism-related activities, and so on. Lastly, the RBI's legal counsel argued that crypto should be banned simply because a number of high-profile finance experts and economists such as Warren Buffet are against it.
- The Court held that the RBI's circular, which prevented regulated entities from providing banking services to those engaged in the trading or facilitating the trading in virtual currencies, was liable to be set aside on the ground of proportionality and stated that *'when the consistent stand of RBI is that they have not banned virtual currencies and when the government of India is unable to take a call despite several committees coming up with several proposals, including two draft bills, both of which advocated exactly opposite positions, it is not possible for us to hold that the impugned measure is proportionate.'*
- The Court took note of three factors while setting aside the circular:
  - Over the last 5 years and more, the activities of Virtual Currency exchanges to have actually adversely impacted the functioning of other entities regulated by RBI
  - The consistent stand taken by RBI is that RBI has not prohibited Virtual Currencies in the country and
  - Even the Inter-Ministerial Committee constituted on November 02, 2017, which initially recommended a specific legal framework including the introduction of a new law namely, Crypto-token Regulation Bill 2018, was of the opinion that a ban might be an extreme tool and that the same objectives can be achieved through regulatory measures
  - The court also referred to cryptocurrencies as a 'by-product' of blockchain technology and said the government could separate the two.

Our view

Bitcoins regulation would create several encumbrances in the following forms. Firstly, determining the nature of the bitcoins could be a problem for RBI would contend that it should come under it by virtue of it being a currency whereas SEBI would contend that it is a security. Secondly, the functional definition of Bitcoin or the wallet would not come under the ambit of IT Act 2000. Thirdly, even if a separate statute is enacted, provisions to combat crimes of distinct nature would cause problems and challenges will arise with respect to imputation of criminal liability in light of jurisdictional determination, cumbersome process of the Code of Criminal Procedure section 166A and 166B would further delay the process of investigation, lack of technologically skilled investigating officers and weak infrastructure pertaining to cyber offences, etc.

While this judgment is being widely hailed by the start-up and fintech community, the future of crypto currency in India remains uncertain. While the Court raised several red flags in this judgment, a draft bill released on February 28, 2020 proposed banning the use of cryptocurrency as legal tender in India as well as prohibiting mining, buying, holding, selling, dealing in, issuance, disposal or use of cryptocurrency.

MANKATSU IMPEX PVT LTD V. AIRVISUAL LTD

ARBITRATION PETITION NO. 32 OF 2018

Background facts

- As per memorandum of understanding (**MOU**) dated September 12, 2016, the respondent agreed to sell to the petitioner the complete line of the respondent's air quality monitors for onward sale. On October 14, 2017, IQAir AG informed the petitioner by a letter that they have acquired the respondent and will not assume any contracts or legal obligations of the respondent under the MOU. The petitioner responded to IQAir AG stating that the MOU provides that any party taking over the business of the respondent is obligated to absolve all rights and obligations on the same terms and conditions. IQAir AG refused to honour the MOU in its executed state and on December 08, 2017, the petitioner issued a notice invoking arbitration under the MOU and nominated an arbitrator.
- Clause 17 of the MOU (the dispute resolution clause) stated that the parties are to refer the dispute to be administered in Hong Kong, which was also stated as the place of arbitration. The clause further stated that the MOU is governed by the laws of India and the courts at New Delhi would have jurisdiction. All disputes were to be adjudicated by a sole arbitrator.
- The petitioner filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (**Act**) before the High Court of Delhi seeking directions to be passed to the respondent and IQAir AG to honour the terms and conditions of the MOU. The petitioner also sought injunction against the respondent and IQAir AG to disallow them from terminating the MOU and from entering into any contract with third parties for products which are the subject matter of the MOU.
- In its reply to the notice of arbitration, the respondent stated that Clause 17 of the MOU provides for arbitration administered and seated in Hong Kong and, therefore, the petitioner should refer the dispute to an arbitration institution in Hong Kong. The petitioner filed a petition under Section 11(6) of the Act before the Supreme Court of India seeking appointment of a sole arbitrator.

