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India Update

2020 in review

Annual compendium highlighting and analyzing legal, regulatory and policy developments in India in 2020.

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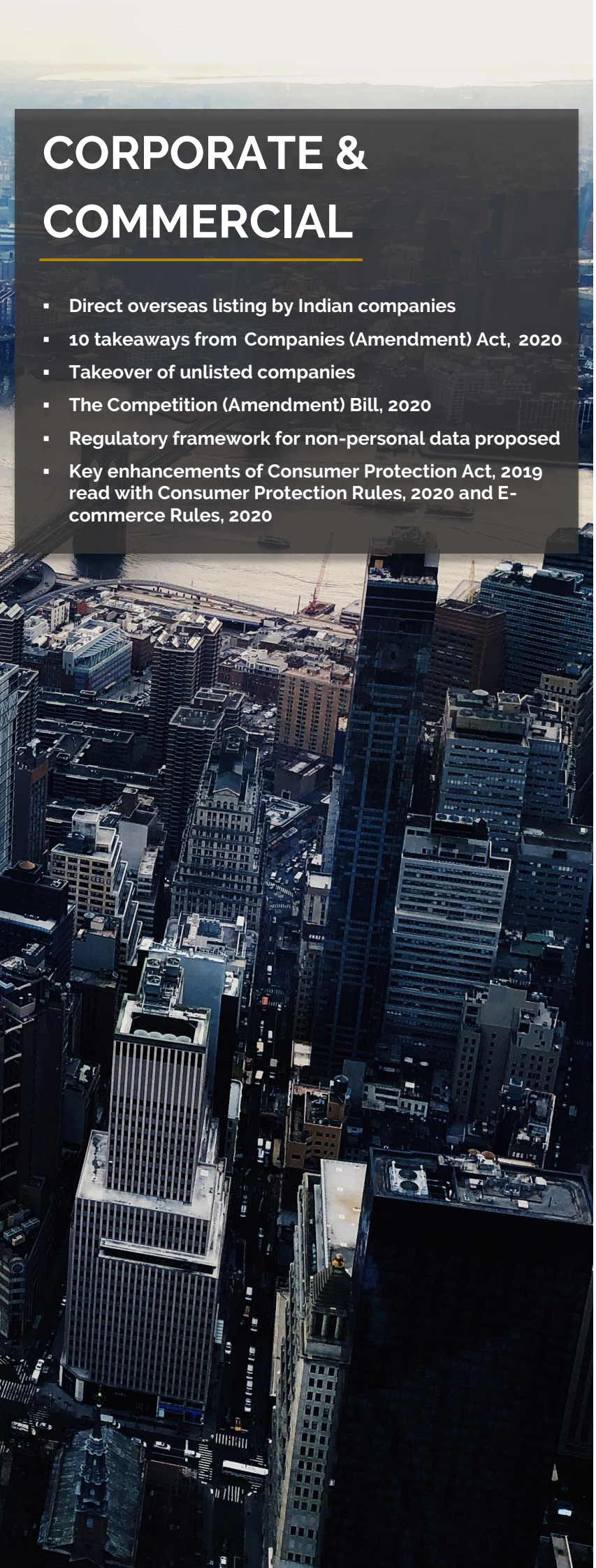
TABLE OF CONTENTS



CORPORATE & COMMERCIAL

Direct overseas listing by Indian companies

To improve ease of doing business, Ministry of Finance, Government of India (**MoF**) announced that Indian companies would now be allowed to list their shares directly in foreign stock exchanges. While consequent amendments and clarifications in legal and regulatory regime are awaited, the move would now allow Indian companies access to multiple jurisdictions for raising capital, with differing costs and listing conditions. At present, direct listing of shares of Indian companies on foreign bourses is not permitted and possible options to raise capital options were restricted to American Depository Receipts (**ADRs**) and Global Depository Receipts (**GDRs**) which were increasingly becoming less popular with the Indian corporates. Government of India and Securities and Exchange Board of India (**SEBI**) have been exploring options so that Indian corporates could access a larger pool of foreign capital.

The policy shift towards direct listing of shares abroad stems from report of a Committee constituted by SEBI in 2018 for listing of equity shares of companies incorporated in India on foreign stock exchanges and of companies incorporated outside India on Indian stock exchanges (**Committee Report**), which had recommended permissible jurisdictions for listing of equity shares of an Indian company based on following principles:

- Countries which are a member of Board of International Organization of Securities Commissions (**IOSCO**) and whose securities market regulator is either a signatory to the IOSCO's multilateral memorandum of understanding or is a signatory to a bilateral memorandum of understanding with SEBI for information sharing arrangements.
- Countries which are members of the Financial Action Task Force (**FATF**).
- Countries not identified in the public statement of the FATF as:
  - A jurisdiction having strategic anti-money laundering or combating the financing of terrorism deficiencies to which countermeasures apply
  - A jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the FATF to address the deficiencies
  - Any other jurisdiction notified by Central Government in consultation with SEBI and/or other regulatory authorities, following an overall review and evaluation of such jurisdiction's capital markets regulations

The criteria for listing in permissible jurisdictions are akin to those of the listing of rupee denominated bonds (commonly referred as '**Masala Bonds**') in foreign exchanges which were introduced in past by Reserve Bank of India. An initial list of 10 jurisdictions were identified as permissible jurisdictions in Committee Report which included United States, China, Japan, South Korea, United Kingdom, Hong Kong, France, Germany, Canada and Switzerland.

While this is a welcome move, actual implementation of the policy would require amendment to several regulations including Foreign Exchange Management (Non-debt Instruments) Rules, 2019; Companies Act, 2013 including rules thereunder; and SEBI regulations related to listing and disclosures, in addition amendment in taxation laws.

10 takeaways from Companies (Amendment) Act, 2020

Continuing with Government of India's recent spate of reforms meant to bolster economic activity and investment in the country, the Companies Amendment Bill, 2020 was introduced to amend the Companies Act, 2013 (**Act**) with the intent of improving the ease of doing business in India, de-criminalizing various minor offences and regulating producer companies, amongst other aspects. This Bill received the President's assent and was notified in the official gazette as the Companies (Amendment) Act, 2020 (**Amendment**) on September 28, 2020.

Key changes

- **De-criminalization of minor offences:** By way of the Amendment, imprisonment as a consequence of contravention of certain provisions of the Act has been done away with for over 46 offences under the Act, in addition to reducing, modifying and omitting the fines/penalties for these offences. By way of example, imprisonment has been removed as a punishment for contravention of provisions in relation to buyback of securities, disclosure of interest by directors, financial statements and Boards' report, formation of companies with charitable objects, disqualification of directors and constitution of audit, stakeholder relationship and nomination and remuneration committee. Similarly, penalties and fines have been omitted/modified/reduced for contravention of provisions in relation to filing of annual return with Registrar, variation of shareholder rights, transfer of securities, alteration of share capital and reduction of share capital, among others.
- **Definition of listed companies:** Prior to the Amendment, a company with 'any of its securities listed on a recognized stock exchange' was qualified as a listed company and resulted in such companies having to comply with the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**LODR**) in addition to compliances under the Act. The Amendment, however, empowers the Central Government to exempt certain class of companies and securities (which are yet to be prescribed) from being considered as a listed company, in consultation with the SEBI. This exclusion of certain class of securities will ease the burden on companies from rigorous compliance and procedural requirements under the LODR and the Act.
- **Foreign listing:** Pursuant to the addition of a new sub-section to Section 23 of the Act, certain classes of public companies incorporated in India, as may be prescribed by the Central Government, are permitted to issue securities for listing on stock exchanges in permissible foreign jurisdiction, without requiring compulsory listing in India. The Central Government is also empowered to exempt such class pf public companies from complying with certain provisions of the Act, namely, provisions relating to private placement and public offer of securities, beneficial ownership, share capital and debentures or punishment for failure to distribute dividend, by way of issuing a notification, which has to be placed before both Houses of Parliament.
- **Periodic financial results:** Section 129A of the Amendment empowers the Central Government to require a certain class of unlisted public companies (which is yet to be prescribed) to prepare periodic financial results. Such periodic financial results are in addition to preparation of annual financial results prescribed under the Act and would need to be approved by the Board of Directors and audited (or subjected to a limited review) by the statutory auditors, in addition to filing periodic financial results with the Registrar. This requirement appears to have been introduced in alignment with similar provisions prescribed for listed companies under the LODR. Given that certain class of public companies will be permitted to list their securities in foreign jurisdictions, without listing on Indian stock exchanges, it is no surprise that the Amendment imposes an additional requirement on unlisted public companies to prepare periodic financial results thereby allowing the Central Government or the Ministry of Corporate Affairs (**MCA**) to keep a close watch on the functioning of such companies on a periodic basis and not just on an annual basis as per existing provisions of the Act.
- **Reduced timelines for rights issue:** Previously, as per the provisions of the Act, in case of a rights issue by a company, the offer period was required to remain open for a period of at least 15 days with an exemption granted to private companies for reduction in offer period subject to approval of 90% of its shareholders. The Amendment seeks to reduce the existing timeline of 15 days and empowers the Central Government to prescribe a timeframe of less than 15 days for the rights issue offer period. This will allow companies a quicker access to funds, without requiring the approval of majority shareholders.
- **Declaration of Beneficial Ownership:** As per the previous norms under the Act, persons holding beneficial interest in the shares of a company are required to submit declarations to this effect and the company is required to file returns with the Registrar intimating such beneficial ownership. The Amendment empowers the Central Government to exempt, unconditionally or subject to conditions, certain classes of person(s) from the aforesaid requirements if it is considered necessary to grant such exemption in the public interest.

- **Reduced timeframe for rectification of name and powers granted to the Central Government thereunder:** Prior to the Amendment, if the Central Government is of the opinion, on an application made to it by a registered proprietor of a trademark, that the name of a company is identical with or too closely resembles an existing trademark, the company is required to change its name within a period of 6 months from date of directions issued by the Central Government in this regard. The Amendment now reduces this timeframe to 3 months. Additionally, Central Government is now empowered to allot a new name to the company (manner to be prescribed) if the company defaults in complying with directions issued by it and the Registrar is entitled to enter such new name in the Register of Companies in place of the old name and issue a fresh Certificate of Incorporation with the new name, which the company must use thereafter. However, none of the above changes restrict a company from subsequently changing its name, in accordance with the provisions laid down in the Act.
- **Corporate Social Responsibility (CSR):** Pursuant to the Amendment, companies that have spent an amount in excess of the requirements prescribed under the Act (i.e., at least 2% of the average net profits of the company made during the 3 immediately preceding financial years) are now permitted to set off such excess amount in succeeding financial years as may be prescribed by the Central Government. Further, companies that are not required to spend more than INR 50,00,000 towards CSR under the provisions of the Act, are now exempted from constituting a CSR Committee and the Board of Directors may discharge the functions of such Committee.
- **Exemption to NBFCs:** Under the Act, a banking company is exempted from filing the resolutions passed to grant loans or give guarantee or provide security in respect of loans in the ordinary course of its business, with the registrar. The Amendment extends such exemption to a registered non-banking finance company and a housing finance company.
- **Remuneration of Independent Directors:** Prior to the Amendment, in case of inadequate profits, only executive directors/managing director of a company were entitled to receive remuneration subject to limits prescribed in the Act. The Amendment seeks to align the aforesaid provisions to independent directors/non-executive directors to the effect that in case a company has no profits or its profits are inadequate, then non- executive directors, including an independent director, will be entitled to receive remuneration up to the extent permissible under the Act.

Conclusion

The benefits of amendments with respect to overseas listing, scope of listed companies, beneficial ownership and other aspects will be tested once the Central Government notifies and prescribes corresponding rules in this regard. Needless to state, de-criminalization of menial offences revolving around procedural requirements and having no negative impact on the public interest will definitely go a long way on easing the burden on corporates from being criminalized for offences that are a product of inadvertent lapses and minor non-compliances with no intent to defraud the authorities or the public at large. All in all, this is a welcome move towards India's goal to improve the ease of doing business in the country.

