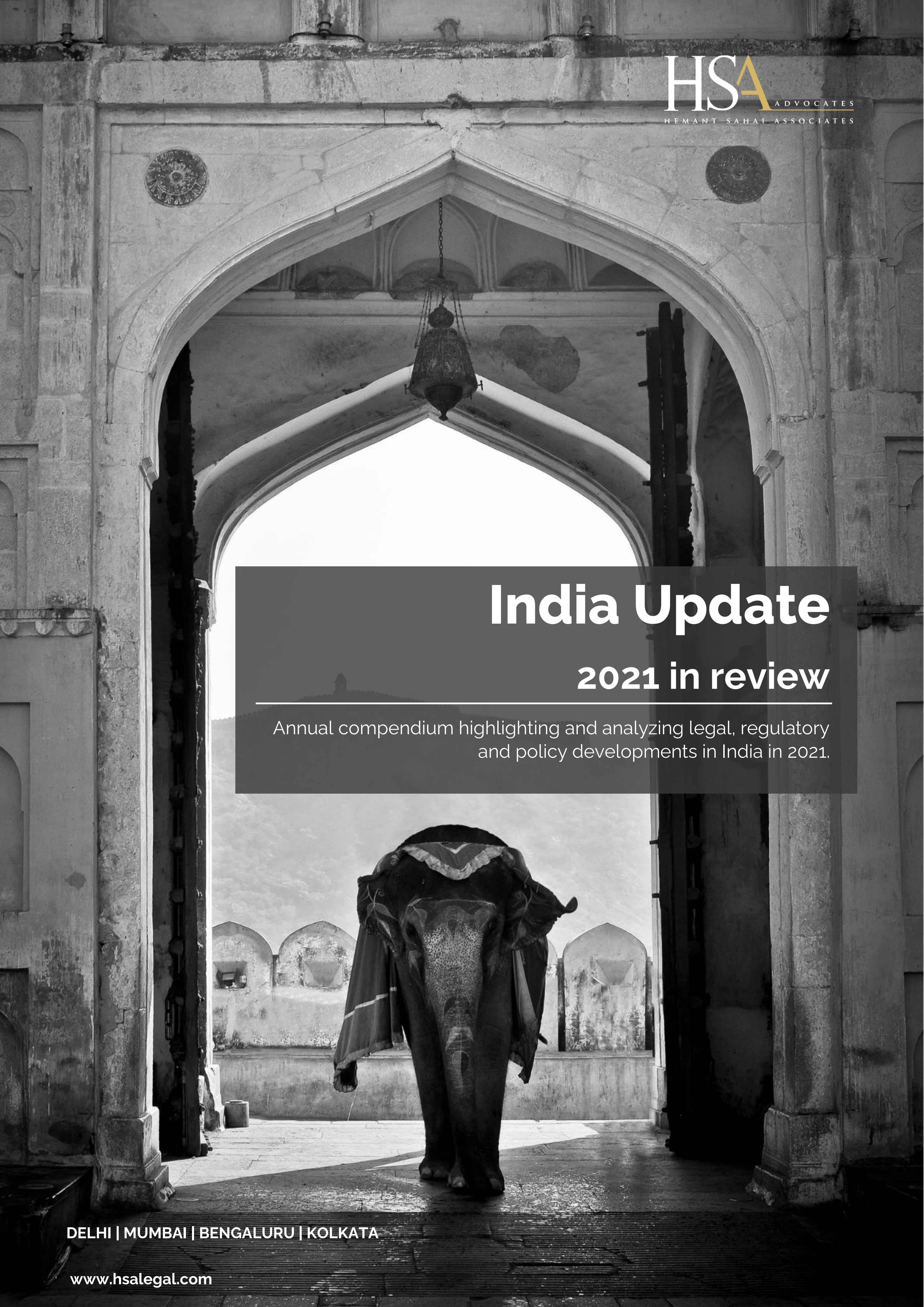

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INVESTMENT AND DEAL ACTIVITY ANALYSIS

▪ DEAL ACTIVITY | CY 2021

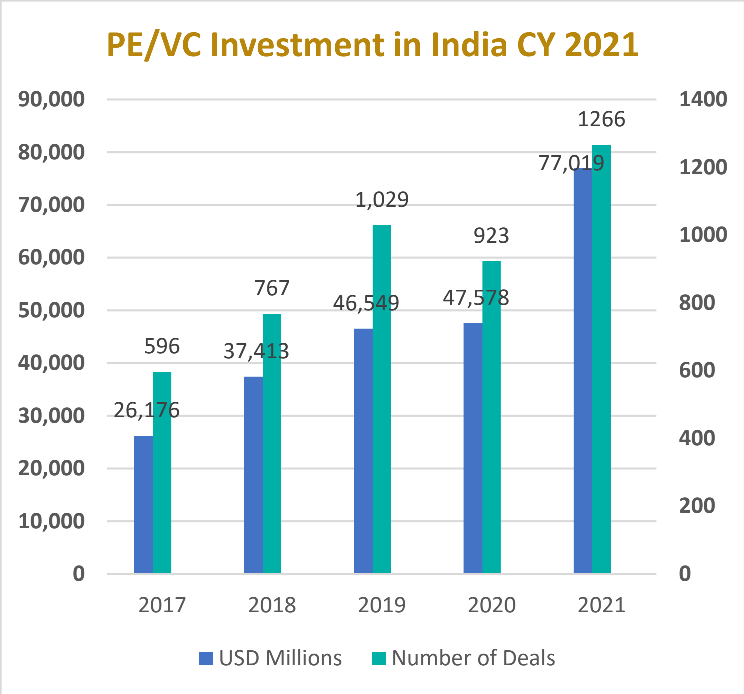
USD **77** Billion | **1266** Deals JAN-DEC 2021

USD **47.6** Billion | **923** Deals JAN-DEC 2020

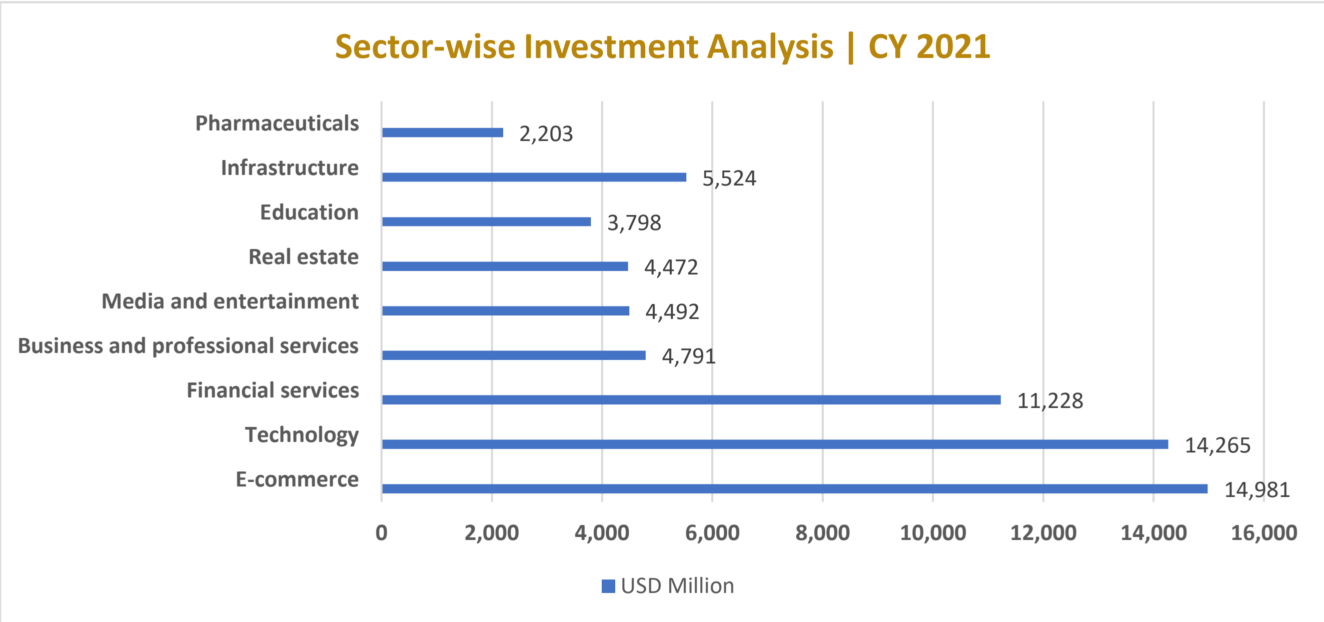
USD **15.9** Billion | **40** Megadeals (USD 100 million +) Q3 2021