Issue at hand

- Whether Hong Kong is the seat or the venue of arbitration?

Findings of the Court

- The Supreme Court (**SC**) held that the case fell under the ambit of international commercial arbitration since the respondent is an entity incorporated under the laws of Hong Kong. The court observed that the significance of the seat of arbitration is that it determines the applicable law when deciding the arbitration and the judicial review over the arbitration award. Since the arbitration clause states that Hong Kong is to be the place of arbitration and that all disputes are to be administered in Hong Kong, the seat of arbitration was held to be Hong Kong by the court. The court dismissed the petition for appointment of a sole arbitrator.

Our view

The court made reference to *Indus Mobile v. Datawind* and stated that when the seat of arbitration can be determined, no other court may have exclusive jurisdiction other than the courts of the seat jurisdiction. In this case, however, the words 'to be administered in Hong Kong' do not by themselves connote that Hong Kong has been agreed as the seat of arbitration by the parties. One cannot relate administration of arbitration by an arbitral institution in a foreign country with the seat of arbitration.

Even if arbitration is administered by an institution in a foreign country, the seat may still be India. Given the fact that the MOU did not state that the seat of arbitration is New Delhi, the court seems to have read into the vague terms of the contract in order to determine the seat. The MOU states that the place of arbitration is Hong Kong which could only mean that Hong Kong is the venue of arbitration. In our view, the Supreme Court did not deploy the correct test to determine the seat of arbitration.

PERKINS EASTMAN ARCHITECTS DPC AND ANR V. HSCC INDIA LTD.

ARBITRATION APPLICATION NO. 32 OF 2019

Background facts

- Hospitals Services Consultancy Co. Ltd. (**HSCC/Respondent**) issued a Request for Proposal for comprehensive architectural planning and designing for works of proposed All India Institute of Medical Sciences at Guntur, Andhra Pradesh. A consortium of Perkins Eastman Architects and Edifice Consultants Pvt. Ltd. (**Perkins/Applicant**) submitted its bid and subsequently a contract was entered between Applicant and Respondent.
- The terms of the dispute resolution clause of the contract stated that any dispute or difference shall be referred to arbitration before a sole arbitrator appointed by Chief Managing Director (**CMD**) of the Respondent within 30 days from receipt of request for arbitration. A dispute arose and the Applicant vide later dated June 06, 2019 called upon the CMD of the Respondent to appoint a sole arbitrator. However, the Respondent failed to appoint the Arbitrator within the stipulated time period and thereafter Chief General Manager of the Respondent addressed a letter purporting to appoint the sole arbitrator.

- Aggrieved by the same, the Applicant filed an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (**Act**) before the Supreme Court (**SC**) disputing the appointment on grounds of delay in appointment and seeking an independent and impartial arbitrator to be appointed by the Court.
- Allahabad High Court, being seized of a batch of connected writ petitions with common issues and facts, was presented with a challenge to a declaration made by Registrar of Companies, UP, Kanpur (**ROC**) publishing notice of disqualification of petitioners under Section 164(2) of Companies Act, 2013 (**Act**) in all companies in which the Petitioners were directors though those Companies are/were not in default.

Issues at hand

- Whether a case had been made out for exercising power by the Court to appoint an arbitrator?