Takeover of unlisted companies

- The following provisions have been brought into effect from February 3, 2020 (**Takeover Amendments**):
  - Section 230 (11) and 230 (12) of Companies Act, 2013
  - Rule 3(5) of Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2020
  - National Company Law Tribunal (Amendment) Rules, 2020

Key aspects of the Takeover Amendments

- Any shareholder (along with others) holding at least three-fourths of value of the shares in the company shall initiate a compromise or arrangement for acquiring the shares of the remaining shareholders by making an application to the tribunal.
- Such application must contain a report by a registered valuer disclosing details of the valuation of shares after considering (a) the highest price at which any person or group of persons has paid for acquisition of shares in the previous 12 months and (b) the fair value of the shares determined considering valuation parameters including return on net worth, book value of shares, earning per share, price earning multiple vis-a-vis the industry average, and such other parameters as are customary for valuation of shares of such companies.
- The acquirer must deposit into a bank account at least half of the total consideration for the takeover.
- With regards to the 'Power to Compromise or Make Arrangements with Creditors and Members' as mentioned in Section 230 of Companies Act, 2013 (Act), the Takeover Amendments provide for
  - Change in application fees for the purposes of Section 230 (1) to INR 5,000
  - Fees of INR 5,000 under Section 230 (12) (for application by a person aggrieved by acquisition of shares under Section 230 (11))
  - List of documents to be attached along with the application under Section 230 (12)

Our view

- It may be pertinent to note that the Takeover Amendments nowhere stipulate an obligation on the part of the offeree shareholders to mandatorily sell their shares.
- Furthermore, the amendments also do not stipulate that acquisition of shares under Section 230 (11) shall be exempt from any direction of the tribunal for calling a meeting of a class of members (which class may constitute of the offeree minority shareholders) under Section 230 (1) of the Act.
- In this scenario, while the Takeover Amendments are being hailed as provisions for a compulsory minority squeeze out, companies may still prefer taking recourse to a selective reduction of capital under Section 66, which requires only a special resolution and has been in the past used for minority squeeze out.
- Thus, further clarity and development of the law through amendments and/or judicial decisions may be required for the purpose of fortifying the Takeover Amendments as a compulsory minority squeeze out.

The Competition (Amendment) Bill, 2020

In order to examine whether the Competition Act, 2020 (**Act**) is in consonance with current market trends, the Competition Law Review Committee (**Committee**) was created in 2018. The Committee was established with the aim of suggesting any changes in the current regime taking into account the market trends, best international practices, other governmental policies and regulatory mechanisms that overlap the Competition Act, and any other related competition issues. The Competition (Amendment) Bill, 2020 (**Bill**) was then drafted based on the recommendations of the Committee.

Key proposed changes

- **Establishment of a governing body:** The Committee recognized that the functions performed by the Competition Commission of India (**CCI**) are diverse. Thus, the Bill introduced the establishment of a governing body, that will consist of ex officio members and part-time members. The rationale behind the introduction of the governing body is to reduce the burden on the CCI, as this governing body will be responsible for carrying out all the quasi-legislative functions and policy decisions.
- **Amalgamation of the office of Director General:** The Bill aims to amalgamate the office of Director General (**DG**) constituted under Section 16 of the Act, as an investigative branch of the CCI.
- **Recognition of settlement or consent orders:** The Bill introduces provisions that recognize the settlement or consent orders, in case of antitrust proceedings. The Bill proposes the introduction of certain provisions that permit an investigated party to offer a settlement or voluntarily undertake certain commitments concerning an anticompetitive vertical agreement or abuse of dominance proceeding. The Bill under these provisions envisions the mechanism to be adopted to permit such commitment or settlement mechanism. The purpose of the adoption of such orders was to enable the CCI to resolve antitrust cases faster, which would, in turn, aid the businesses to avoid lengthy investigation procedure and uncertainty.
- **Clear standards of 'material influence':** The definition of 'control' under the Act did not define the minimum standards required to establish such control, therefore the CCI would use the ability to exercise 'decisive influence' and 'material influence'. The Bill proposes to recognize the standards of 'material influence'. This can bring consistency and certainty in the decisions and can also ensure that many transactions are scrutinized while an investment-friendly economy is sustained.
- **Changes to combinations regulations:** The Bill proposes many changes with regard to the regulations of combinations. Some of these are certain specific grounds that would constitute combination as per the Act and the parties involved in such a transaction would be under a duty to inform CCI before the execution of any such agreement. The Bill introduces the power of the central government in consultation with CCI to identify any other ground which would constitute a combination. The Bill further states that this power would also include the power to delist any ground which would otherwise constitute combination. This leads to an increase in the jurisdictional threshold of CCI, which would lead to including several digital transactions that were currently out of the scope of scrutiny of CCI.
- **Statutory recognition of the green channel process:** The Bill also proposes to recognize the green channel process statutorily. The rationale behind the introduction of such a process is to enable fast-paced regulatory approvals for a vast majority of mergers and acquisitions that may have no major concerns regarding appreciable adverse effects on competition. The goal is to move towards a disclosure-based regime with severe consequences for not providing accurate or complete information. The power of the green channel will also extend to authorize resolutions arrived at in an insolvency resolution process under the IBC.

- **Reduction in time limit for preliminary opinions:** The Bill also lessens the time within which the CCI has to issue its preliminary opinion on whether a combination would have an adverse effect on competition, from 30 working days to 20 calendar days. Such timelines may help ease the burden on the parties involved in the transactions.
- **Inclusion of digital markets in the scope of the Act:** The Bill aims at expanding the scope of the Act to include within its scope the digital markets through express inclusion of hub and spoke arrangement and buyer's cartel. The Committee recognized the strategies used by the companies to escape inquiry under the Act and also considered the orders issued by the CCI in Hyundai Motors case and Uber case, and suggested that the element of 'knowledge' or 'intention' should not be considered under such agreements.
- **Broadened scope of Section 3 of the Act:** The Bill seeks to broaden the scope of section 3 of the Act. It currently restricts the scope of the section to horizontal or vertical agreement leading to an adverse effect on competition. The Bill intends to include other agreements as well, taking into account the decision in *Ramakant Kini v. Dr. L.H. Hiranandani Hospital*[1] and to expand the scope of the provision to include agreement entered in the digital market.
- **Penal powers to DG and CCI:** The principal Act did not grant any penal powers to the DG or the CCI, whereas the Bill intends to introduce a wide range of powers to the DG as well as the CCI. The Bill proposes a provision under which any person who fails to produce any documents, information or record; did not appear before the DG or fail to answer any question by the DG and/or fails to sign the note of cross-examination, shall be punishable with imprisonment of term extending up to six months or fine up to one crore rupees.
- **Increased penalty on individuals in cartels:** The Bill also introduces the highest cap of penalty as 10% of the income of the individual in the preceding three years, in case of the formation of cartels.

Regulatory framework for non-personal data proposed

A draft Personal Data Protection Bill, 2019 (**Draft Privacy Bill**) is presently being considered by the Indian Parliament. In September 2019, the Ministry of Electronics and Information Technology (**MeitY**) constituted a committee of experts (**Committee**) to study and provide it suggestions on regulating non-personal data. The Committee released its report on Non-Personal Data (**NPD**) Governance Framework (**Report**) on July 12, 2020 and made substantive recommendations on the scope, classification, ownership and other issues related to non-personal data. It also made a clarion call for a comprehensive non-personal data regulation in India, to complement the future law dedicated to personal data.

Key recommendations of the Report

- **Definition of NPD:** The report defined NPD as any data that is not personal data and classified into three categories, namely public, community, and private. Public NPD includes data collected or generated by government agencies, community NPD includes anonymized data and private NPD includes data related to privately owned assets of a person or entity or derives as a result of private effort.
- **Sensitive NPD:** The Report defined a new concept of 'sensitivity of Non-Personal Data', as even Non-Personal Data could be sensitive such as data relating to national interest, business interests, or confidential information and anonymized data which bears the risk of re-identification.
- **New regulatory mechanism and authority:** The report suggests the establishment of a separate regulatory authority to enforce underlying rules, undertake risk evaluations and ensure NPD is shared for spurring innovation in the country. The Committee has also recommended the formulation of a new law for the regulation and management of NPD.
- **Regulation of data business:** An organization that collects and provides services using NPD becomes a data business. Such entities have to disclose that they are a data business to the non-personal data regulator. The requirement for registration will be triggered by a threshold decided by regulators.
- **Stakeholders:** Data principal (the person to whom the NPD relates), data custodian (the person who collects/stores, processes, and/or uses the NPD), data trustees (rights based group/community of data principals) and data trusts (institutional structures, comprising specific rules and protocols for maintaining and sharing a given set of data) have been identified as stakeholders that are proposed to be regulated.
- **Consent for anonymized data:** The Report recommends that the data principal should also provide consent for anonymization and usage of the anonymized data while providing consent for collection and usage of his/her personal data. The appropriate standards of anonymization will also be defined to prevent/minimize the risks of re-identification.

[1] Case No. 39 of 2012

- **Ownership of data:** The Report developed certain guiding principles for establishing legal rights over data. These include:
  - **Data sovereignty:** Where data sets are considered a national resource, they will be owned by the State
  - **Beneficial ownership/interest:** In case of community NPD, rights over the NPD would vest in a trustee and the community would be the beneficial owner
  - **Origin:** NPD derived from personal data will be owned by individual whose personal data is underlying NPD.
  - **Data storage:** The principles for storage of personal data stated in the Draft Privacy Bill are suggested for NPD as well. Data storage should be in a distributed format so that there is no single point of leakage and sharing is to be undertaken using APIs only, so that all requests can be tracked and logged. Sensitive NPD may be transferred outside of India but shall continue to be stored locally and critical NPD, which is to be defined and notified by the Government, can only be stored and processed in India. General NPD may be stored and processed anywhere in the world.
  - **Data sharing:** Data sharing refers to the provision of controlled access to private sector data, public sector data and community data to individuals and organizations for defined purposes and with appropriate safeguards in place. NPD may be requested by government agencies, citizens, start-ups, companies, NGOs, research institutes and universities for sovereign purposes, core interest public purposes and economic purposes. The report proposes the development of a data sharing mechanism for various purposes and the different categories of NPD.

Data is increasingly taking center-stage across almost all economic sectors around the world. Data protection and information privacy have been gaining mainstream momentum in India with the forthcoming comprehensive regime for the protection of personal data. The ownership and use of NPD – which refers to data that lacks any personally identifiable information or is data that has been anonymized – is the second prong of the Indian Government's approach to 'data sovereignty.'

While the report is helpful in setting context for the forthcoming regulations for non-personal data and in proposing a data governance regime, the Government is likely to evaluate its content, hold wider consultations and consider other policy aspects prior to formulating a comprehensive data framework governing non-personal data in India.

Key enhancements of Consumer Protection Act, 2019 read with Consumer Protection Rules, 2020 and E-commerce Rules, 2020

Department of Consumer Affairs under the Ministry of Consumer Affairs, Food and Public Distribution notified that Consumer Protection Act, 2019 (**Act**) and Consumer Protection Rules, 2020 (**Rules**) and came into effect from July 20, 2020. The Act provides more rights to consumers and assures timely justice. This comprehensive legislation was need of the hour with changing times of economic liberalization and digitalization. With the changing trend of consumption of goods and services, the amendment has expanded ambit of the Act to online platforms introducing stricter rules for sellers.

The government went a step ahead and issued E-Commerce Rules, 2020 to govern online transactions by mandating practices such as display of expiry date and country of origin on their websites helping consumers take pre-informed decisions. It also expanded definition of 'unfair trade practices' to aid new set of consumer expectations.