USD **10.7** Billion | **FPI Inflow** 2021 - 22

44 | **Unicorns** (USD 1 billion +)



Source: IVCA-EY PE/VC round-up 2021



Source: IVCA-EY PE/VC round-up 2021

▪ EXITS | CY 2021

USD **16.9** Billion | **Strategic Sale** 1026 Deals

USD **14.4** Billion | **Secondary Sale** 913 Deals

USD **5** Billion | **IPO Route**

CORPORATE & COMMERCIAL

- Pooled investment vehicles and amendments to the SCRA 1956
- Fresh guidelines for social media intermediaries and OTT
- E-commerce rules - Proposed amendments and implications
- Companies (CSR Policy) Amendment Rules, 2021
- Companies (incorporation) Fifth Amendment Rules, 2021

Pooled investment vehicles and amendments to the SCRA, 1956

Pursuant to the Finance Act, 2021, the Securities Contracts (Regulation) Act, 1956 (**SCRA 1956**) underwent certain amendments recently. These pertain to changes brought about by the inclusion of 'pooled investment vehicles' within the ambit of the SCRA's governance. The key changes are provided herein below:

Revised definitions

New Section 2(da) has been inserted in the SCRA, which defines a 'pooled investment vehicle' as a fund established in India in the form of a trust or otherwise (for example, mutual fund, alternative investment fund, collective investment scheme or a business trust as understood under Section 2(13A) of the Income Tax Act, 1961 and registered with the SEBI) or such other fund, which raises or collects monies from investors and invests the same in accordance with SEBI regulations in this regard. Consequent thereto, the definition of 'securities' has been amended, whereby:

- In Section 2(h)(i) of the inclusive definition, 'pooled investment vehicle' has been inserted. It may be noted that Section 2(h)(i) of the SCRA pertains to forms of marketable securities.
- New Section 2(h)(ida) has been inserted to include units or any other instrument issued by any pooled investment vehicle.

Section 30B

Section 30B has been inserted into the SCRA in relation to debt fund raising by pooled investment vehicles. It states that a pooled investment vehicle (whether constituted as a trust or otherwise) that is registered with SEBI would be allowed to borrow and issue debt securities in line with regulations that SEBI may prescribe. Interestingly, this allowance is stated to override not just the Indian Trust Act, 1882 (the foundation legislation for private trust law in the country) and any other law being in force at the time, but also any judgment, decree or order by any court, tribunal, or authority. In addition, the pooled investment vehicle would also be allowed to create security interest in favor of a lender, whereby such lender could enforce such security interest against the trust property in case of a default by the pooled investment vehicle.

Observations

With these changes coming in, there are a few aspects to further consider.

The most obvious consequence in relation to the amendments to Section 2(h) of the SCRA is that units or instruments issued by pooled investment vehicles would now fall within the purview of 'Security' under stamp laws, whereby making their transfers eligible to stamp duty payment. In particular, for Section 2(h)(i) of the SCRA, which pertains to marketable securities in an incorporated company, body corporate or pooled investment vehicle, it should be considered whether with private placement memoranda for alternate investment funds that typically contain conditions and restrictions around transfer, they could at all fall within the purview of 'marketable security'.

While the SCRA itself may not have a definition for this, the Indian Stamp Act, 1899, does. This definition, inserted last year in the legislation, states that a marketable security is one that can be traded on any stock exchange in India.

For Section 30B, the overriding of existing judgment, decree or order is an interesting position, as does the overriding of any other legislations in force at the time. Whether this has an effect on an entity that is in an insolvency process may have to be explored further. Whether further SEBI regulations and prescriptions would address this remains to be seen.

Conclusion

While both the changes were expected – bringing the units by pooled investment vehicles within the ambit of stamp duty regime, as well as clear recognition of debt fund raising by vehicles (including INVITs and REITs) – clarity on the potential inconsistencies shall, of course, be welcome.

Fresh guidelines for social media intermediaries and OTT

Amid growing concerns around the lack of transparency, accountability and rights of users related to digital media, the Government has introduced the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 (**Rules**)**.** These Rules have been framed in exercise of powers under Section 87(2) of the Information Technology Act, 2000. The Rules aim at empowering social media users and ensure that Social Media Intermediaries (**Intermediaries**) and Over-The-Top (**OTT**) platforms create a safe environment digitally.

Social Media Intermediaries will fall into two categories – an Intermediary and a Significant Social Media Intermediary. This distinction is based on the number of users on the social media platform, and the government will soon notify the threshold of the user base that will distinguish the two.

Key guidelines for Intermediaries

- **Applicability of 'safe harbor' provisions**: Intermediaries have to follow the prescribed diligence protocols to ensure applicability of 'safe harbor' provisions. In case these are not followed, the safe harbor provisions (defined under Section 79 of the IT Act, 2000) providing immunity from legal prosecution for any content posted on their platforms, will not apply to them.
- **Mandatory grievance redressal mechanism:** The Intermediaries shall appoint a Grievance Officer to deal with complaints and will share the name and contact details of such officers, who shall acknowledge the complaint within twenty-four hours and resolve it within fifteen days from receipt.
- **Ensuring online safety and dignity of users:** Intermediaries shall remove or disable access within 24 hours of receipt of complaints of content that exposes the private areas of individuals, show such individuals in full or partial nudity or in sexual act or is in the nature of impersonation including morphed images etc. Such a complaint can be filed either by the individual or by any other person on his/her behalf.
- **Additional Due Diligences for the Significant Social Media Intermediaries:**
  - **Appointments:** The Significant Social Media Intermediaries need to appoint a Chief Compliance Officer, a Nodal Contact Person and a Resident Grievance Officer, all of whom should be residents of India.
  - **Compliance Report:** The Intermediaries need to publish a monthly compliance report mentioning the details of complaints received, action taken on the complaints as well as details of content removed proactively.
  - **Enabling identity of the Originator:** As per the guidelines, social media intermediaries providing services primarily in the nature of messaging shall enable identification of the first originator of the information. However, this is required only for the purposes of prevention, detection, investigation, prosecution, or punishment of an offence related to sovereignty and integrity of India, the security of the State, friendly relations with foreign States, or public order as well as incitement to an offence relating to the above or in relation with rape, sexually explicit material, or child sexual abuse material punishable with imprisonment for a term of not less than five years.
  - **Removal of unlawful information:** An Intermediary upon receiving actual knowledge in the form of an order by a court or being notified by the Government or its agencies through authorized officer should not host or publish any information which is prohibited under any law in relation to the interest of the sovereignty and integrity of India, public order, friendly relations with foreign countries etc.

Key guidelines for OTT platforms

- **Self-classification of content:** The OTT platforms shall self-classify the content into five age based categories- U (Universal), U/A 7+, U/A 13+, U/A 16+, and A (**Adult**).
- **Parental lock:** Platforms would be required to implement parental locks for content classified as U/A 13+ or higher, and reliable age verification mechanisms for content classified as 'A'.
- **Display rating:** The OTTs shall prominently display the classification rating specific to each content or programme together with a content descriptor informing the user about the nature of the content and advising on viewer description (if applicable) at the beginning of every programme enabling the user to make an informed decision, prior to watching the programme.

Key guidelines for news publishers and digital media

- **Level playing field:** News publishers will be required to observe Norms of Journalistic Conduct of the Press Council of India and the Programme Code under the Cable Television Networks Regulation Act 1995, to ensure a level playing field between offline (**Print, TV**) and digital media.
- **Grievance Redressal Mechanism:** A three-level grievance redressal mechanism has been established under the rules with different levels of self-regulation i.e., Level-I (Self-regulation by the publishers); Level-II (Self-regulation by the self-regulating bodies of the publishers); and Level-III (Oversight mechanism).
- **Self-regulation by the publisher:** The publisher shall appoint a Grievance Redressal Officer based in India who shall be responsible for the redressal of grievances received within 15 days.
- **Self-regulatory body:** There may be one or more self-regulatory bodies of publishers, which shall be headed by a retired judge of the Supreme Court, a High Court or an independent eminent person and have not more than six members; such a body will have to register with the Ministry of Information and Broadcasting and will oversee the adherence by the publisher to the Code of Ethics and address grievances that have not been resolved by the publisher within 15 days.
- **Oversight mechanism:** The Ministry of Information and Broadcasting shall formulate an oversight mechanism and publish a charter for self-regulating bodies, including Codes of Practices, in addition to establish an Inter-Departmental Committee for hearing grievances.