Findings of the Court

- The Court noted that the dispute resolution clause empowers the CMD of HSCC to appoint a sole arbitrator and also stipulates that no other person may act as an arbitrator. SC in the case of *TRF Ltd v/s Energo Engineering Projects Ltd* dealt with similar issue and held that the Managing Director was ineligible/disqualified to act as an arbitrator by operation of law under Section 12(5) of the Act and applying the principle of 'what cannot be done directly may not be done indirectly' made him ineligible to nominate another person to act as an arbitrator.
- SC pointed out that the arbitration clause in the present case was different as CMD was not authorized to arbitrate himself and only had power to appoint/nominate the sole arbitrator. Nevertheless, the Court held that the logic of TRF Judgment would apply, and appointment by the CMD would be invalid.
- SC observed that in cases where only one party has right to appoint sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course of arbitration. Therefore, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint the sole arbitrator. Additionally, it was also of the view that a person who is ineligible to act as an arbitrator cannot also appoint one. SC exercised its power under Section 11(6) of the Act and appointed Justice A.K Sikri (Retd.) as the sole arbitrator.

Our view

By way of this judgment, the Supreme Court has reinstated the importance of independent and impartial arbitrators for a healthy arbitration environment.

The Apex Court has made an effort to address the issue of misuse of power by dominating parties in contracts and we believe that the present judgment will have a substantial impact on contracts that contain one-sided arbitration clauses. While the judgment clarifies the law on unilateral appointment of sole arbitrators, the appointment of a tribunal where a party is only allowed to choose an arbitrator from a panel unilaterally prepared by the opposite party still remains unsettled.

BANK OF BARODA V. KOTAK MAHINDRA BANK LTD.

CIVIL APPEAL NO 2175 OF 2020

Background facts

- SC was seized of an appeal impugning the order dated November 13, 2014 of the Karnataka High Court which had upheld the order dated July 20, 2013 dismissing of the execution petition of a foreign decree filed after 14 years in terms of Section 44A read with Order 21 Rule 3 of the Code of Civil Procedure, 1908 (**CPC**) as being time barred under Article 136 of the Limitation Act 1963 (**Act**).

Issues at hand

- Whether Section 44A of the Act merely provides for manner of execution of foreign decrees or does it also indicate the period of limitation for filing execution proceedings for the same?
- What is the period of limitation for executing a decree passed by a foreign court (from a reciprocating country) in India?
- From which date the period of limitation will run in relation to a foreign decree (passed in a reciprocating country) sought to be executed in India?

Findings of the Court

- In respect of Issue No.1 adverting to Section 3 of the CPC, the Apex Court observed that subject to provisions contained in Section 4 to Section 24 of the Act, every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed even if limitation is not set up as a defence, including an application filed for execution of a foreign decree. As such, principles of delay and laches as applicable to writ proceedings cannot be applied to civil proceedings, much less proceedings under the CPC which must be filed within the prescribed period of limitation. It was conclusively held that Section 44A only enables the District Court to execute the decree and provides for the District Court to follow the same procedure as it follows

while executing an Indian decree, without laying down or indicating the period of limitation for filing such petition.

- On Issue No.2, the Apex Court observed that unlike the earlier position, the law of limitation cannot be held to be procedural, especially when it leads to extinguishment of rights or remedies. Hence, there is an evolved worldwide view that the law of limitation of the cause country, i.e. the country in which the decree has been passed, shall apply instead of the law of limitation of the forum country, i.e. the country where the decree is brought for execution. It was further held that where the remedy stands extinguished in the cause country, it virtually extinguishes the rights of a decree holder to execute the decree and creates a corresponding rights in a judgment debtor to challenge the execution of the decree, which rights are substantive and not procedural. Further, if the law of a forum country is silent with regard to limitation for execution of a foreign decree, then the limitation of the cause country shall apply, as in the present case, of course subject to the decree being executable in terms of Section 13 of the CPC.
- On Issue No.3, it was conclusively held that period of limitation in India would start running from the date of passing of the decree in the cause country and if the decree remains unsatisfied in such execution, the decree holder can file a petition for execution within a period of three years from the finalization of execution proceedings in the cause country. For the above-decided issues and reasoning of the Apex Court, the appeal was dismissed and orders of the both the courts below were upheld, though for different reasons.