The key differences between the Consumer Protection Act, 1986 and Consumer Protection Act, 2019 are summarized in the table below.

Criteria	Consumer Protection Act, 1986	Consumer Protection Act, 2019
Definition of 'consumer'	'Consumer' includes a person who buys any goods or hires/avails any services such as telecom, housing construction services etc.	Ambit of definition of 'consumer' has been expanded to cover online and teleshopping transactions for a consideration. Free and personal services continue to be excluded from the definition.
Increase in ambit of jurisdiction for filing a complaint	Consumer can file a complaint in same state as registered address of seller, be it a product or service.	Flexibility to consumer to file complaints in state with registered office address seller or at the place of residence or work of consumer.
Electronic filing of complaints	No provisions for electronic filing of complaints.	Allows consumers to file complaints electronically and appear through video conferencing for hearing or cross examination. The admissibility of complaint will be notified within 21 days, otherwise will be deemed accepted and will be proceeded further.

Grievance Officers for online and offline transaction	No provisions making it mandatory for any entity to have grievance officers.	Mandatory for all online entities to establish adequate redressal mechanism and provide clear and accessible information to consumers to approach grievance officers, who are bound to reply within 48 hours and resolve complaint within 1 month.
Transition of Forum to Commission and enhancement of financial control by Commissions	The District Forums catered to matters up to INR 20 lakh, State Commission between INR 20 lakh to INR 1 crore and National Consumer Disputes Redressal Commission (**NCDRC**) above INR 1 crore.	Revised pecuniary limits for District, State and National Commissions. The newly established District Consumer Protection Redressal Commission will entertain matters up to INR 1 crore, State Commissions will hear matters between INR 1 crore to INR 10 crore and NCDRC will hear matters of above INR 10 crores.
Provision for Alternate Dispute Resolution	No provisions for any alternate dispute resolution (**ADR**) mechanisms.	Introduction of Chapter V which provides for mediation as an ADR mechanism, making process of dispute adjudication simpler and quicker.
Establishment of Central Consumer Protection Authority	No regulatory authority.	Establishment of new regulatory authority – Central Consumer Protection Authority (**CCPA**) – with wide powers of investigation and enforcement. It has been granted powers to take suo-moto actions, recall products, order reimbursement of price of goods/services, cancel licenses and impose penalties for false and misleading advertisements.
Increased ambit of liability for misleading advertisements	Misleading advertisements were considered unfair trade practice and were highly discouraged but only seller was held liable.	Both misleading advertisements and false representations treated as unfair trade practices; CCPA may impose a penalty on manufacturer/endorser/seller to tune of INR 10 lakhs with imprisonment, going up to INR 50 lakhs for subsequent offences.
Definition of Unfair Trade Practices	The list of activities which amounted to 'unfair trade practices' included only offline transactions and included false representation of good or service, misleading advertisements, selling defective goods etc.	Four more activities added to the list of 'unfair trade practices': ▪ Seller refusing to accept a defective good or refund for deficient service within 30 days ▪ Any platform or seller disclosing personal information of a consumer given in confidence, unless required by law or in public interest ▪ Seller making false representation by advertising incorrect characteristics, access and usage conditions of such goods or services ▪ Seller posting false reviews about goods and services or misrepresenting quality or features of any goods and services
General Rules for e-commerce entities	There were no provisions and rules for e-commerce transactions.	The newly notified E-commerce Rules include both marketplace and inventory models. These are applicable to all electronic retailers (**e-tailers**) registered in India or abroad but offering goods and services to Indian consumers.
Product liability	There were no explicit provisions for product liability but in case of a defective good/service only supplier of goods and services was held liable.	Scope of liability extended to product manufacturer, product service provider and product seller, for any claim for compensation. Service provider's liability will include deficiency in service and non-conformance to express warranty. With respect to e-commerce entities, no marketplace/inventory model entity can refuse to return or refund for any goods or services which are different from what was advertised or where delivery was late from stated delivery schedule.

BANKING & FINANCE

- Regulatory changes in the AIF regime in India
- Third Amendment to FEMA NDI Rules
- Fair Practices Code for Asset Reconstruction Companies issued by RBI on July 16, 2020

Regulatory changes in the AIF regime in India

Investments in Alternative Investment Funds (**AIFs**) in India are governed by the securities market regulator, SEBI). In 2012, SEBI had issued the SEBI (AIF) Regulations, 2012 (**Regulations**) to regulate the formation and investments by AIFs. Recently, SEBI has notified 3 key changes to the management framework of AIFs vide its notification dated October 19, 2020[2] (**Notification**) and circular dated October 22, 2020[3] (**Circular**).

The changes primarily deal with enhanced eligibility criteria for investment team of AIF, imposing responsibility on the investment committee and clarification on membership of non-resident Indian citizens in investment committees.

Key takeaways

- **Enhanced qualification criteria for the key investment team:** The Notification has enhanced qualification criteria for key investment team, requiring team to have adequate experience, with following specifications:
  - At least 1 key personnel with minimum 5 years of experience in advising or managing pools of capital/fund etc.
  - At least 1 key personnel with professional qualification in finance, accountancy, business management, commerce, economics, capital market or banking from a University or an institution recognized by the Central Government or any State Government or a foreign university, or a CFA charter from the CFA institute or any other qualification as may be specified by SEBI

  The Notification aims to specify the scope of qualifications required by the investment team in AIF, which was earlier cryptic in its description. This will seek to ensure that the investment team consists professionals having adequate qualification and experience to understand the investment decisions of AIF and protect the interests of investors.
- **Regulating the constitution of investment committee:** The second change introduced by SEBI is by regulating the constitution of investment committee by investment managers. Until now, while it is common for AIFs to constitute an investment committee to vet and approve investment decisions made by the investment manager, the Regulations did not regulate the functioning of such investment committee. The Notification amended Regulation 6 of the Regulations to also provide for the following conditions:
  - That the members of investment committee shall be equally responsible as the investment manager for investment decisions of AIF
  - That the investment manager and members of investment committee shall ensure that AIF investments are in compliance with Regulations, the placement memorandum, agreement with investor, any other fund documents and any other applicable law
  - External members whose names are not disclosed in the placement memorandum or agreement with investor or any other fund documents at the time of on-boarding investors, shall be appointed to the investment committee only with the consent of at least 75% percent of the investors by value of their investment in AIF or scheme

[2] Notification No. SEBI/LAD-NRO/GN/2020/37
[3] Circular No. SEBI/HO/IMD/DF6/CIR/P/2020/209

- **Membership of non-resident Indian citizens in investment committees:** Vide the Circular, a clarification has been issued by SEBI on membership of non-resident Indian citizens in investment committees as external members. The investment committees proposed by investment managers would consist of internal members (employees, directors/ partners of the investment manager) and/or external members., which could include non-resident Indian citizens as external members. As a result, SEBI had sought clarification from the Central Government and the Reserve Bank of India on the applicability of Schedule VIII (4) of the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (**Non-Debt Rules**) to the investments made by AIF whose investment committee consists of non-resident Indian citizens as external members. As per Schedule VIII (4) of the Non-Debt Rules, downstream investment by an AIF shall be considered foreign investment if the sponsor or investment manager is owned and controlled by persons resident outside India. However, a clarification is yet to be received by SEBI from Central Government and RBI. Pending such clarification, SEBI has clarified as follows:
  - Applications by AIFs under which investment committees are proposed to be formed with external members who are resident Indian citizens would be duly processed by SEBI
  - Applications under which investment committees are proposed to be formed with external members who are non-resident Indian citizens, will be processed by SEBI only after a clarification is received from Central Government and RBI

By way of the Notification and Circular, SEBI has brought much needed and awaited guidelines on the requirement of professional qualification for the team of investment manager and the same will seek to add a professional layer to the management of AIFs. The involvement of an investment committee in fund management was already a standard practice for better management of the fund. However, the regulation of such committees is definitely a welcome move and will increase transparency and accountability, particularly in terms of fund management philosophy. Lastly, the clarification sought by SEBI from Central Government and RBI will be a determinant factor on participation of non-resident Indian citizens in the investment committees of AIFs.

Third Amendment to FEMA NDI Rules

The FEMA (Non-Debt Instrument) Rules, 2019 (**NDI Rules**), notified by the Central Government on October 17, 2019, were recently amended further. The Ministry of Finance issued the NDI (Third Amendment) Rules, 2020 (**Third Amendment**) vide its notification dated July 27, 2020. At the outset, third amendment seeks to bring about two major changes in NDI Rules, namely granting powers to the Reserve Bank of India (**RBI**) to administer the NDI Rules and to issue directions or circulars, as it may deem necessary, in this regard and amendment in the entry route and other conditions in relation to air transport services.

Key changes

- **Powers granted to the RBI**
  - **Insertion of rule 2A:** Under the NDI Rules, the powers granted to the RBI was exercisable in consultation with the Central Government. Under the Third Amendment, by way of insertion of rule 2A, the RBI has been granted exclusive powers to administer the NDI Rules and to interpret and issue directions, circulars, instructions or clarifications, as it may deem fit, for effective implementation of the provisions of the NDI Rules.
  - **Amendment to rule 3 and rule 4:** In alignment with the insertion of rule 2A, consequent changes have been made in rules 3 and 4 of the NDI Rules, whereby the RBI may, on an application made to it, permit a person resident outside India to make any investment in India subject to such conditions as may be considered necessary; and an Indian entity or an investment vehicle, or a venture capital fund or a firm or an association of persons or a proprietary concern to receive any investment in India from a person resident outside India or to record such investment subject to such conditions as may be considered necessary, without consultation with Central Government.
- **FDI in air transport services**
  - **Removal of dispensation for OCIs:** Under Schedule I of the NDI Rules, FDI by NRIs and OCIs in scheduled air transport service/domestic scheduled passenger airline and regional air transport service was allowed under the automatic route up to 100%. However, the Third Amendment seeks to remove the dispensation provided to OCIs, in this regard. Currently, under the Third Amendment, S. No. 9.3 of Schedule I provides that only foreign direct investment by NRIs in scheduled air transport service/domestic scheduled passenger airline and regional air transport service, shall be allowed under the automatic route up to 100%. Further, 'Air Operator Certificate' (as opposed to Scheduled Operators' Permit under the NDI Rules) to operate scheduled air transport services (including domestic scheduled passenger airline or regional air transport service) shall be granted to such company or a body corporate which is registered and has its principal place of business within

India; whose chairman and at least 2/3rd of its directors are Indian citizens; and whose substantial ownership and effective control is vested in Indian nationals.

- **Changes in other conditions for investment in air transport services:** FDI in air transport services is subject to other specific conditions prescribed in this regard. The Third Amendment seeks to introduce certain changes in S. No. 9.5 of Schedule I of the NDI Rules, which include the following:
  - **Amendments to 9.5 (c):** Conditions subject to which foreign airlines shall invest in the capital of Indian companies, operating scheduled and non-scheduled air transport services, up to the limit of 49% of their paid-up capital has been amended to include limit of 49% shall include the FDI and FII/FPI investment, the investments made hereunder shall be in compliance with relevant regulations of the Securities and Exchange Board of India (**SEBI**), such as the Issue of Capital and Disclosure Requirements (**ICDR**) Regulations/Substantial Acquisition of Shares and Takeovers (**SAST**) Regulations, as well as other applicable rules and regulations and removal of grant of Scheduled Operators' Permit. However, NRIs, who are Indian Nationals shall not be subject to the limit of aforesaid limit of 49%, in which case foreign investments shall be permitted up to 100% under the automatic route.
  - **Amendments to 9.5 (d):** Prior to the third amendment, foreign investments in M/s Air India Ltd, including that of foreign airlines were not permitted beyond 49% (directly or indirectly). However, under the Third Amendment, the aforesaid restriction of 49% shall not be applicable in case of any foreign investments by NRIs who Indian Nationals are, in which case, foreign investments shall be permitted up to 100% under the automatic route.
  - **Insertion of 9.5 (e):** FDI in Civil Aviation shall be subject to the provisions of the Aircraft Rules, 1937, as amended from time to time.
  - **Other changes:** Any investment by foreign airlines in companies operating in air transport services, including in M/s Air India Ltd, shall be subject to the following:
    - Such investment shall be in the equity of companies operating cargo airlines, helicopter and seaplane services, as per the limits and entry routes prescribed
    - **Conditions specified in 9.5(c):** FDI limits specified in Sr. No. 9.2 (Airports) and 9.3 (Air Transport Services) of the NDI Rules (as amended from time to time, including the Third Amendment) shall be applicable in cases where there is no investment by a foreign airline.