E-commerce rules - Proposed amendments and implications

The Consumer Affairs Ministry has proposed significant amendments (Proposed Amendments) to the Consumer Protection (E-Commerce) Rules, 2020 (**Rules**). Key aspects of the Proposed Amendments are as follows:

- **Definition of e-commerce entity:** The proposed change casts a wider net to cover two additional categories of persons within the purview of 'e-commerce entity':
  - A person engaged by an e-commerce entity for fulfilment of orders would now be counted as an e-commerce entity as well
  - Any 'related party' of an e-commerce entity as per the Companies Act, 2013 (**Act**), would also be an e-commerce entity
  - While these changes seem intended to bring third party logistics entities within applicable regulatory fold, this could be a large envelope that will potentially cover related party entities of wide swathe of business houses who might own/operate/manage an e-commerce facility but also have other diverse business interests
- **Bar on flash sales:** The proposed definition of 'flash sale' has the expected references to reduced prices and high discounts as well as such sales being organized by fraudulently intercepting ordinary course of business using technology. This will enable only certain seller(s) managed by the e-commerce entity to undertake flash sales and can potentially hurt inventory-based e-commerce entities, some of whom may have a genuine need to clear inventory and improve cashflows. The most worrisome parts are the absence of metrics for what would constitute 'fraudulent interception' and 'ordinary course of business.
- **Prohibition on mis-selling and misrepresentation:** Mis-selling has been introduced as a prohibited activity, premised upon deliberate misrepresentation of information to a user. However, when defining misrepresentation, one criterion states 'causing, however innocently, a consumer to purchase such goods or services, to make a mistake as to the substance of the thing which is the subject of the purchase'. The use of 'however innocently' creates an absolute burden of compliance that is naturally difficult to achieve. Furthermore, its usage also appears contradictory to the notion of 'deliberate misrepresentation'.

- **Fall back liability**: Introduced particularly for marketplace model entities, the definition proposes to make the entity liable to a user who faces loss due to commissions, omissions and negligent conduct towards such user by a seller registered on the platform.
- **Registration of e-commerce entities:** The nodal body for this would be the Department for Promotion of Industry and Internal Trade. If this does come into effect, further details for the process would be expected from the regulator. At present, complete procedures remain unknown.
- **Clamp down on misleading users:** An e-commerce entity has been barred from allowing display or promotion of misleading advertisements, whether in the course of business on its platform or otherwise. While this is good for the users, it has wide ramifications for a marketplace entity and also creates fall back liability for a seller who might have placed a misleading advertisement. To what extent a marketplace entity would have the ability to evaluate such advertisements or obtain back-to-back protection from a seller is a matter to ponder. Another example is for the e-commerce entity to not mislead users by manipulating their search result/index. Once again, it is difficult to test for what could be construed as manipulation and whether such search result/index indeed misled a user (because search results would have to appear in some sequence or the other).
- **Deeper compliance and grievance redressal:** E-commerce entities have been mandated to increase points of redress, with the Proposed Amendments mandating the appointment of a Chief Compliance Officer and a Resident Grievance Officer. In addition, there is also the obligation to appoint a nodal contact person (other than the Chief Compliance Officer) for 24x7 coordination with law enforcement. It can be debated whether the space where this law is intended to operate requires a 24x7 coordination with law enforcement agencies or if this might be a compliance and cost burden on an e-commerce entity. Furthermore, there are additional provisions pertaining to increased information disclosures about products and their sourcing, as well as restrictions against consumer information being shared.
- **Abuse of dominant position:** No e-commerce entity that holds a dominant position in any market shall be allowed to abuse the same. This is a reiteration of a positive protection for consumers and smaller players. However, what would constitute market remains unclear (as it could cover product market, product category market, retail market and similar variables).
- **Disclosure of cross-sell data:** The Proposed Amendments mandate disclosures on cross-sell data by the e-commerce entity to users. While this is a good to have, it may not be of particular benefit to users or their purchasing needs.
- **Additional obligations for marketplace entities:** Obligation to ensure that none of its related parties or associated enterprises are enlisted by it for sale to consumers directly. While the restriction of B2C sale is understandable, there is inconsistency in defining 'related party'. The term 'associated enterprise' in the Proposed Amendments has a wider import than the Act's definition of 'associate company'. One possible reason may be that the Proposed Amendments intend to snap certain business models that could be considered circumvention of the spirit, if not the letter, of the existing law.
- Ensure that its related parties/associated enterprises do nothing that the entity itself would not be permitted to do. One such example is related parties and associated enterprises of the marketplace entity are not supposed to listed as sellers on the marketplace platform.
- Ensure that any information the marketplace entity collects through its platform is not used for unfair advantage of its related parties and associated enterprises. There are questions that this raises. For instance, can it be presumed that the information is supposed to be only of users, since the parent law is for consumer protection, and could information of other third-party sellers be used? Would data/information that a user or a third-party seller has consented to sharing with the marketplace entity be off limits for data analytics? What would constitute 'unfair advantage'?

There is food for thought aplenty in the Proposed Amendments, not just for large marketplace entities but smaller players as well as inventory model operators. In addition, logistics entities as well as end-consumers will also notice that there are aspects that unintentionally have the potential of causing confusion. As various stakeholders continue to evaluate the Proposed Amendments, it is clear that they need to be put under a microscope for some fine tuning.

Companies (CSR Policy) Amendment Rules, 2021

The Companies Amendment Acts of 2019 and 2020 resulted in some major changes in the CSR provision under Section 135 of the Companies Act. The Ministry of Corporate Affairs (MCA) on January 22, 2021 notified the Companies (Corporate Social Responsibility Policy) Amendment Rules 2021 (**New Rules**) giving effect to the changes introduced in CSR by the Companies Amendment Acts of 2019 and 2020.

CSR has been evolving in India ever since CSR spending was statutorily mandated in 2014 and now, in the wake of urgent emerging health care requirements, MCA has issued multiple clarifications on what companies could consider as part of their CSR expenditure.

Few noteworthy changes brought to the CSR Regime vide the New Rules and subsequent notifications of the MCA are as below:

- Any company engaged in research and development of new vaccines, pharmaceuticals, and medical devices in the ordinary course of business may undertake research and development of new vaccines, medicines, and medical devices relevant to Covid-19 as CSR during the FYs 2020-21, 2021-22, and 2022-23, subject to the following conditions:
  - Such R&D activities must be carried out in collaboration with any of the institutes or organizations mentioned in Item (ix) of Schedule VII of the Companies Act (e.g., Indian Council of Medical Research, Council of Scientific and Industrial Research, Department of Biotechnology and the Department of Science and Technology)
  - Details of such activity must be disclosed separately in the annual report on CSR included in the board's report
- Contributions made by companies towards following activities are now allowed to be considered as eligible CSR expenditure:
  - Contributions to the PM CARES Fund
  - Contributions to incubators or R&D projects in the field of science, technology, engineering, and medicine, funded by the central or state government, a public sector undertaking or any agency of the central or state government
  - Contributions to public-funded universities engaged in conducting research in science, technology, engineering, and medicine to promote sustainable development goals, in collaboration (additional) with Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy and the Department of Pharmaceuticals
- Companies could use CSR funds for creating health infrastructure for Covid-19 care, establishment of medical oxygen and storage plants, manufacturing and supply of oxygen concentrators, ventilators, cylinders, and other medical equipment for countering Covid-19
- Amendment to Rule 7: As companies are now allowed to set off CSR expenditure above the required 2% expenditure in any financial year against the required expenditure for up to three financial year, if a company spends an amount in excess to their CSR requirements

The provisions of the New Rules appear to be more structured and paint a promising picture for India's CSR regime. These changes have reduced the excessive discretion in the hands of a company, have enhanced clarity, and introduced uniformity by laying down the procedures to be followed in certain respects by introducing new statutory requirements. While the companies are battling the gruesome blows of Covid and at the same time are in recalibration mode by trying to shift their operational guidelines as per the framework of the new CSR Rules, which has introduced significant changes to monitoring and evaluation of CSR activities, and utilization of CSR expenditure and also mete out serious punishment for non-compliance. The aforesaid are merely highlights of the wide array of transitional challenges which companies have to deal with while, simultaneously juggling with the impact of Covid on businesses.

Companies (Incorporation) Fifth Amendment Rules, 2021

MCA on July 22, 2021 notified the Companies (Incorporation) Fifth Amendment Rules, 2021 to further amend the Companies (Incorporation) Rules, 2014. As per the amendment, if a company fails to change its name or new name in accordance with the direction issued under Section 16(1) of the Companies Act, 2013 within a period of three months from the date of issue of such direction, the letters 'ORDNC' (**Order of Regional Director Not Complied**), the year of passing of the direction, the serial number and the existing Corporate Identity Number of the company shall become the new name of the company without any further act or deed by the company, and the Registrar shall accordingly make entry of the new name in the Register of Companies and issue a fresh Certificate of Incorporation in Form No. INC-11C.