Our view

This is a landmark judgment, especially in light of the recent inclusion of United Arab Emirates (**UAE**) as a reciprocating country vide Notification dated January 17, 2020 (the list includes U.K., Singapore, Bangladesh, Malaysia, New Zealand, Hong Kong, Trinidad & Tobago, Papua New Guinea, Fiji and Aden, among other countries) and adds certainty to the preliminary legal issue of maintainability of an execution petition filed in India for foreign decrees passed by competent courts in these reciprocating countries, apart from opening up additional avenues of realizing debt, recoveries and claims and impacting litigation strategies of financial institutions and corporates in these countries.

JAGJEET SINGH LYALLPURI (DECEASED) THROUGH LEGAL REPRESENTATIVES & ORS. V. UNITOP APARTMENTS AND BUILDERS LTD

(2020) 2 SCC 279

Background facts

- The case emanates from an appeal against the decision of Punjab and Haryana High Court (**HC**) wherein it set aside an award in Respondent's appeal under section 37 of the Arbitration and Conciliation Act (**Act**) and remanded the matter back to the sole arbitrator on the ground that the parties have not been granted appropriate opportunity to tender the evidence and to cross-examine the witnesses.
- The HC further held that the arbitrator has not considered the aspect relating to the extent to which the construction was already completed, and the amount expended by the respondent herein and no determination in that regard has been made.

Issues on hand

- Whether the HC could have adverted into the merits of the contention beyond the scope available under Section 34(2) of the Act so as to set aside the award and remand the matter to the arbitrator in an appeal under Section 37 of the Act?
- Whether the contentions which were put forth to assail the award based on procedure adopted by the Ld. Sole Arbitrator is to be accepted or not, keeping in view the scope of Section 34(2) of the Act? If yes, determine as to whether such ground is made out in the present case?

Findings of the Court

- SC held that while arbitrator recorded that the Parties did not wish to cross-examine any of the witnesses whose affidavits have been filed, no grievance was made by either of the parties and, therefore, after having accepted the said procedure under Section 19 of the Act, it was not open for the Respondent to raise a different contention on not being granted an opportunity by the arbitrator to cross-examine the Appellant's witnesses.
- It was further held that neither did Respondent file any application before Arbitrator to recall the said order and provide opportunity to tender evidence or cross examine, nor was a challenge raised by initiating any other proceedings before the award was passed, the Respondent's challenge post the passing of the award, therefore, being an afterthought.
- Apex Court further held that Respondent's challenge to the award on the ground of not having answered each of the claims separately was unacceptable since the issues for consideration on which the arguments would be addressed was settled on the same proceeding held by the arbitrator on November 28, 2019 without any objection by the Parties.
- SC therefore set aside the impugned order dated July 31, 2015 passed by the Punjab and Haryana HC and restored the arbitral award.

Our view

The Apex Court has very cautiously treated procedural lapse on the part of the Arbitrator as being within the purview for consideration in a challenge to the award under Section 34 of the Act or in proceedings against Section 37 of the Act thereto, while at the same time rejecting any such procedural lapse on the facts of the case, being well within the procedure stipulated by the Arbitrator and consented by the Parties.

NEW DELHI

81/1, Adchini
Sri Aurobindo Marg
New Delhi – 110 017

Phone: (+91) (11) 6638 7000
Email: newdelhi@hsalegal.com

MUMBAI

Construction House, 5th Floor
Ballard Estate
Mumbai – 400 001

Phone: (+91) (22) 4340 0400
Email: mumbai@hsalegal.com

BENGALURU

Aswan, Ground Floor, 15/6
Primrose Road
Bengaluru – 560 001

Phone: (+91) (80) 4631 7000
Email: bengaluru@hsalegal.com

KOLKATA

No. 14 S/P, Block C
Chowringhee Mansions,
Kolkata – 700 016

Phone: (+91) (33) 4035 0000
Email: kolkata@hsalegal.com

mail@hsalegal.com

www.hsalegal.com

HSA Advocates

HSA ADVOCATES
HEMANT SAHAI ASSOCIATES