The Third Amendment aims to clearly shift the powers from the Central Government to the RBI to administer the NDI Rules and issue directions and circulars to give effect to the NDI rules. It also restricts the foreign investment by OCIs in air transport services in India up to 49% of their paid-up capital and provide clarity on the relevant SEBI regulations to be complied with, in respect of foreign investment in air transport services and combine foreign investments by FII/FPI and FDI to 49% in scheduled and non-scheduled air transport services in India.

Fair Practices Code for Asset Reconstruction Companies issued by RBI on July 16, 2020

On July 16, 2020, Reserve Bank of India (**RBI**) introduced a Fair Practices Code for the Asset Reconstruction Companies (**ARCs**).

Salient features of the Code

- ARCs have been advised to put in place Fair Practices Code (**FPC**) duly approved by board. FPC issued by RBI prescribes minimum regulatory expectations but the ARCs' boards are free to enhance its scope and coverage.
- ARCs would have to follow a transparent and non-discriminatory practice in acquisition of assets.
- To enhance transparency in process of sale of secured assets, invitation for participation in auction would have to be publicly solicited to enable participation of as many prospective buyers as possible. The terms and conditions of such sale may be decided in wider consultation with investors in security receipts as per SARFAESI Act, 2002. It is interesting to note that this Code also provides that the spirit of Section 29A of IBC may be followed while dealing with prospective buyers.
- ARCs would release all securities on repayment of dues or realization of outstanding amount, subject to any other rights or lien for any other claim which they may have against the borrower. If such right of set off is to be exercised, the borrower has to be given notice about the same.
- ARCs would have to put in place Board approved policy on management fee, expenses and incentives, if any claimed from trusts under their management. The said policy has to be transparent and ensure that management fee is reasonable and proportionate to financial transactions.

- ARCs intending to outsource will have to put in place a comprehensive outsourcing policy approved by their board, incorporating criteria for selection of such activities, service providers, delegation of authority depending on risks and systems to monitor and review the operations of these activities and service providers. ARCs would ensure that the outsourcing arrangements neither diminish its ability to fulfil its obligations to customers and RBI nor impede supervision by RBI. If outsourced agency is owned/controlled by a director of ARC, same may be disclosed.
- In relation to matters of recovery of loan or outstanding amounts, the ARCs would not resort to harassment of the debtor. Further, ARCs would ensure that their agents are properly trained to handle their responsibilities with utmost care and sensitivity, particularly with regards to aspects such as hours of calling, privacy of customer information etc. The ARCs have to ensure that their recovery agents do not adopt uncivilized, unlawful and questionable behavior or recovery process.
  - ARCs would have to constitute grievance redressal machinery within the organization. The name and contact number of the designated grievance redressal officer needs to be mentioned in the communication with borrowers. The designated grievance redressal officer would ensure that the grievances are redressed promptly. ARCs grievance redressal machinery would also deal with issues relating to services provided by outsourced agency and recovery agents, if any.
  - ARCs shall keep the information that they acquire in the course of their business, strictly confidential and shall not disclose it to anyone, including companies forming part of the group except under following circumstances:
    - Required by law
    - Duty towards public to reveal information
    - Borrower's permission
  - Compliance with the Fair Practices Code would be subject to periodic review by the Board.

RESTRUCTURING & INSOLVENCY

- Personal guarantors to corporate debtors to be included within the ambit of IBC
- Insolvency and Bankruptcy (Amendment) Act, 2020
- Suspension of Sections 7, 9 and 10 of the IBC
- Relaxation to NBFCs for taking action under the SARFAESI Act

Personal guarantors to corporate debtors to be included within the ambit of IBC

Untill recently, IBC only dealt with corporate debtors and Part III of the IBC, which dealt with the insolvency resolution and bankruptcy processes of individuals and partnership firms, was not notified. However, with effect from December 1, 2019, personal guarantors to corporate debtors have also been included within the ambit of the IBC vide the Insolvency and Bankruptcy (Application to Adjudicatory Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 and the IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019. The remaining provisions for individuals and partnership firms, for which the Debts Recovery Tribunal will be Adjudicating Authority are yet to be notified.

Key features of the insolvency resolution process of personal guarantors to corporate debtors

- The term 'guarantor' is restricted to a personal guarantor to a corporate debtor and in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or part.
- Under the IBC, where there are pending insolvency or liquidation proceedings against a corporate debtor before any bench of NCLT, the application for insolvency resolution or bankruptcy proceedings against the personal guarantors to the said corporate debtor are also to be filed before the same bench.
- On the date of making of an application, an interim moratorium will be declared till the approval or rejection of the application and during such moratorium, no fresh legal proceedings relating to the debt owed by the personal guarantor can be initiated nor can any such pending legal proceedings be continued.
- A resolution professional will be appointed who has to examine the application filed and submit a report to the Adjudicating Authority recommending approval or rejection. The Adjudicating Authority, after examining the report, will thereafter accept or reject the Application.
- If the Adjudicating Authority admits the application, a moratorium comes into effect. Thereafter, the guarantor in consultation with the resolution professional, has to prepare a repayment plan which provides for a restructuring mechanism for the debts owed by the guarantor.
- The creditors may at the meeting approve, reject or modify the resolution plan and their voting share shall be in proportion to the debt owed to them.
- Subsequent to the meeting, the resolution professional has to submit a report of the meeting and their decision regarding the plan to the Adjudicating Authority, which shall either accept or reject the resolution plan on the basis of the report submitted by the RP.
- In the event the adjudicating Authority rejects the plan, the creditors and/or the debtor may file an application for bankruptcy of the guarantor.

Insolvency and Bankruptcy (Amendment) Act, 2020

On March 13, 2020, the Insolvency and Bankruptcy Code (Amendment) Bill, 2020, which was passed by both the houses of the Parliament, received the President's assent to become a law in the form of the Insolvency and Bankruptcy Code (Amendment) Act, 2020 (**Amendment Act**).

Salient features of the Amendment Act

- By way of the Amendment Act, Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 has been repealed. Amendment Act also provides that it shall be deemed to have come in force on December 28, 2019.
- The proviso to Section 5(12) of the IBC has been deleted thereby making it clear that even in cases where the IRP is not appointed by the NCLT in the order for admission of the application for initiation of insolvency proceedings, the insolvency commencement date would be the date of admission of an application for initiating insolvency proceedings by the NCLT under Sections 7, 9 or 10.
- Section 7 of the IBC has been amended and a minimum threshold for initiating CIRP for a certain category of financial creditors has been put in place. Consequently, the financial creditors who are allottees under a real estate project may initiate CIRP against the corporate debtor by filing a joint application comprising of not less than 100 (one hundred) such allottees under the same real estate project or not less than 10% of the total number of such allottees under the same real estate project, whichever is less. Further, the financial creditors falling in the category of creditors referred to in Section 21(6A) (a) and (b) may file a joint application for initiating CIRP against the corporate debtor comprising of not less than one hundred of such creditors in the same class or not less than 10% of the total number of such creditors in the same class, whichever is less.
- Explanation II has been inserted to Section 11 of the IBC, consequent to which, a corporate debtor is now permitted to initiate CIRP proceedings against other corporate debtors.
- An explanation has been inserted to Section 14 of the IBC, consequent to which, a license, permit, registration, quota, concession, clearances or a similar grant or right etc. given by the Central Government, State Government, local authority, sectoral regulator or any other authority shall not be suspended or terminated on the grounds of insolvency, subject to there being no default in payment of current dues arising for the use or continuation of the license, permit, etc. during the moratorium period.
- Sub-section (2A) has been inserted to Section 14 of the IBC, consequent to which, where the IRP/RP considers the supply of goods / services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated or interrupted during moratorium, except where the corporate debtor has not paid dues arising from supply during moratorium.
- Section 16(1) of IBC has been amended, consequent to which NCLT has to appoint an IRP on insolvency commencement date itself i.e. the date on which the application for initiation of CIRP proceedings is admitted. Earlier, NCLT had to appoint an IRP within 14 days from insolvency commencement date.
- The proviso to Section 23(1) of the IBC has been amended to the effect that it clarifies that the RP shall continue to manage the operations of the corporate debtor after the expiry of the CIRP period, until an order approving the resolution plan or appointing a liquidator is passed by the NCLT.
- Section 32A has been inserted which provides that the corporate debtor will not be liable for an offence committed prior to the commencement of CIRP from the date the resolution plan is approved by the NCLT. However, the approved resolution plan must result in change in the management or control of the corporate debtor as prescribed in Section 32A. The said Section further discharges the corporate debtor from any prosecution that has been instituted against it during the CIRP on the approval of the resolution plan, however, the officer who is default in case of a company and a designated partner in case of an LLP shall continue to be liable for any such offence committed by the corporate debtor. In respect to such a scenario, this Section also safeguards the property of the corporate debtor from actions such as attachment, seizure, retention or confiscation of such property.

The instant Amendment attempts to cater to interests of all stakeholders and fine tune certain aspects of insolvency resolution process, so as to make it more efficient. It provides comfort to corporate debtors by introducing additional thresholds for initiation of insolvency proceedings by certain categories of financial creditors. It clarifies date of appointment of IRP and further clarifies term and tenure of RP. Further, it ensures that corporate debtor functions as a going concern during CIRP by ensuring that licenses, permits, concessions, clearances etc. granted to corporate debtor are terminated or suspended during the moratorium period. The Amendment also ensures the supply of goods/services deemed essential by RP. Moreover, Amendment attempts to provide a clean slate to successful resolution applicant by providing much needed protection from criminal proceedings arising out offences committed by previous management.

Suspension of Sections 7, 9 and 10 of the IBC

On June 05, 2020, President of India promulgated Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 (**Ordinance**), wherein, Section 10A was inserted to the Insolvency and Bankruptcy Code, 2016 (**IBC**). The Section lays down that no Application for initiation of CIRP shall be filed for any default arising on or after March 25, 2020 for a period of six months or for a further period of up to one year, as may be notified.

The proviso to Section 10A provides that no Application for initiation of CIRP can ever be filed for a default occurring during the above-mentioned period. Hence, in effect, such defaults have been excluded from the ambit of 'default' under Section 3(12) of IBC. Consequently, any default arising in or after March 25, 2020 would be exempted from the rigors of the IBC for a period of six months i.e., up to September 25, 2020.

This period, which was due to be expired on September 25, 2020 was further extended by the government for period of 3 months rounding up to December 25, 2020 via notification dated September 24, 2020 in the Gazette of India.

In continuation to the above extension of suspension of operation of Sections 7, 9 and 10 of the IBC to initiate a fresh insolvency proceeding and to provide more relief period to the companies suffering from financial distress, the Central Government, vide the Notification dated December 22, 2020, issued by the Ministry of Corporate Affairs, in exercise of its powers under Section 10A of the IBC, has further extended the period of suspension by another three months, with effect from December 25, 2020 until March 25, 2021.