BANKING & FINANCE

- Contribution to AIF set up in offshore jurisdiction including IFSCs
- Change in bonds auction methodology
- Framework for outsourcing of payment and settlement - related activities
- Modifications to current norms on round tripping

Contribution to AIF set up in offshore jurisdiction including IFSCs

In another attempt to relax the provisions of Overseas Direct Investment (**ODI**), RBI recently permitted Indian Party (**IP**) to make offshore investment in an AIF by treating it under automatic route to simplify the offshore remittance process involved to comply with sponsor commitment for such funds.

RBI, under the ODI route by Residents in JVs/WOS abroad, permits IP incorporated as a company in India or a registered partnership firm or other approved entity making investment in a JV or WOS abroad, and includes any other entity in India as may be notified by the RBI, subject to certain conditions.

Importantly, RBI guidelines for offshore investments made by IP did not prescribe certainty for investment route for investments in approved offshore AIFs, including that for International Financial Services Centres (**IFSC**), which had to primarily comply with local AIF regulations. AIF regime in IFSC obligates the entity to be established through a minimum sponsor commitment of 2.5% of the corpus or USD 750,000 for Category 1 and 2 AIFs, whichever is lower, and % of the corpus or USD 1.5 million, whichever is lower for Category 3 AIFs.

Change in bonds auction methodology

Reserve Bank of India (**RBI**) typically uses multiple price methods in government security auctions. But on July 2, 2021 RBI notified a shift in its method of auctioning government bonds to decrease volatility and further spike in yields. Under the new mechanism, bonds maturing between 2-14 years will now be auctioned under the uniform price auction except the 30 – 40 years bonds which will continue to be auctioned via the multiple price-based method. At this auction, more than INR 10,000 crore in bonds maturing in 2026 were devolved on underwriters. This uniform price auction is applicable on bonds of following tenure - 2 year bonds; 3 year bonds; 5 year bonds; 10 year bonds; 14 year bonds and Floating rate bonds

To decrease the volatility in bids, an auction cut-off rate is fixed based on bids placed. Once the cut off rate is established, securities are allotted to all participants at the same rate. This is unlike the multiple price auction, where bidders pay at the respective rate, they had bid.

This change in the methodology is not a very common phenomenon. Earlier in February 2021, RBI had modified the auction method for a series of difficult-to-sell bonds, introducing uniform price auction applicable to all bidders.

Apart from the change in auction methodology, RBI has also written to primary dealers to come up with a framework to set acceptable bids at auctions, as underwriters are having to step into rescue more bond sales.

Framework for outsourcing of payment and settlement - related activities

On August 3, 2021 RBI issued the 'Framework for outsourcing of payment and settlement - related activities by Payment System Operators' (**Framework**). The non - bank Payment System Operators (**PSOs**) mainly outsource their payment and settlement related activities to several other entities. This Framework has been issued to enable the effective management of certain attendant risks in such outsourcing. The Framework has been issued under Section 10(2) read with Section 18 of the Payment and Settlement Systems Act, 2007 (**Act**). PSOs shall ensure that their outsourcing arrangements, including the existing ones, follow the Framework by March 31, 2022.

Application

- PSOs
- Non - bank PSOs
- System providers located in India or elsewhere. A system provider means a person who operates an authorized payment system
- Token requestors in tokenization services by card networks
- Third - party service providers of unified payments interfaces

Outsourcing of core management functions

The Framework bars PSOs from outsourcing their fundamental management responsibilities, such as risk management, internal audit, compliance, and decision - making processes including assessing KYC norms compliance. These restrictions are in accordance with the current regulations governing banks and non - bank financial companies (**NBFCs**). The circular clarifies that 'core management functions' should include, but not be limited to the following:

- Management of payment system operations
- Transaction management
- Management of customer data

Customer rights and data protection

PSOs must take steps to make sure that outsourcing does not damage any rights of customers or participants of the payment system. PSOs are also in charge of dealing with complaints, particularly those involving third - party service providers. On the customers' grievance redressal services being outsourced, they should be able to directly register any grievances with a PSO's nodal officers. PSOs must ensure that customers are aware of this option, such as through advertisements, and should present the details regarding their nodal officers on their websites and mobile applications.

Conclusion

As a welcome regulatory measure, the Framework lays importance on protecting customer rights and data by instituting norms on the usage of customer information by third - party service providers. Framework may increase compliance costs for PSOs, yet it will be instrumental in restricting data leaks attributed to mere regulatory loopholes.

Modifications to current norms on round tripping

Some of the largest Indian companies, start-ups and multinationals with an India presence have put their outbound investment, fundraising, and restructuring plans on hold as the RBI looks to introduce fresh regulations around 'round tripping.' Round tripping refers to money that leaves the country though various channels and makes its way back into the country often as foreign investment. This mostly involves black money and is allegedly used for stock price manipulation.

RBI aims to tweak the existing regulations and has come up with draft rules around round tripping. With a view to liberalize regulatory framework and promote ease of doing business, it has been decided to rationalize the existing provisions governing overseas investment. According to the draft rule, any entity making an any investment outside India, in turn, invests in India will be treated as round - tripping if the purpose is to escape tax. This is as the same rationale used by the tax department under General Anti Avoidance Rule. Three significant changes stand out in the rules proposed by the regulator are as follows:

- **Threshold for Overseas Direct Investment (ODI):** The new definition of ODI as proposed by the regulator are as follows:

- Acquisition of equity capital of unlisted foreign entity, subscription to the Memorandum of Association of the foreign entity
- Investment in 10% more of the paid-up capital of a listed foreign entity
- Acquisition of direct or indirect control in the foreign entity
- Foreign Entity will be defined as
  - An entity which is incorporated and registered outside India
  - An unincorporated entity which is engaged in a strategic sector

- **Treatment of step-down subsidiaries:** In case where such a foreign entity having ODI and control by an Indian entity having ODI and control by an Indian entity sets up a subsidiary, then it will become a step-down subsidiary. The Indian entity and its promoters can provide corporate, personal, performance, bank guarantee on behalf of both foreign entity and step-down subsidiary within the overall limit of the financial commitment according to the Foreign Exchange Management Act.
- **Plugging the gift gap:** Further, the draft rules have put a cap on acquiring foreign securities by way of a gift. The draft rules propose to allow transfer by way of gift only from relatives subject to limitations as prescribed by the RBI.

RESTRUCTURING & INSOLVENCY

- Pre-packaged Insolvency Resolution Process
- The Insolvency and Bankruptcy Code (Amendment) Act, 2021
- Tightened investment rules in NBFC from FATF non-compliant jurisdictions

Pre-packaged Insolvency Resolution Process

The President of India has promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 (The Ordinance) on April 04, 2021, to allow pre-packaged insolvency resolution process for Corporate Debtors classified as micro, small or medium enterprises (**MSME**) under the Micro, Small and Medium Enterprises Development Act, 2006.

In the aftermath of the Covid-19 pandemic, the Central Government via the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 introduced Section 10A into the Insolvency and Bankruptcy Code, 2016 (**IBC**), which suspended the operation of Section 7, 9 and 10 of the IBC for initiation of fresh insolvency proceedings against the defaults incurred on and after March 24, 2020, for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf.

The Ordinance alters the IBC by introducing the Ordinance as a part of Chapter IIIA of Part II of the Code. Further Section 4 of the Code has been amended to enable the Central Government to notify a pre-packaged procedure for defaults not more than INR 1 crore.

A pre-packaged settlement entails a corporation working out a restructuring agreement with its creditors before applying for bankruptcy protection. This helps to reduce the overall time and expense of the process and also ensures a quicker, cost-effective and value maximizing outcome for all the stakeholders. An application for initiating a pre-packaged insolvency resolution process may be made in respect of a Corporate Debtor, subject to the following conditions, that:

- It has not undergone pre-packaged insolvency resolution process or completed corporate insolvency resolution process, as the case may be, during the period of three years preceding the initiation date
- It is not undergoing a corporate insolvency resolution process
- No order requiring it to be liquidated is passed under section 33
- It is eligible to submit a resolution plan under section 29A
- The financial creditors of the Corporate Debtor, not being its related parties, representing such number and such manner as may be specified, have proposed the name of the insolvency professional to be appointed as the resolution professional for conducting the pre-packaged insolvency resolution process of the Corporate Debtor, and the financial creditors of the Corporate Debtor, not being its related parties, representing not less than 66%
- The majority of the directors or partners of the Corporate Debtor, as the case may be, have made a declaration, in a form that may be specified, as to the limitation period along with a declaration of no intent to commit fraud
- The members of the Corporate Debtor have passed a special resolution, or at least 3/4th of the total number of partners, as the case may be, of the Corporate Debtor has passed a resolution, approving the filing of an application for initiating pre-packaged insolvency resolution process
- The Corporate Debtor must obtain approval from its Financial Creditors, who are not connected to it, for the filing of an application to initiate a pre-packaged insolvency resolution procedure, in such form as may be stated,

representing not less than 66% in value of the financial debt due to such creditors.

- The pre-packaged insolvency resolution phase must be completed within 120 days of the pre-packaged insolvency start date. The moratorium will be in place from the pre-packaged start date until the process is completed, whether by resolution plan approval or otherwise.
- During the pre-pack period, the Corporate Debtor will remain under the current promoters' and management's control and custody. On the grounds set out in Section 61(3) of the Code, the Ordinance appeals against an order authorizing the pre-packaged resolution plan.

By introducing a new facet of insolvency, the Government appears to be attempting to provide an alternative and efficient resolution mechanism. This is a positive development, but it was hoped that a similar platform would apply to non-MSME businesses. Prepacks will assist Corporate Debtors in reaching an agreement with lenders and handling the company's entire liability. A proper implementation of the Pre-Packaged Insolvency regime would benefit both the Debtor (**MSME'**s) and the Creditors as higher resolution values could be achieved due to the quick process involved as compared to the steps involved in the Resolution Process under the IBC.

Overall, it is expected that with the pursuit of the proposed Draft framework, a positive impact will be seen on the financial health of the debt market. However, a concrete conclusion can only be arrived at after this framework is approved and comes into effect. In addition to this The Government needs to further enhance the NCLT's infrastructure for proper utilization of the aimed benefits to introduce pre-packs.

The Insolvency and Bankruptcy Code (Amendment) Act, 2021

The Insolvency and Bankruptcy Code (Amendment) Bill, 2021 as introduced by the Ministry of Finance before the Lok Sabha in July 2021. It received the assent of the President in August 2021. In view thereof, Amendment Bill, 2021 will now be recognized as the Insolvency and Bankruptcy Code (Amendment) Act, 2021 (**Amendment Act**).

- A brief history of the Amendment:
  - A proviso has been added to Section 4 of the IBC whereby a minimum threshold of not more than one crore rupees for initiating pre-packaged insolvency resolution process has been introduced.
  - Chapter III-A, containing Sections 54A to 54P dealing with pre-packaged insolvency resolution process for micro, small and medium enterprise, has been introduced. These are to be read with the IBBI (Pre-packaged Insolvency Resolution Process) Regulations, 2021 (**PPIRP Regulations**).
  - The provisions pertaining to penalty for fraudulent management of the Corporate Debtor during PPIRP and punishment for offences related to PPIRP has been introduced.

Tightened investment rules in NBFC from FATF non-compliant jurisdictions

RBI issued guidelines for investors seeking foreign investment directly or indirectly in existing Non-Banking Financial Companies (**NBFC**s) or in companies seeking Certification of Registration (**CoR**) through non-compliant Financial Action Task Force (**FATF**) member Countries.

FATF periodically identifies jurisdictions having low measures to combat money laundering and terrorist financing (**AML/CFT**) referred in High-Risk Jurisdictions subject to a Call for Action and Jurisdictions under Increased Monitoring. A jurisdiction whose name does not appear in the prescribed FATF compliant list is referred to as a FATF compliant jurisdiction.

Further, being part of FATF member country, the investor shall not be a resident in the country identified in the public statement of FATF as a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply or 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 ('non-compliant' jurisdiction).

Investment in NBFCs from FATF non-compliant jurisdictions

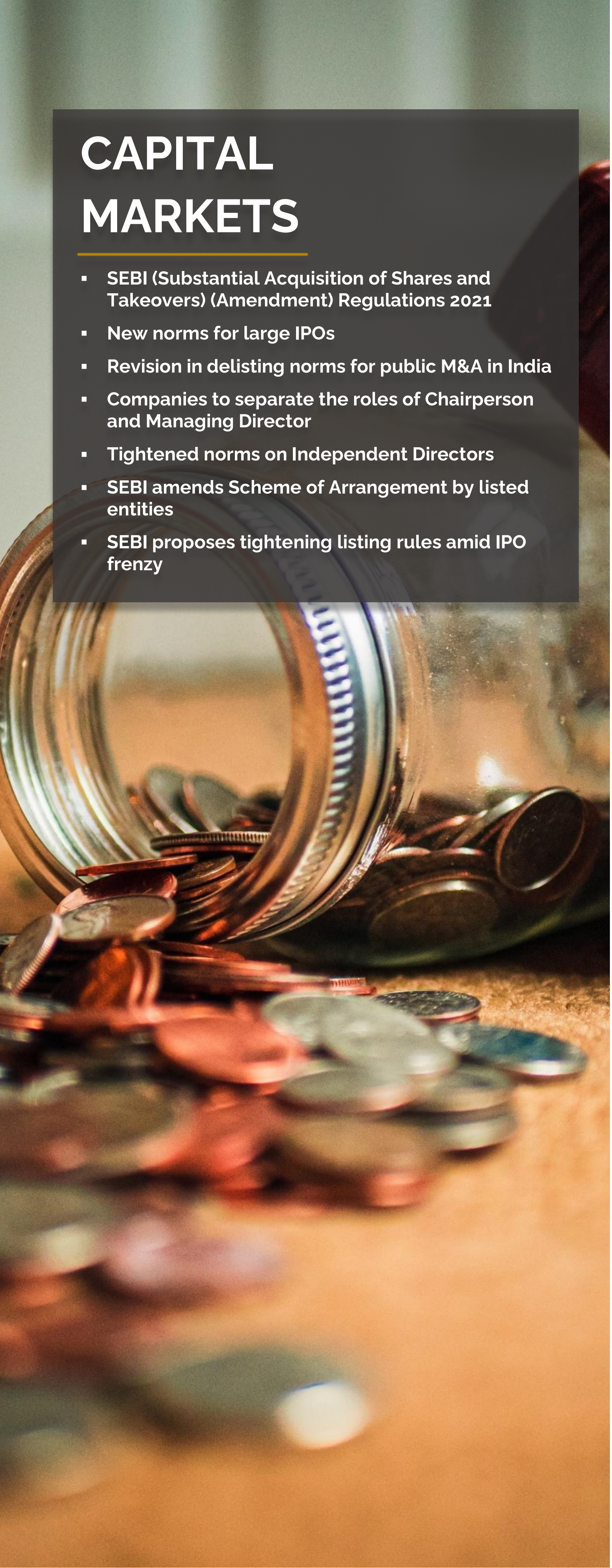
Presently, foreign investment guidelines in India permits investment in the NBFC segment under the automatic route.

Investors in the existing NBFCs having investments prior to the classification of the source or intermediate jurisdiction/s as FATF non-compliant, may continue with the investments or bring in additional investments as per extant regulations to support continuity of business in India.

Investments in NBFCs from FATF non-compliant jurisdictions shall not be treated at par with that from the compliant jurisdictions. Hence, new investors from or through non-compliant FATF jurisdictions, whether in existing NBFCs or in entities seeking COR, are restricted to acquire directly or indirectly ‘significant influence’ in the investee, as defined in the applicable accounting standards and also specified in. Effectively, new investors (directly or indirectly) from such FATF non-compliant jurisdictions in aggregate should be less than the threshold of 20 per cent of the voting power (including potential voting power) of the NBFC.

Conclusion

In effect, such investment from the foreign jurisdictions that are FATF non-compliant seeking investment may be obligated to acquire substantial holdings only after seeking prior RBI approval. This seems to be in line with other FPI regulations, that does not permit non-FATF compliant jurisdiction to participate in the Indian capital markets. The tightening of the rules comes effectively with the renewed interest in the Indian NBFC sector that might be exposed to investment flow from prohibited countries from the FATF.



CAPITAL MARKETS

- SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations 2021
- New norms for large IPOs
- Revision in delisting norms for public M&A in India
- Companies to separate the roles of Chairperson and Managing Director
- Tightened norms on Independent Directors
- SEBI amends Scheme of Arrangement by listed entities
- SEBI proposes tightening listing rules amid IPO frenzy

SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations 2021

SEBI vide Gazette notification dated May 05, 2021, notified the SEBI (Substantial Acquisitions of Shares and Takeover) (Amendment) Regulations, 2021 (**Amendment**) which amends the SEBI (Substantial Acquisitions of Shares and Takeover) Regulations, 2011 (**Regulations**).