This extension by the Central Government provides an extended breather to the companies going through financial distress in the wake of Covid-19. This is the third extension and now there is an imperative need to consider if such extensions are futile in nature and are just prolonging the inevitable outcome of initiation of CIRP of certain companies facing economic distress, especially when public money is involved.

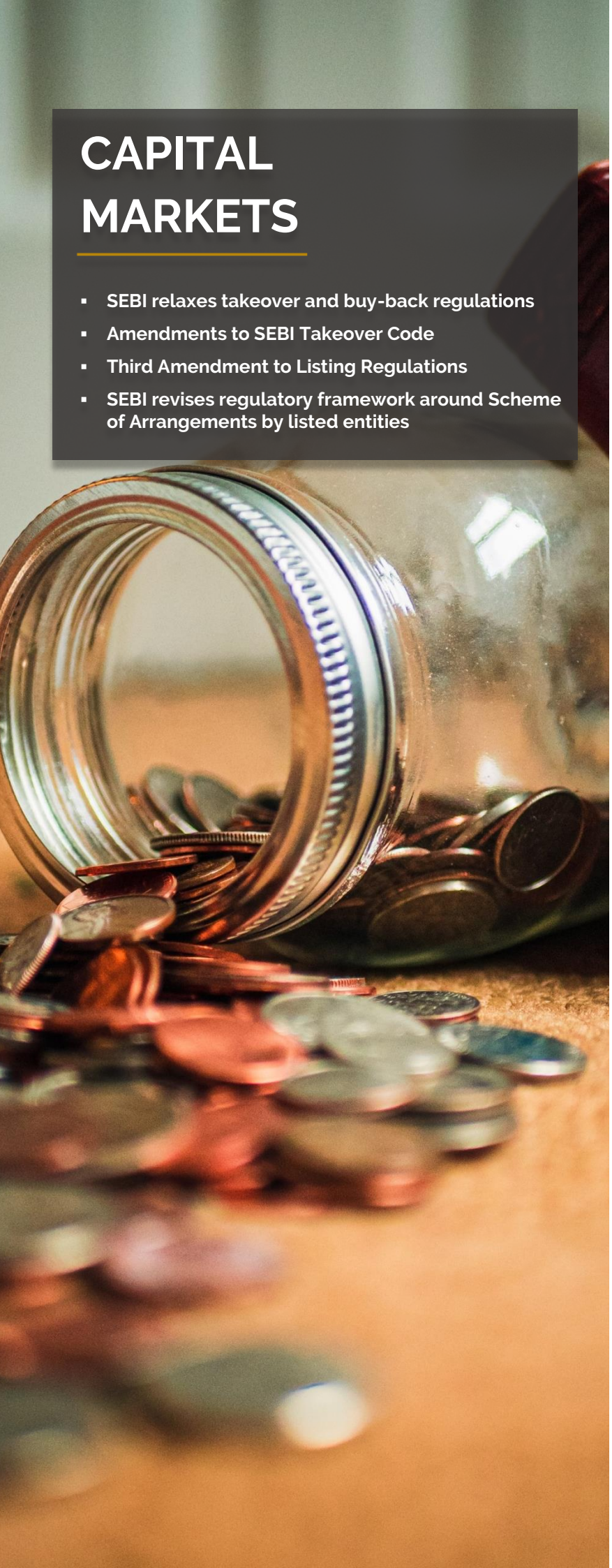
Relaxation to NBFCs for taking action under the SARFAESI Act

To address the liquidity crisis which has engulfed Non-banking Financial Companies (**NBFCs**), the Government had proposed to ease the eligibility criteria for NBFCs for debt recovery under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**SARFAESI Act**). To this end, Ministry of Finance issued Notification vide S.O 856(E) (**Notification**) to notify the proposed change.

Relaxation in eligibility criteria: The Notification relaxes the previous eligibility criteria where NBFC having an asset size of INR 500 crore or above and having loan size was of INR 1 crore or more was eligible to recover its debt under the Sarfaesi Act. Pursuant to the Notification, any NBFC having asset size of INR 100 crore is entitled for enforcement of security interest in secured debts of INR 50 lakh and above as 'financial institutions' as defined under the Sarfaesi Act

Reduced time taken for resolution: High loan ticket limit made it tough for NBFCs to take action against defaulters in a time bound manner as civil suits usually take 3-4 years to be decided. The notification will allow a greater number of NBFCs to take the SARFAESI route, wherein asset recovery procedures take just one year as compared to a civil suit for recovery. Using the Sarfaesi option also predicates a substantial time to recovery, as there is 90 days' time for a debt to turn non-performing; there is a mandatory 60 days' notice before any repossession action; and there is a mandatory 30 days' time before sale

While rights have been conferred to a larger pool of NBFCs to enforce their security interest under the Sarfaesi Act, these NBFCs have not been given any powers to file suits for recovery before the Debts Recovery Tribunals (**DRT**) under the Recovery of Debts and Bankruptcy Act, 1993, which essentially means that even after filing the case under Sarfaesi and receiving a favourable outcome, the significant time to get permission from the revenue department to auction or otherwise sell the collateral will make it difficult for NBFCs to dispose of immovable property. At the same time, the move would likely lead to an increase in litigation before DRT, leading to pendency of proceedings.



CAPITAL MARKETS

SEBI relaxes takeover and buy-back regulations

On May 14, 2020, SEBI issued a circular (**Circular**) granting a one-time relaxation from strict enforcement of procedural requirements under Regulation 18(2) of the Takeover Regulations and Regulation 9(ii) of the Buy-Back Regulations for all open offers and buy-back tender offers opening till July 31, 2020. Pursuant to this Circular, SEBI has permitted the dispatch of letter of offer and tender form through electronic mode provided in Regulation 18(2) and 9(ii), subject to fulfilment of the following conditions by the acquirer/company:

- Publishing the letter of offer and tender form on the websites of the company, registrar, stock exchanges and managers to the offer
- Undertaking adequate steps, along with lead managers, to reach out to the shareholders through other means such as ordinary post, SMS, audio-visual advertisement on television or digital advertisement, etc.
- Publishing an advertisement containing details of the dispatch of letter of offer electronically and its availability on the websites of the company, stock exchanges, registrar and managers to the offer, in the same newspapers where the detailed public statement was published as per Regulation 14(3) of the Takeover Regulations (i.e. one English national daily and Hindi national daily with wide circulation, and any one regional language daily with wide circulation at the place where the registered office of the target company is situated and one regional language daily at the place of the stock exchange where the maximum volume of trading in the shares of the target company are recorded during the 60 days preceding the date of the public announcement).
- Publishing an advertisement containing prescribed material information and details of the dispatch of the letter of offer and tender form electronically and its availability in the websites of the company, stock exchanges, registrar and managers to the offer, in the same newspapers where the detailed public statement was published under Regulation 7(i) of the Buy-Back Regulations (i.e., one English national daily, Hindi national daily and regional national daily, all with wide circulation at the place where registered office of the company is situated)
- In addition to the aforesaid, the acquirer/company may publish the dispatch advertisement in additional newspapers
- Ensuring availability of all advertisements issued hereunder on the websites of the company, registrar, stock exchanges and managers to the offer

In addition to the above, the acquirer/company shall provide appropriate procedures for the inspection of material documents electronically and also attempt to adhere to the existing prescribed framework. It is pertinent to note that these relaxations are only one-time relaxations and are applicable only to open offers and buy-back tender offers opening till July 31, 2020. Through these relaxations, SEBI intends to ease the burden on companies and acquirers from compliance and procedural requirements with the Takeover Regulations and Buy-Back Regulations, which has become increasingly difficult due to the ongoing Covid-19 pandemic and the lockdown imposed by the State and Central governments. This is one of the many welcome measures introduced by SEBI in order to enable companies to function in a seamless fashion, in there trying times.

Amendments to SEBI Takeover Code

SEBI on June 16, June 22 and July 1, 2020 amended SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (**Takeover Regulations**). In recent past, in response to Covid-19 crisis, SEBI has made several relaxations in regulations to assist an infusion of funds into companies. SEBI has been very forthcoming in addressing the needs of all stakeholders in these troubled times, and Corporate India hopes to see more relief on this front.

Key amendments to the Takeover Regulations

- **The following provision has been added after Regulation 3 Takeover Regulations:**

  "Provided that the acquisition beyond five per cent but up to ten per cent of the voting rights in the target company shall be permitted for the financial year 2020-21 only in respect of acquisition by a promoter pursuant to preferential issue of equity shares by the target company.

- **The requirement to comply with the following provision to Regulation 6 of Takeover Regulations has been relaxed until March 31, 2020:**

  "Provided that where an acquirer or any person acting in concert with him has acquired shares of the target company in the preceding fifty-two weeks without attracting the obligation to make a public announcement of an open offer, he shall not be eligible to voluntarily make a public announcement of an open offer for acquiring shares under this regulation."

- **In Regulation 10 of the Takeover Regulations, which deals with categories of share acquisitions exempted from making a public offer, the following sub regulation 2B has been inserted:**

  "(2B) Any acquisition of shares or voting rights or control of the target company by way of preferential issue in compliance with regulation 164A of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 shall be exempt from the obligation to make an open offer under sub-regulation (1) of regulation 3 and regulation 4."

- **In Regulation 17 sub-regulation (1) of the Takeover Regulations, which deals with opening and maintaining an escrow account, the following new proviso has been inserted after the existing proviso:**

  "Provided further that in case of indirect acquisitions where public announcement has been made in terms of clause (e) of sub-regulation (2) of regulation 13 of these regulations, an amount equivalent to hundred per cent of the consideration payable in the open offer shall be deposited in the escrow account."

- **In Regulation 17 sub-regulation (3) of the Takeover Regulations, which deals various modes of keeping an escrow, the following new proviso has been inserted after the existing proviso:**

  "Provided further that the deposit of securities shall not be permitted in respect of indirect acquisitions where public announcement has been made in terms of clause (e) of sub-regulation (2) of regulation 13 of these regulations."

- **In Regulation 18 of the Takeover Regulations, which deals with procedures for filing a letter of offer, after sub-regulation (11), the following new sub regulation has been inserted:**

  "(11A) Without prejudice to sub-regulation 11, in case the acquirer is unable to make payment to the shareholders who have accepted the open offer within such period, the acquirer shall pay interest for the period of delay to all such shareholders whose shares have been accepted in the open offer, at the rate of ten per cent per annum.

  Provided that in case the delay was not attributable to any act of omission or commission of the acquirer, or due to the reasons or circumstances beyond the control of acquirer, the Board may grant waiver from the payment of interest.

  Provided further that the payment of interest would be without prejudice to the Board taking any action under regulation 32 of these regulations or under the Act."

- **In Regulation 22, sub- regulation (2A) "block deals" has been deleted from exemptions to completion of transaction prior to expiry of open offer period.**

The amendments relate to enhancement of creeping acquisition from 5% per financial year to 10% for financial year 2020-21, provided such acquisition of shares is only made by promoters by a preferential issue. Further, voluntary offers by shareholders already holding more than 25% shares and who have acquired shares in the target in the preceding 52 weeks without triggering the obligation to make a takeover offer (for example, acquisitions under the creeping acquisition mechanism) would now be allowed to make an open offer until March 31, 2021. These amendments are primarily aimed to liquidity relief to listed companies for addressing Clovid-19 woes.

Third Amendment to Listing Regulations

SEBI has, on October 08, 2020, issued the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2020 (**Amendment**) amending provisions of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**Listing Regulations**) in relation to disclosure requirements for listed entities and obligations with respect to listed debt securities.

Key proposed changes

- **Asset cover:** Prior to the Amendment, entities that had listed their non-convertible debt securities (**NCDs**) were required to maintain an asset cover of 100% at all times. Further, the Listing Regulations also exempted regulated financial sector entities that issued unsecured debt securities for meeting capital requirements as specified by their respective regulators, from maintaining the aforesaid asset cover. However, the Amendment has done away with such exemption granted to regulated financial entities and now requires all entities (including regulated financial sector entities) with listed NCDs to maintain an asset cover of 100% or asset cover as per the terms of the offer document/Information Memorandum and/or Debenture Trust Deed, sufficient to discharge the principal amount at all times for such listed NCDs.
- **Intimation to debenture trustees:** Pursuant to the Listing Regulations, listed entities (which have their NCDs listed) are obligated to intimate debenture trustees regarding any revision in the rating, default in interest payments/redemption of NCDs or any failure to create charge on the assets. The Amendment introduces an additional obligation on listed entities to intimate their debenture trustees with respect to all covenants of the issue, including side letters, accelerated payment clauses, etc.
- **Half-yearly certificate:** Under the Listing Regulations, listed entities were required to mandatorily submit a half-yearly certificate regarding maintenance of 100% asset cover in respect of listed NCDs. In line with the permission granted by SEBI to maintain asset cover as per the terms of the offer document/Information Memorandum and/or Debenture Trust Deed, the half-yearly certificate shall now accordingly reflect compliance with the asset cover. Further, listed entities were earlier allowed to obtain this half yearly certificate from either a practicing company secretary or a practicing-chartered accountant, which is now required to be obtained from the statutory auditor of the listed entity. Additionally, the Listing Regulations exempted banks and non-banking financial companies registered with the RBI and bonds that are secured by a Government guarantee from submitting the half-yearly certificate to their debenture trustees. The Amendment now removes the exemption granted to banks and non-banking financial companies registered with the RBI, who will now be required to submit half-yearly certificates to their debenture trustees.
- **Disclosure of forensic audit:** Prior to the Amendment, there was no requirement for listed entities for disclosing details of the forensic audit to the stock exchanges/investors, except if considered material by the listed entity under Part B of Schedule III of the Listing Regulations. Addressing the gaps in the availability of information with respect to forensic audits of listed entities, the Amendment now requires all listed entities to disclose to the stock exchanges, without application of materiality, the fact of initiation of forensic audit along-with name of the entity initiating the audit and reasons for the same, if available, and a copy of the final forensic audit report received by the listed entity (other than those initiated by regulatory or enforcement agencies) with comments from the management, if any.

The Amendment focuses on bestowing debenture trustees with additional responsibilities and strengthening their role to protect the interest of debenture holders. Further, the requirement to disclose forensic audit of listed entities, without applicability of materiality, intends to bring about transparency for investors especially the public at large holding interests in listed entities to have adequate information about lapses in the entities, if any, which was otherwise not being disclosed or available in the public domain.

SEBI revises regulatory framework around Scheme of Arrangements by listed entities

The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**LODR**) place obligations on listed entities and stock exchanges with respect to Scheme of Arrangements. On March 10, 2017, SEBI issued a circular revising the regulatory framework around Scheme of Arrangements and laid down requirements for listed entities seeing relaxations under rule 19(7) of the Securities Contracts (Regulation) Rules, 1957 (**Rules**) (**2017 Circular**).

Recently, on November 3, 2020, SEBI notified certain amendments to the 2017 Circular, thereby streamlining the processing of draft schemes filed with the stock exchanges by listed entities (**Amendment**). The Amendment will be applicable for all Schemes of Arrangements filed with the stock exchanges after November 17, 2020.

Changes brought about by the Amendment

- **Audit Committee report:** Prior to the Amendment, listed entities were required to submit a report from their audit committee recommending the draft scheme, taking into consideration the valuation report, which was also required to be placed before the audit committee. The Amendment imposes an additional obligation on the audit committee, requiring it to ensure that its report shall include comments on the following aspects of the scheme:
  - Need for the merger/demerger/amalgamation/arrangement
  - Rationale of the scheme
  - Synergies of business of the entities involved in the scheme
  - Impact of the scheme on the shareholders.
  - Cost benefit analysis of the scheme.
- **Report by independent directors:** Pursuant to a new insertion by the Amendment, independent directors of listed entities have been imposed with an obligation to ensure that the scheme is not detrimental to the shareholders of the listed entity and are required to issue a report, recommending the draft scheme, to this effect. Such report is required to be submitted by listed entities to the stock exchanges.
- **Valuation report:** Under the 2017 Circular, all listed entities were required to submit a valuation report from an Independent Chartered Accountant. Pursuant to the Amendment, listed entities are now required to submit a valuation report from a Registered Valuer, who shall be a person registered as a valuer, having such qualifications and experience and being a member of an organization recognized, as specified in Section 247 of the Companies Act, 2013 read with the applicable rules issued thereunder.
- **Approval of shareholders to scheme through e-voting:** Under the 2017 Circular, the scheme involved the transfer of whole or substantially the whole of the undertaking of the listed entity and the consideration for such transfer is not in the form of listed equity shares. To determine what constitutes 'substantially the whole of the undertaking', the 2017 Circular referred to the explanation provided under Section 180 (1)(a)(i) of the Companies Act, 2013. The Amendment now refers to section 180(1)(a)(ii) of the Companies Act, 2013 for the purpose of determining 'substantially the whole of the undertaking'.
- **Stock exchange(s) to issue no-objection letters only:** Prior to the Amendment, stock exchanges having nationwide terminals or regional stock exchanges, as the case may be, had to provide either the 'observation letter' or 'no-objection Letter' to SEBI on the draft scheme submitted by listed entities, upon receipt of which SEBI issued a 'comment letter'. The Amendment now requires stock exchanges having nationwide terminals or regional stock exchanges, as the case may be, to issue only a 'no-objection letter' to SEBI, in co-ordination with each other, after which SEBI will issue its 'comment letter'. The Amendment removes the concept of 'observation letter' and accordingly stock exchanges re now required to issue 'no-objection certificates' only, in relation to the draft schemes.
- **Requirements to be fulfilled by listed entity for listing of equity shares:** Listed entities seeking relaxation from the Rules were required to fulfil certain conditions prescribed in the 2017 Circular. One such condition was that trading of securities shall commence within 45 days from the order of NCLT/High Court and prior to commencement of trading, the transferee entity was required to publish an advertisement in in one English and one Hindi newspaper providing certain specific details.

  The Amendment has modified certain aspects of the aforesaid condition and now allows 60 days for the listed entity to commence trading simultaneously on all stock exchanges (where its equity shares is/was listed). The Amendment also prescribes the following additional details to be disclosed by the transferee entity, in the form of an information document, on the website of the stock exchange and in the advertisement to be published in one English and one Hindi newspaper:
  - Name and details of Board of Directors (experience including current/past position held in other firms)
  - Business model/business overview and strategy
  - Details in respect of 'restated' audited financials, as opposed to 'audited financials' as was prescribed in the 2017 Circular
  - Summary table of contingent liabilities as disclosed in the restated financial statements
  - Summary table of related party transactions in last 3 years as disclosed in the restated financial statements
  - Internal risk factors (minimum 5 and maximum 10)
  - Regulatory actions, if any, including disciplinary action taken by SEBI or stock exchanges against the promoters in last 5 financial years
  - Brief details of outstanding criminal proceedings against the promoters

The Amendment aims at empowering stock exchanges and ensuring that the recognized stock exchanges make an informed decision with respect to the draft schemes submitted by listed companies in a manner that they are fully compliant with the SEBI Act, rules, regulations and circulars framed thereunder and only then refer such draft schemes to SEBI. The Amendment ensures that, not only the audit committee, but also the independent directors of the listed entities recommend the draft scheme having regard to the interests of the stakeholders, from an unbiased perspective.

PROJECTS, ENERGY & INFRASTRUCTURE

MoEFCC notifies the EPA Rules

The Ministry of Environment, Forest and Climate Change (**MoEFCC**) notified Environment (Protection) Amendment Rules, 2020 (**EPA Rules**) seeking to specifically amend Rule 3 of Environment (Protection) Rules, 1986 (**EP Rules**) that deals with standards for emissions or discharge of environmental pollutants. This has been done in view of the recommendation of NITI Aayog that it may be prudent to determine and enforce the environmental and pollution norms, to be complied with by thermal power generators, rather than restricting the ash content in coal, based on distance of transportation.

Rule 3 Sub-rule 8 of the EP Rules now governs the use of coal by thermal power plants, without stipulations as regards to ash content or distance, and entails numerous conditions that would need to be satisfied prior to such use. These conditions range from setting up of a technological solution for emission norms, transportation to management of ash ponds.

It is significant to note that compliance with the above-mentioned Rule 3 Sub-rule 8 of the EP Rules will be deemed to be additional conditions of the relevant environmental clearances for respective projects for financial year 2020-21 and onwards.

The existing environmental clearances will stand modified so as to make the above conditions operative for relevant sectors. The Consent to Operate would be issued by respective State Pollution Control Boards accordingly.

FDI permitted in commercial coal mining in India

The FDI Policy, 2017 was recently amended vide the Press Note 4 of 2019, issued by the Government of India (**GoI**), to permit 100% FDI under automatic route in coal mining activities including associated processing infrastructure, for sale of coal, subject to the provisions of Coal Mines (Special Provisions) Act, 2015 and the Mines and Minerals (Development and Regulation) Act, 1957 as amended from time to time and other relevant acts on the subject.

This move has been initiated in reference to the ongoing auction process of coal mines for commercial coal mining in India, which was launched by the Nominated Authority, Ministry of Coal, GoI in June 2020.

The amendment further clarifies that any FDI in the commercial coal mining is subject to applicable laws including the Press Note 3 of 2020 issued by the GoI according to which 'an entity of a country, which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can invest only under the government route. Further, a citizen of Pakistan or an entity incorporated in Pakistan can invest, only under the government route, in sectors/activities other than defence, space, atomic energy and sectors/activities prohibited for foreign investment.'

The Draft Electricity (Amendment) Bill, 2020

On April 17, 2020, the Ministry of Power, Government of India (**MoP**) issued the draft Electricity (Amendment) Bill, 2020 (**Amendment Bill**) proposing to amend the Electricity Act, 2003 (**EA03**). The statement of reasons accompanying the draft Amendment Bill provides the intended purpose of these amendments, which inter alia includes:

- Promotion of privatization of distribution companies
- Promotion of renewable and hydro generation and purchase
- Cost-reflective electricity tariff without subsidy
- Strengthening of payment security mechanism
- Establishing an Electricity Contract Enforcement Authority
- Strengthening enforcement capabilities of the Appellate Tribunal for Electricity

It is apparent that with the proposed amendments, various decision and policy making powers are being vested with the Central Government by allowing it to prescribe norms or parameters through policies, thereby curtailing to an extent the discretions exercised earlier by the ERCs or State Governments. The structural reforms proposed vide the Draft Amendment Bill bridge the disconnect between central and state level policy narratives and at the same time distance the state government's influence on the regulatory regime. Broad overview of the Amendment Bill and our views on the same are set out below.

Policy amendments

- **Renewable Energy:** The Amendment creates a policy environment for the Central Government to issue a specific energy policy for promotion of generation of electricity from renewable sources of energy and prescribe a minimum percentage of purchase of electricity from renewable and hydro sources of energy. The Government is now equipped to issue directives for incentivizing renewable and hydro generation.
- **Cross-border Trade:** In addition to the focus on renewable energy, a substantial makeover in the market of electricity sector revolves around cross-border trade of electricity. The Central Government has been delegated with the power to prescribe rules and guidelines to allow and facilitate cross-border trade of electricity. The Amendment Bill has also amended the existing powers and functions of the Central Electricity Regulatory Commission (**CERC**) to allow it to regulate the cross-border trade of electricity which includes sale, purchase and transmission of electricity.
- **Electricity Contract Enforcement Authority:** The Central Government shall establish an Electricity Contract Enforcement Authority (**ECEA**) which will be vested with the powers similar to that of a civil court and will be headed by a Judge of a High Court. The scope of the adjudicatory jurisdiction of the ERCs has been reduced and the power to adjudicate disputes and enforce performance of contracts related to purchase or sale or transmission of power is now vested ECEA.