The primary aim of the Regulation is to monitor and control acquisition of shares and voting rights in publicly listed companies of India. During the course of the time, the Regulation has gone through multiple amendments to keep up with the dynamic trading platforms and investor behavior patterns. The current Amendment aims to amend the Regulations to insert certain provisions relating to the Innovators Growth Platform and the trigger point for making open offer by an acquirer.

Amendment

The Amendment has amended the nomenclature wherein the Institutional Trading Platforms (**ITP**) has been substituted with Innovators Growth Platform (**IGP**). Further, the trigger for making a public offer under Regulations 3 and 6 of the Regulations, in the listed entities on IGP has been enhanced to 49% from the erstwhile 25%, pursuant to the Amendment.

Pursuant to the Amendment, the requirement to disclose further acquisition of shares to the board of that company, beyond the threshold of 5% has been revised to 10%. Regulation 29 (2) of the Regulations requires disclosure of change in shareholding or voting rights of the acquirer if such change exceeds 5% of total shareholding /voting rights from the erstwhile 2%, pursuant to the Amendment.

Furthermore, Regulation 26 (6) of the Regulations, which deals with the analysis by the committee of independent directors, the Amendment seeks to introduce disclosure of voting pattern of the meeting in which the open offer proposal was discussed as a part of the detailed public statement issued along with the open offer by the acquirer.

Conclusion

The Amendment is seen as another modification by SEBI to revive the market lows, as the trade and market experience a decline in value creation by different firms using such platforms. Setting the bar lower for shareholders and voting rights was intended to stamp on fair market play and encourage more transparency on the acquisition of shares, voting rights, and standing on the shareholder's board. However, intending to give liberty to the acquirers and motivate them to indulge in trading in companies, SEBI has relaxed the regulations to some extent. It would mean that the acquirer can buy such shares without triggering the need for making an open offer until 49%, unlike other listed entities whereupon acquiring 25% shares, the acquirer shall have to make an open offer to the public mandatorily. Any acquirer will now be able to exercise a little more room to avoid the procedural formality of public disclosures and infuse capital in cash strapped companies.

New norms for large IPOs

SEBI has eased the listing norms for certain companies by reducing the threshold for minimum public shareholding. These changes were brought in considering the decline of Initial Public Offerings (**IPOs**) and constraints faced by companies with post-issue Market Capital (**MCap**).

Key takeaways

- **Reduced MPO requirements:** The prevailing norms mandated that for companies with a post-issue capital above INR 4000 crore, the minimum public offer size was 10% of shares. However, this caused several practical problems, especially for Very Large Companies (**VLC**s), as the requirement of offering at least 10% stake to the public made compliance troublesome. The new norms have brought in changes to reduce the burden on VLCs and the requirement of Minimum Public Offer (**MPO**), for post-issue capital has been reduced from the existing 10% to INR 1,000 crore plus 5% of the incremental amount when MCap is beyond INR 10,000 crore.
- **Revised MPS tenure:** The other amendment brought in is with respect to the Minimum Public Shareholding (**MPS**) tenure. In view of this proposal, it has been observed that Large and Very Large issuers may find themselves in a position of having to issue 10% public shareholding during the listing and being jeopardized under Rule 19(2)(b) of the Securities Contracts (Regulations) Rules, 1957, (**SCRR**), which mandates such companies to have at least 25% of their MCap in MPS within a period of 3 years from the date of listing. There arises a need for such companies to have a requisite interval to first raise 10% of public shareholding and then subsequently comply with the 25% MPS requirement. Under the new norms, companies with MCap inside the bracket of INR 10,000 to 100,000 crore are directed to achieve 10% of their public shareholding within 18 months and 25% MPS within 3 years from the date of listing. Similarly, for companies having a market capitalization of more than INR 100,000 crore, 10% public shareholding is to be achieved within 2 years and 25% MPS within 5 years from the date of listing.

These amendments, effective from June 18, 2021, have been hailed as a progressive change in recognizing the expanding scale of companies in India. The newly updated norms will prove significantly beneficial in allowing companies with substantial market capitalizations to successfully conduct IPOs and fulfill MPO requirements without the burden of making a huge offer for newly listed companies.

Revision in delisting norms for public M&A in India

On June 10, 2021, SEBI introduced the SEBI (Delisting of Equity Shares) Regulations, 2021 to turn the process more investor friendly as well as safeguard shareholders' interest. The delisting regulations paves the way for a streamlined, timebound and transparent process, while addressing certain lacunae in the erstwhile regulations. The proposed regulatory framework is expected to make M&A transactions for listed companies more rational.

Key changes proposed

- **Disclosure by the acquirer:** Acquirer will be required to disclose an intention to delist the company by making an initial public announcement.
- **Eligibility for delisting:**
  - The company should have been listed for 3 years
  - No outstanding securities that are convertible into equity shares required to be delisted
  - The acquirer should not have sold shares of the company six months prior to making the initial public announcement
- **Floor price and indicative price:** The new norms specify that the indicative price must be higher than the floor price. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 have set a minimum price for delisting which is disclosed as the 'floor price'. Now, the acquirer has the option to disclose an 'indicative price' (higher than floor price) which can also be increased until the bidding commences.
- **Reverse book-building process and determination of discovered price:** Discovered price is the price at which shares accepted through eligible bids takes the shareholding of the acquirer to at least 90% of the company's share capital. Delisting fails if the 90% threshold is not met.
- **Financial arrangements for a delisting offer:** Prior to commencing the delisting offer process, the acquirer must ensure that their financial arrangements will be able to fulfil the payment obligations. It is mandatory for the acquirer to set up an escrow account and deposit the total consideration amount in phased manner.

- **Exit Period for residual shareholders:** After a successful delisting, for one year (exit period) the acquirer is obliged to acquire shares voluntarily tendered by the residual shareholders at the final delisting price.
- **Delisting under the following special provisions:**
  - Delisting of shares on Innovators Growth Platform
  - A subsidiary company getting delisted through scheme of arrangement wherein the listed holding entity and the subsidiary company are in the same line of business
  - Delisting by operation of law

The fresh norms emphasize on incremental improvements by plugging the gaps in the erstwhile regulations. The hassle-free framework is a stimulant for taking privates and therefore public M&A in India. The enhanced disclosures will instill confidence among the shareholders and ease the earlier complex procedure of voluntary delisting.

Reforms with checks and balances in valuation reports and fairness opinions could achieve an outcome for potential investors as well as public shareholders and timebound procedure will also help the companies to take an exit from the stock exchanges and explore their business opportunities by going private.

Companies to separate the roles of Chairperson and Managing Director

Securities and Exchange Board of India (**SEBI**) has asked Indian companies to work towards separating the roles of chairperson and managing director (**MD**). The deadline is a year away, but the market regulator is hinting that it will no longer extend it. Listed entities were initially required to separate the roles of chairperson and MD/CEO from April 01, 2020 onwards. However, based on industry representations, an additional time period of two years was allowed for compliance. The regulation will now be applicable to the top 500 listed entities by market capitalization, with effect from April 01, 2022. As at the end of December 2020, only 53 % of the top 500 listed entities had complied with this provision. He said the rule is not to weaken the position of promoters but to improve corporate governance.

Tightened norms on Independent Directors

On June 29, 2021, Securities Exchange Board of India (**SEBI**) made several crucial decisions regarding independent directors on boards of listed companies.

An independent director being a non-executive director aids the company in revamping the governance standards and corporate credibility. The concept of independent directors was added in The Companies Act, 2013 (**Act**) after the need was felt of having an autonomous voice to speak on behalf of minority shareholders. Section 149 of the Act (to be read along with Rule 4 and Rule 5 of the Companies (Appointment and Qualification of Directors) Rules, 2014), showcases the provisions for appointment of directors, including the code of conduct to be adhered by them. The provision of the Act mandates the requirement of one- third of the total directors to be independent in all the listed public companies.

A consultation paper (Consultation Paper on Review of Regulatory Provisions related to Independent Directors) was released by SEBI on March 1, 2021 to review the provisions with respect to the independent directors. Considering the same, major amendments have been done in the rules governing the appointment, removal, re-appointment, resignation of the independent directors.

Key amendment announced by SEBI

- **Appointment of directors:** Applicable for all entities, a special resolution with 75% of votes in support must be passed for the appointment, reappointment, and removal of the independent directors. Furthermore, instead of the existing requirement of a majority, there will be a Nomination Committee and a Remuneration Committee having 2/3rd independent directors. The selection of the candidate as an independent director will be done by this committee only, which shall also disclose the skillset of the candidate, thereby justifying the selection.
- **Cooling-off period:** Key managerial personnel and their relatives or the promoter group's employees will have to necessarily undergo a three-year cooling off period before getting appointed as an independent director. Similarly, an independent director transitioning into a full-time director in the same company/subsidiary/any company that belongs to the promoter group, will have to observe a cooling period of one year.
- **Resignation of independent directors:** If an independent director resigns from the board, the company must disclose the complete resignation letter, including a list of his/her present membership and directorship in the board committees.

- **Audit Committee:** The Audit Committee should have 2/3rd members as independent directors. It is further stipulated that approval regarding every related party transaction must be given by the independent directors on the Audit Committee.

Independent directors play a crucial role in taking an unambiguous and independent stand to check and balance the minority shareholders and thereby reduce the exposure of unwanted risks. The regulator has defined the role and responsibilities of an independent director quite elaborately, including the requirement that the person, apart from receiving director's remuneration should not have any pecuniary or financial relations of any kind with the company for two preceding financial years. The changes, which will be applicable from January 1, 2022 will certainly boost the independence of independent directors and ensure transparency on a more holistic level. The changes shall.

SEBI amends Scheme of Arrangement by listed entities

Formerly, all listed companies intending to participate in any type of Scheme of Arrangement had to first obtain the approval of the relevant stock exchange(s). This situation changed in 2013, when SEBI mandated that all listed companies were to obtain a No Objection Certificate (**NOC**) from SEBI.

Pursuant to this, the SEBI in 2020 issued its Master Circular on filing of Schemes of Arrangement by listed entities, which is a compilation of operational circulars issued by SEBI dealing with the Schemes of Arrangement (**Scheme**) by listed entities. SEBI vide its circulars dated November 16, 2021 and November 28, 2021 (collectively **Circulars**) amended certain provisions of the 2020 Master Circular. In addition to the Master Circular, the stock exchanges also released a Standard Operating Procedure (**SOP**) for listed companies to follow when they are requesting the NOC.

Key aspects

- **Valuation report:** Listed entity participating in the Scheme shall be required to give an undertaking to the stock exchanges stating that no material event impacting the valuation has occurred during the intervening period of filing the scheme documents with stock exchange and period under consideration for valuation.
- **Declaration of past defaults:** Listed entities to submit a declaration stating all past defaults (if any) with respect to their listed debt obligations. Additionally, if there have been no previous defaults, then the listed entities shall be required to submit an undertaking/declaration to its effect.
- **Obtain NOC:** The listed entity implementing a Scheme shall be required to submit an NOC from its lending scheduled commercial banks/financial institutions/debenture trustees in addition to filing an application under Regulation 37 of the Listing Regulations.
- **Fractional entitlements:** Several provisions in relation to fractional entitlements have been inserted, which are as follows:
  - The fractional entitlements (if any) shall be aggregated and held by the trust, nominated by the Board in that behalf, who shall subsequently sell such shares in the market, within a period of 90 days from the date of allotment of shares, in accordance with the draft Scheme submitted to SEBI.
  - Submission of 2 reports by the listed company –from Audit Committee and Independent Directors – certifying that the listed entity has compensated the eligible shareholders. Both the reports need to be submitted within 7 days of compensating the shareholders.
- **Punitive action:** In case the listed entity makes any misstatement or furnishes false information with regard to the information related to fractional entitlements, such listed entity shall be held liable for punitive action as per the provisions of applicable laws and regulations.

These amendments have clarified several queries pertaining to requisite declarations, NOCs, procedures, and timelines for filing the Scheme of Arrangement, by a listed entity. Moreover, the timelines set by SEBI for submitting of approvals and documents are short and strict, thereby leading a path of speedier approvals and confirmations to such Schemes.

- **Disclosure requirements**
  - Prior to the amendment and the circular, the disclosure requirements were restricted to that of RPTs on a consolidated basis, within 30 days from the date of publication of the financial results of half year. However, after the amendment, the enhanced disclosure of information related to RPTs for all listed entities must be placed before the audit committee, provided in the notice to the shareholders for material RPTs and should also be provided to the stock exchanges every 6 months in the format specified by the Board, within 15 days from the date of publication of financials, simultaneously with the financials w.e.f. April, 2023.

Conclusion

It is noteworthy to mention that the ambit of RPTs has not only included transactions which have a direct nexus with a RP but also those transactions which would indirectly benefit the RP. While the widening of the definition of RP and RPTs and enhanced disclosure requirements attempt to plug in gaps within the regulatory net around RPTs, the is also likely to encounter and bring in cumbersome secretarial and disclosure requirements including the need for consistent exchange of information between subsidiaries and holding entity. Given the shareholding of listed entities is not static, ensuring the above will pose its own set of implementational challenges. Further, the codification of materiality in RPT policy will limit the discretion of the audit committees considering any transaction as an RPT.

SEBI proposes tightening listing rules amid IPO frenzy

SEBI proposed to tighten rules on how companies can spend cash raised through IPO. The market regulator has sought public comments on the proposal till November 30, 2021. The suggestion comes amid a slew of new-age technology companies that are filing draft papers to raise funds through initial share sales.

Changes proposed by SEBI

- As much as 35% of the IPO issue can be used for inorganic growth initiatives and general corporate purpose.
- Technology companies often need to raise funds for expanding into new markets, acquiring customers or other firms, objectives that are often broadly lumped under the category of 'Funding of Inorganic Growth' that create uncertainty for investor.
- For IPO of firms with no identifiable promoters, a share sale by significant shareholders will be capped at 50% of their pre-issue holding. Any investor holding more than 20% will be deemed a 'significant shareholder.'
- Such shareholders will face a lock-in period of six months after the share sale. This may include venture capital funds, alternate investment funds.
- At least 50% of the anchor investors should be those who are willing to stay invested for at least 90 days. This compares with 30 days currently.
- The regulator has proposed that the issue proceeds earmarked under should be brought under monitoring.
- The utilization of the GCP amount by the issuer company may need to be disclosed in the quarterly monitoring agency report. The regulator observed that companies are coming up with issues, which are very large in size. Thus, with a larger issue size, the GCP amount also becomes very substantial.
- The proposals from SEBI follow the RBI's decision last month to cap lending for investments in new listings at INR 1 crore per borrower, effective from April 01, 2022.

PROJECTS, ENERGY & INFRASTRUCTURE

- MNRE issues new direction w.r.t restoration of bank guarantees
- SECI plans 2,000 mwh capacity standalone energy storage project
- Major ports now have a new tariff setting authority
- Solitaire BTN Solar Pvt Ltd v. Tamil Nadu Electricity Regulatory Commission & Ors

MNRE issues new direction w.r.t restoration of bank guarantees

On December 16, 2021 Ministry of New and Renewable Energy (**MNRE**) issued an Order by virtue of which it has directed MNRE's renewable energy implementing agencies (**SECI/NTPC/NHPC**) to incorporate the following amount in all renewable energy tenders:

- Earnest Money Deposit - 2% of the estimated project cost
- Performance Bank Guarantee - 4% of estimated project cost (in case of site Specified by the procurer) and 5% of estimated project cost (in case of site selected by the generator)

SECI plans 2,000 mwh capacity standalone energy storage project

The Solar Energy Corporation of India (**SECI**) is planning a 2,000 MWh standalone energy storage system which will be executed by the private sector. The state-owned solar energy focused corporation said the projects will be set up on a build-own-operate (**BOO**) basis with a 25-year agreement. The detailed tender will be floated by August end. SECI has issued a notice for request for selection and will enter into an agreement with the successful bidders for 25 years as per the terms, conditions, and provisions.

Major ports now have a new tariff setting authority

On April 17, 2020, The Tariff Authority for Major Ports (**TAMP**) will no longer be in charge of setting tariffs at the 12 major ports under Central government control. The Major Ports Authority Bill, 2020 established the Board of Port Authority, which will now set tariffs that will be used as a guide during the bidding process for public-private-partnership (**PPP**) projects.

According to the Ministry of Shipping's annual report for 2020-21, PPP operators are free to set tariffs based on market conditions. TAMP's Reference Tariff Guidelines were extended until 8th March 2021, or until further orders, whichever comes first. According to the ministry's annual report, it's now official that TAMP is no longer in effect.

With the addition of multiple facilities, both private and public, the landscape of ports and port terminals has changed dramatically over time, providing users with options that aren't always based on tariffs. This reduced TAMP's importance in an indirect way. The ministry could, however, initiate a consultative process.

Solitaire BTN Solar Pvt Ltd v. Tamil Nadu Electricity Regulatory Commission & Ors

APTEL's Judgement dated July 05, 2021 in Appeal No. 67 of 2021

HSA Advocates partners Hemant Sahai and Nitish Gupta, along with Associate Partner Molshree Bhatnagar represented Solitaire BTN in this matter.