Functional amendments

- **Payment security mechanism:** With a view to introduce an adequate payment security mechanism to avoid the frequent payment defaults that render certain generating assets as NPAs, the amendments propose to statutorily mandate the Regional Load Despatch Centres (**RLDCs**) and State Load Despatch Centres (**SLDCs**) to treat the payment security, as may be agreed upon between the parties under the contract, a condition precedent to scheduling and despatching of electricity by them.
- **Constitution of selection committee to recommend members for commissions/authorities:** There is a slew of provisions for the constitution of a Selection Committee for making recommendations of members to the Appellate Tribunal and the Chairperson and Members of Central Commission, Electricity Contract Enforcement Authority, State Commissions and Joint Commissions. Streamlining of selection process for all commissions and authorities is a step in the right direction and will bring in uniformity and higher accountability.
- **Enhancement of penalty under Section 142 and Section 146:** In order to ensure compliance with the provisions of the Electricity Act and orders of the Commission, section 142 and section 146 of the Electricity Act are proposed to be amended to provide for higher penalties.
- **Deemed tariff adoption:** The Amendment Bill in order to circumvent the ambiguity that delay of adoption of tariff brings and to streamline the process across the ERCs, prescribes a sixty-day time period for adoption of tariff by the appropriate commission from the date of receipt of the application complete in all respects. Failing to adopt tariff in the prescribed timeline of 60 days, the tariff would be deemed to be adopted.

- **Cost reflective tariff:** It is proposed that the tariff determined by the SERCs shall be cost reflective and should not account for any subsidy granted by the State Government. Therefore, the licensee shall charge the consumers proportionate to the consumption of electricity as per the tariff determined by State Commission, and any subsidy as may be granted by the State Government shall be paid directly to appropriate consumers by the State Government in advance. This is a much awaited and welcome step in treating electricity a commodity and will help in reducing political interference in tariff determination process.
- **Distribution sub-licensee and franchisee:** To ease the burden of distribution licensees and in order to promote some form of demographic specialization, the distribution licensees, can appoint another entity for distribution of electricity on its behalf, within its area of supply. This entity can be either a distribution sub-license appointed with prior permission of the State Commission or it may be a franchisee appointed by merely informing the State Commission. This move could possibly give more leeway to power generators and licensed distributors sub-contract the obligations and allot risk to specific parties, where they belong. However, there is no addition of further clauses which specifically govern either of these newly introduced entities, wherein the extent of statutory obligation of each of the entities is co-extensive with one another.
- **Codification of responsibility of the National Load Despatch Centre:** The draft amendment proposes modification under in the functions and responsibilities of National Load Dispatch Centre (**NLDC**), for the purpose of creating clear hierarchy amongst the Load Despatch Centres (**LDCs**) and to remove any jurisdictional contradiction in relation to directions issued by NLDC to the LDCs and other State Utilities. The amendments vest NLDC with the responsibility to ensure the optimum scheduling and dispatch of power between regions and act as a supervisory body of inter-regional and inter-state transmission of electricity, for ensuring the stability, safety and security of the national grid.
- **Enhancement of the powers of the Appellate Tribunal of Electricity:** APTEL is proposed to have the powers of a High Court to deal with wilful non-compliance by persons and/or entities of its orders/directions and to treat the same as contempt. Notably, such proceedings can be initiated on its own motion or on a motion made by the Advocate General or such Law Officer as the Central Government may specify. The number of members at the APTEL is proposed to be increased to a minimum of eight members. Hopefully, this will ensure creation of new benches and expeditious disposal of pending matters.
- **Applicable to the whole of India:** The act is proposed to be made applicable throughout the country including the State of Jammu and Kashmir and the Union Territory of Ladakh. Having a uniform applicability of Electricity Act, 2003 will help in creating a unified market as well as capturing the hydro potential in the State of Jammu and Kashmir and the Union Territory of Ladakh.

Jaiprakash Power Ventures Ltd v. Uttar Pradesh Power Corporation Ltd

Significant order upholding the principle of 'Regulations overriding the PPA' and clarifies pertinent aspects regarding payment of secondary energy charges for hydro power plants.

Uttar Pradesh Electricity Regulatory Commission unequivocally confirmed the intent of UPERC Tariff Regulations, 2014 and stated that the Regulations would override any inconsistent provisions contained in Power Purchase Agreements approved by UPERC in the past, especially in the context of secondary energy charges. Additionally, generators in the state of Uttar Pradesh would be entitled to reimbursement of taxes on income strictly in accordance with the UPERC Tariff Regulations and subject to actual payment of the same as certified by statutory auditors.

Renascent Power Ventures Pvt Ltd v. UPERC

Supreme Court (SC) vide its order dismissed the challenge to APTEL Judgment involving issues of regulatory overreach and the statutory role of a regulatory commission while dealing with debt resolution efforts of lenders

SC by virtue of its order refused to grant leave for filing Appeal to certain individuals claiming to be aggrieved consumers of the State of Uttar Pradesh against the Judgment dated September 27, 2019 passed by the APTEL. The refusal of SC to grant permission for filing Appeal would deter any further challenge to the findings of APTEL which, through a detailed, cogent and weighty Judgment, has put to rest the controversy in favor of Renascent. APTEL has laid down the law in relation to the statutory role of a Regulatory Commission while discharging its regulatory functions under Section 86(1)(b) and Section 63 of the Electricity Act. APTEL has also observed that the waiver of loan amount by SBI/lenders cannot be taken as a windfall gain by Renascent, especially in terms of specific facts including that of sustainable vs unsustainable debt, the regulatory process of transparent and competitive bid process being in compliance of Section 63 of the Electricity Act is sacrosanct among such other. This judgment will be helpful to similar efforts being undertaken by banks, which is likely to give a much-needed boost to much needed debt resolution efforts in India's infrastructure and power generation sector.

Eastern Power Distribution Company of Andhra Pradesh Ltd & Anr v. GMR Vemagiri Power Generation Ltd & Ors

SC dismissed appeals filed by Andhra Pradesh DISCOMs questioning CERC's jurisdiction in case of inter-state generation and supply of electricity between Andhra Pradesh and Telangana

SC recognized that the controversy involved both State of Andhra Pradesh as well as State of Telangana and ultimate effect is going to be on more than one state, therefore considering the provisions contained in Andhra Pradesh (Reorganization) Act, 2014, Central Electricity Regulatory Commission is the appropriate authority to hear and decide the dispute. This decision impacted various power generators involved in disputes with AP DISCOMs amounting to several thousand crores. These disputes were not being decided by the regulatory commissions because the issue of jurisdiction was pending disposal before the Supreme Court.

Gujarat Urja Vikas Nigam Ltd v. Yes Bank Ltd & Anr

Termination of Power Purchase Agreements amid subsistence of Moratorium

National Company Law Appellate Tribunal (**NCLAT**) upheld the order passed by National Company Law Tribunal (**NCLT**), Hyderabad Bench setting aside the termination of PPA by the GUVNL and observed that the solar power plant and the PPA related to the plant form one integrated economic asset. Enumerating the primary objective of IBC i.e. maximizing the value of assets while maintaining the entity as a going concern, it stated that the PPA entered into between the power producer and power purchaser provides a long-term and steady stream of revenue accrual from the project. This forms the economics behind such projects and this economic value of the project of the Corporate Debtor, the IBC seeks to maximize during the resolution process. It observed that the PPA cannot be terminated if the Corporate Debtor goes into liquidation and subsistence of PPA is imperative to ensure that the Corporate Debtor remains a going concern.

DISPUTE RESOLUTION & ARBITRATION

Internet and Mobile Association of India v. RBI

2020 SCC Online SC 275

RBI ban on financial services to Cryptocurrency dealers set aside on grounds of proportionality.

Supreme Court (**SC**) set aside the ban which RBI had put on financial institutions providing banking services to cryptocurrency businesses on the grounds that RBI's measure violated Article 19 (1) (g) for virtual currency exchanges. As part of the proceedings, 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 Court also recognized that RBI has the power to regulate the monetary and credit system, which also extends to the regulation of virtual or cryptocurrencies.

Asian Resurfacing of Road Agency Pvt Ltd v. CBI

(2018) 16 SCC 299

Stay by 'any court' in criminal/civil proceedings automatically expires within a period of 6 months unless extended for 'good reasons'.

The Court clarified that whatever stay has been granted by any court, including the High Court, automatically expires within a period of six months, and unless extension is granted for good reason, within the next six months, the trial court is, on the expiry of the first period of six months, to set a date for the trial and go ahead with the same.

Mankastu Impex Pvt Ltd v. Airvisual Ltd

2020 SCC OnLine SC 30

Significance of seat of arbitration is that it determines the applicable law when deciding the arbitration proceedings and arbitration procedure as well as judicial review over the arbitration award.

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 stated 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.

Avitel Post Studioz Ltd & Ors v. HSBC PI Holdings (Mauritius) Ltd

MANU/DE/1367/2020

Arbitrability of a dispute involving allegations of fraud.

The Court held that serious allegations of fraud arise only in two situations:

- If it can be clearly concluded that the arbitration clause or agreement itself does not exist
- Cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or malafide conduct, thus necessitating the hearing of the case by a writ court.

This means that all other cases involving 'serious allegations of fraud' i.e. the cases which do not meet the above two tests laid down by the Supreme Court, would be arbitrable.

Sanjiv Prakash v. Seema Kukreja & Ors

ARB.P. 4/2020

Whether a party can invoke arbitration clause of a superseded contract?

The Court observed that an arbitration agreement is a creation of an agreement and may be destroyed by a subsequent agreement owing to novation. It was held that the arbitration clause perished owing to the novation of the Contract and thus, invocation of the same is not justified. The Court vide this judgment upheld that a contract is an outcome of agreement between the parties and is equally open to the parties thereto to agree to bring it to an end. The Court has further upheld party autonomy by keeping it open to the parties to terminate the previous contract and substitute in its place a new contract or alter the original contract is such a way that it cannot subsist.

Pandurang Ganpati v. Vishwasrao Patil Murgud Sahakari Bank Ltd

2020 SCC OnLine SC 431

SARFAESI Act will apply to co-operative Banks as it does to commercial banks

The Constitution Bench held that the Securitization and Reconstruction of Financial Assets and Enforcement of Security (**SARFAESI**) Act, 2002 is applicable to cooperative banks which are 'banks' under the Act.

Skill Lotto Solutions v. Union of India

2020 SCC OnLine SC 990

Supreme Court upholds constitutionality of levy of GST on lottery, betting

The Court upheld the imposition of Goods and Service Tax (**GST**) on sale of lotteries, holding that the Central Goods and Services Tax Act, 2017 and the notifications issued under the same bringing lottery and gambling under GST net are valid.

The Court opined that the definition of 'goods' under Article 366(12) of the Constitution is inclusive and there is no intention to give any restrictive meaning to 'goods'.

Asian Resurfacing of Road Agency Pvt Ltd v. CBI

Miscellaneous application no. 1577 OF 2020

Stay by 'any court' in criminal/civil proceedings automatically expires within a period of 6 months unless extended for 'good reasons'

The Court clarified that whatever stay has been granted by any court, including the High Court, automatically expires within a period of six months, and unless extension is granted for good reason, within the next six months, the trial court is, on the expiry of the first period of six months, to set a date for the trial and go ahead with the same.

LABOR & EMPLOYMENT

- **Key takeaways from the new labor codes**
  - Social Security Code, 2020
  - Code on Wages, 2019
  - Industrial Relations Code, 2020
  - Occupational Safety, Health and Working Conditions Code, 2020

Key takeaways from the new labor codes

Labor reforms in India have been a long-pending demand of foreign investors, a majority of which consider the country's labor and employment laws responsible for limiting investment interest by forcing private employers to be sub-scale and simultaneously creating a plethora of compliances and regulatory barriers. In this context, the consolidation of major central labor laws relating to wages, social security, industrial relations, and occupational safety and health, is indeed a welcome step that underscores the Government's attempt to boost ease of doing business and update domestic laws in order to bring them in line with modern best practices.

In order to simplify and consolidate the labor laws of India, the Government has introduced 4 labor codes (Codes) which subsume 29 labor laws. A similar consolidation of central labor laws in 4 broad categories was earlier recommended by the Second National Commission on Labor in 2002, which led to the Ministry of Labor and Employment introducing 4 codes in 2019 which regulate Wages (**Wages**), Industrial Relations (**IR**), Social Security (**SS**) and Occupational Safety, Health and Working Conditions (**OSH**). While the Code on Wages, 2019 was passed by the Parliament, in 2019, the three other Bills were referred to a Standing Committee on Labor. These three Bills were replaced by the government with updated versions on September 19, 2020 based on the committee's recommendations and were passed by the Union Legislature on September 23, 2020.

It is expected that these Codes will be brought into force from the next financial year, and a thorough understanding of the extant provisions is recommended for employers and employees alike.

Common aspects across the four codes

- **Definition of 'appropriate government':** All 4 Codes specify that Central Government will act as appropriate government for any central Public Sector Undertaking (**PSU**), even if holding of Central Government in PSU becomes less than 50%. Establishments of railways, mines, oil fields, major ports, air transport services, telecommunication, banking, insurance companies, and any other 'controlled industries' as may be specified by Central Government, will be regulated by Central Government as appropriate government. All other establishments, including private establishments belonging to none of the above industries, will have the State Government as their appropriate government.
- **Delegated legislation:** The Codes delegate various essential aspects of lawmaking to the appropriate government through rulemaking, such as specifying safety standards under the OSH Code, or setting thresholds for the applicability of social security schemes under the Code on SS. Although the executive has been given wide-ranging rule making powers conventionally in labor law, the government may consider creating a balance so that it does not lead to excessive delegation.
- **Dispute Resolution:** IR and SS Codes provide that offences punishable with imprisonment up to one year or with fine are compoundable. Hence, in case of offences with fine, compounding is allowed for a sum of 50% of the maximum fine provided for the offence. IR and OSH Codes, and partly SS Code bar Civil Courts from hearing any matters arising out of respective Codes.

- **Power to exempt establishments:** The Code on IR provides the appropriate government with the power to exempt any new industrial establishment or class of establishments from any or all of its provisions in 'public interest'. The OSH Code also provides the appropriate government with the power to exempt any establishment for a time period by notification. The OSH Code also empowers the State Government to exempt any new factory (or class of factories) from the Code in the interest of creating more economic activity and employment.
- **Inspectors-cum-Facilitators:** 'Inspectors-cum-Facilitators', a new authority established under the OSH, IR and SS Codes, have witnessed a transformation in terms of powers and responsibilities, as compared to their current equivalents, i.e. Labor Inspectors. The Inspectors-cum-Facilitators will be carrying out inspections as well as providing information to employers and employees pertaining to compliance. Inspections will be done based on a scheme decided by the appropriate government.

Social Security Code, 2020

- **Employee Provident Fund (EPF):** Provident fund and pension scheme will apply to all establishments employing 10 or 20 employees, and to any other establishments as may be notified by government.
- **Employees State Insurance (ESI):** ESI Scheme will apply to establishments employing 10 or more employees. In case of a pandemic, epidemic or a national disaster, the Central Government can make changes to the employer's or the employee's contribution under Employees State Insurance for up to three months. If the employer fails to pay ESI contributions, the ESIC may pay the benefits to the employee and recover it from the employer the capitalized value of the benefit, including the contribution amount, interest and damages, as an arrear of land revenue or otherwise.
- **Registration:** Every new establishment to which the Code applies is required to register. Establishments already registered under any other Central Law would not be required to register again. Aadhaar-based registration is mandated for all categories of workers.
- **Gratuity:** Fixed-term employees (i.e. employed for a fixed duration) will be entitled to pro-rated gratuity based on the term of their contract. The threshold period of such an employment will also be a continuous working period of 5 years, as is the case for other categories of employees.
- **Maternity benefit:** In addition to maternity benefit in terms of paid leaves, every woman is entitled to medical bonus of up to INR 3,500 (if pre-natal confinement and post-natal care is not provided by employer).
- **Unorganized workers:** The Code makes an attempt at bringing within its fold the unorganized sector of the economy. For instance, the Code allows schemes for unorganized workers to be funded by a company's CSR fund. The Code empowers the Central Government to frame social security schemes for unorganized workers, gig workers (workers outside the traditional employer-employee relationship) and online platform workers (those who access organizations or individuals through an online platform and provide services or solve specific problems.)
- **Offences and penalties:** The Code prescribes a five-year limitation period for initiating inquiries for payment of dues under EPF and ESI schemes.

Code on Wages, 2019

- **Applicability:** The Code seeks to regulate wage and bonus payments in all public and private enterprises belonging to the organized or unorganized sector. The term 'Wages' includes salary, allowance, or any other component capable of being expressed in monetary terms. The Central Government will make wage-related decisions for establishments operating under its authority, and for establishments in industries such as aviation, telecom, banking and insurance among others (State governments will make decisions for all other classes of establishments). The Code will have an overriding effect, notwithstanding any other law in force, award, agreement, settlement, or contract of service to the contrary.
- **Floor wage:** The Central Government will fix a floor wage, taking into account living standards of workers. Floor wages can vary with geographical areas. Minimum wages fixed by the Central or State governments for establishments falling under their jurisdiction must not be lower than such floor wage.
- **Fixing the minimum wage:** In line with the Minimum Wages Act, 1948, this Code prohibits employers from paying wages less than the fixed minimum wage to its employees. The appropriate government, while fixing minimum wages, may take into account factors such as skill of workers and difficulty of work.
- **Overtime:** Employees would be entitled to 'overtime wages' which will be at least twice the normal rate of wages.

- **Payment of wages:** Wages can be paid in multiple modes such as coins, currency notes, cheque, bank account credit or electronic modes. The employer must set a wage period as either daily, weekly, fortnightly or monthly.
- **Deductions:** Deductions (not exceeding 50% of total wage) from an employee's wages may be made on grounds including fines, absence from duty, accommodation provided by employer or recovery of advances given to employee, among others.
- **Determination of bonus:** Employees will be entitled to an annual bonus in case their wages do not exceed a specified monthly amount. Currently, under the Payment of Bonus Act, 1965, this amount is INR 21,000. The annual minimum bonus will be at least 8.33% of the wages, or INR 100, whichever is higher. If the allocable surplus exceeds the total minimum bonus payable to employees, a part of the gross profit must be distributed between the employees in proportion to their annual wages. An employee can receive a maximum bonus of 20% of their annual wages.
- **Gender discrimination:** In matters pertaining to wages and recruitment of employees for same or similar work, the Code on Wages prohibits gender discrimination.
- **Offences:** The Code lays down penalties for offences committed by an employer in contravention of any provisions of the Code. Such penalties depend on the nature and gravity of such offence. The highest penalty prescribed is imprisonment for 3 months and/or a fine up to INR 1 lakh. The Inspector-cum-Facilitator is required to give employers who are first-time offenders an opportunity to comply with provisions of Code before initiating prosecution.

Industrial Relations Code, 2020

- **Definitions:**
  - The definition of 'worker' under the code is similar to (but not same as) the definition of 'workman' under Industrial Disputes Act, 1947, with minor changes such as exclusion of apprentices from scope of definition. A worker means 'any person employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether terms of employment be express or implied, and includes working journalists'.
  - The term 'Industry' has been given a broader definition, including within its scope all systematic activities carried on by co-operation between employers and workers. Notable exclusions are charitable organizations, sovereign functions of the government, domestic service and other activities that may be notified by the Central Government.
  - A situation where 50% of more workers are on casual leave simultaneously, is said to fall within the scope of term 'strike'.
  - IR Code retains the definition of 'retrenchment', however, termination due to continued ill-health is no longer considered retrenchment.
  - A new concept of 'fixed term employment' has been introduced. It refers to workers that are hired for a fixed period but will enjoy the same benefits and entitlements as are available to permanent workers.
- **Negotiating Union/Council:** A Trade Union with at least 51% of the workers as members will be the sole negotiating union. In case no Trade Union has at least 51% of workers as members, a negotiating council will be formed consisting of representatives of Trade Unions that contain at least 20% of workers as members. For every 20% of total workers as members, one representative will be included.
- **Prior permission of appropriate government:** Prior permission of government before closure, lay-off, or retrenchment now needs to be sought only by establishments with at least 300 workers, instead of 100 workers.
- **Worker re-skilling fund:** This is a new concept introduced under IR Code, where a fund shall be created for contribution by employer of an amount equal to fifteen days wages last drawn by worker immediately before retrenchment, and contributions from other sources prescribed by appropriate government. The fund shall be utilized within 45 days of retrenchment, or as may be prescribed.
- **Model Standing Orders:** This provision will apply to establishments employing 300 or more workers. Central Government will be drafting Model Standing Orders basis which employers must prepare their own draft standing orders from date of commencement of IR Code. Employers must consult trade unions or negotiating union before submitting standing orders to certifying officer.
- **Dispute resolution mechanism:** The Code provides for Industrial Tribunals consisting of an administrative member and a judicial member. Either party to a dispute can approach Industrial Tribunal. However, only Central Government can make a reference to National Industrial Tribunal.

Occupational Safety, Health and Working Conditions Code, 2020

- **Definitions**
  - The definition 'Factory' has been expanded to 20 workers for premises where the process uses power and 40 workers where the process uses no power.
  - Provisions of Code pertaining to contract labour would only apply to establishments involving 50 or more contract laborers.
- **Licenses and registration:** New Establishments covered by Code must register themselves (within 60 days of commencement of Code) with registering officers, appointed by appropriate government. Establishments already registered under any other Central Law would not be required to register again.
- **Duties of Employers**
  - Issuing appointment letters to employees
  - Ensuring a workplace that is free from hazards that may cause injury or disease
  - Providing periodical health examination to employees in notified establishments
  - Informing relevant authorities in case an accident at workplace leads to either death or serious bodily injury to an employee
  - There are other duties prescribed for employers in respect of mines, docks, factories, plantations and construction work which include instructing employees about safety protocols and provisioning for a risk-free work environment.
- **Safety and welfare provisions:** The employer is mandated to provide a hygienic work environment along with adequate ventilation, sufficient space to avoid overcrowding, potable drinking water, arrangements for separate washrooms for male, female, and transgender workers, etc. The Code also provides for a uniform threshold of welfare provisions for all establishments such as a canteen, crèche, first aid, welfare officer, etc.
- **Working hours:** Appropriate government is empowered to notify working hours for various classes of establishments and employees. For overtime, prior consent of workers is required along with overtime wage. Female workers may work past 7 pm and before 6 am only with their consent, as prescribed by appropriate government.
- **Relevant authorities:** Inspectors-cum-Facilitators appointed by the appropriate government can inquire into accidents and conduct inspections. They have been given special powers in respect of factories, mines, dock-works and buildings or other construction works, prohibiting work in hazardous environment. Safety committees may also be formed in certain establishments, and for certain classes of workers, by the appropriate government. These committees will aim to function as a liaison between employers and employees.
- **Leaves:** No worker in an establishment will be allowed to work for more than six days a week, except as provided for by Code. Every worker shall be entitled to one day of leave for every 20 days of work per calendar year.

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