Background facts

- Solitaire BTN Solar Pvt Ltd (Solitaire BTN) filed an appeal before the Appellate Tribunal for Electricity (**Tribunal**) against the Order dated November 24, 2020, passed by the Tamil Nadu Electricity Regulatory Commission in DRP No. 05 of 2020 (**TNERC Order**).
- TNERC by way of the TNERC Order rejected the claims of Solitaire BTN to seek extension of the Scheduled Commercial Operation Date (**SCOD**) as defined under the Power Purchase Agreement dated September 27, 2017 (**PPA**), executed between Solitaire BTN and Tamil Nadu Generation & Distribution Co Ltd (**TANGEDCO**), for supply of power from its 100 MW Solar PV Power Plant at village Ganguvarpatty, Periyakulum Taluk, District Theni – Tamil Nadu (**Project**).
- The delay in achieving commissioning of the Project was a direct consequence of the delay by TANGEDCO and the Tamil Nadu Transmission Corporation (**TANTRANSCO**), in providing an adequate transmission system to Solitaire BTN for evacuation of power.

Issues at hand

- Did TANTRANSCO grant conditional connectivity approval to the Appellant to interface its Project at Batlagundu S/S at 110 kV level?
- Have the Respondents completed the works, identified in the letter dated January 06, 2018 giving the conditional approval, to provide transmission system to facilitate evacuation of the entire 100 MW of power from the projects of the Appellant?
- Whether the Appellant can be granted extension of time for commissioning of its solar plant invoking the provisions of Force Majeure under PPA?

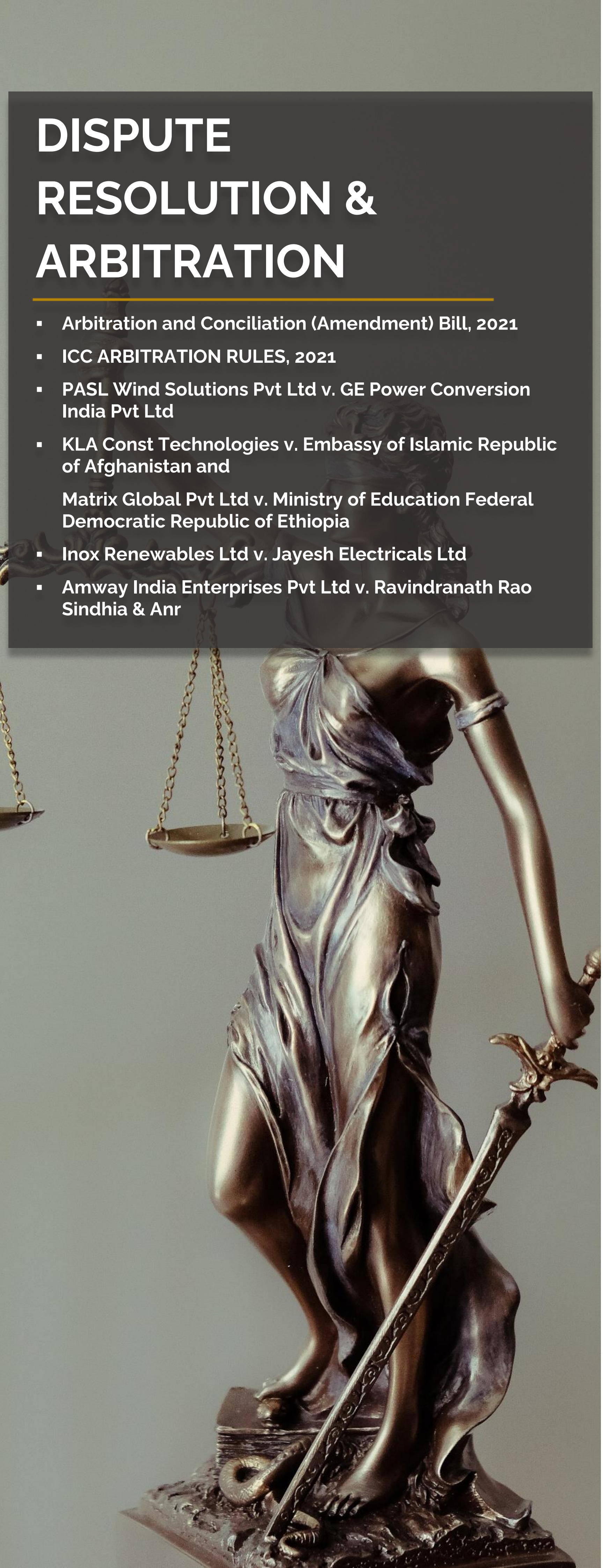
Decision of the Tribunal

- **Re: Grant of conditional connectivity approval to interface the Project at Batlagundu S/S at 110 kV level**
  - The Tribunal observed that due to the difficulty faced in acquiring the land at Kariapatti Taluk, Solitaire BTN applied for a change of project location to Ganguvarpatty Taluk and also requested TANGEDCO to undertake a load flow study for the said location to connect it to the existing 110 kV Batlagundu Substation. Further, TANGEDCO vide its letter dated January 06, 2018, informed Solitaire BTN that as per the load flow studies conducted, the Project can be interfaced at the existing 110 kV Batlagundu Substation only after completion of the 4-pre-connectivity works listed in the said letter (**Conditional Evacuation Approval**).
  - The Tribunal held that TANGEDCO granted conditional connectivity approval to Solitaire BTN as the said approval was contingent on successful completion of the 4 pre-connectivity works identified in the said approval.
- **Re: Completion of pre-connectivity works to provide transmission system to facilitate evacuation of the entire Project**
  - It was noted that in terms of the conditional evacuation approval, Solitaire BTN can only evacuate the entire capacity of its Project after completion of pre-connectivity works. The existing Wolf Conductor installed at 110 kV Theni-Sembatti I & II is 60 years old and evacuation of power from the existing 110 kV Batlagundu Substation can only be at a maximum limit of 60 MW. Since the pre-connectivity work i.e., conversion of 110 kV Theni-Sembatti Feeder I and II by Wolf equivalent HTLS has not been undertaken by TANGEDCO, therefore, the existing evacuation infrastructure is incapable of evacuating the entire contracted capacity of 100 MW.
  - Further, the Tribunal also observed that the TANGEDCO failed to complete all the works identified in the conditional evacuation approval and its obligation under RfS, LoI, PPA and the Electricity Act, 2003, to provide an adequate transmission system to Solitaire BTN to evacuate the entire output of the Project.
- **Re: Grant of extension of SCOD on account of Force Majeure**
  - The Tribunal observed that in terms of Rfs, LoI, PPA and Electricity Act, 2003, the delay caused in the implementation of the Project due to unavailability of the transmission system is for reasons beyond the control of Solitaire BTN. Therefore, Solitaire BTN has been given the following extensions: (i) ten months on account of Force Majeure event of unavailability of transmission system; and (ii) five months on account of Force Majeure event of lockdown due to corona pandemic.

- Further, the SCOD of the Project has been extended from September 27, 2019 to December 27, 2020, without the encashment of Performance Bank Guarantee and payment of Liquidated Damages. Accordingly, the Tribunal has directed the TANGEDCO to return the Performance Bank Guarantee of INR 20 crore and Additional Performance Bank Guarantee of INR 7.6 crore to the Appellant without any delay along with the cost of renewing such Bank Guarantee.
- It has further directed TANGEDCO to pay full tariff of INR 3.47/unit for the balance 50 MW w.e.f. February 08, 2021, i.e., the date on which this capacity was synchronized with the grid and TANGEDCO to pay the differential tariff withheld along with carrying cost.

Our viewpoint

This judgement is in line with various precedents that have reiterated that the delay in receiving various approvals/clearances by the Government and its instrumentalities which are beyond the control of the Generating Companies should be treated as an event of Force Majeure. The decision of the Tribunal is positive in so far as extension of SCOD on account of delay in availability/construction of evacuation infrastructure by State instrumentality is concerned.



DISPUTE RESOLUTION & ARBITRATION

- Arbitration and Conciliation (Amendment) Bill, 2021
- ICC ARBITRATION RULES, 2021
- PASL Wind Solutions Pvt Ltd v. GE Power Conversion India Pvt Ltd
- KLA Const Technologies v. Embassy of Islamic Republic of Afghanistan and

  Matrix Global Pvt Ltd v. Ministry of Education Federal Democratic Republic of Ethiopia
- Inox Renewables Ltd v. Jayesh Electricals Ltd
- Amway India Enterprises Pvt Ltd v. Ravindranath Rao Sindhia & Anr

Arbitration and Conciliation (Amendment) Bill, 2021

The Arbitration and Conciliation (Amendment) Bill, 2021 (**Bill**) was introduced in Lok Sabha on February 04, 2021. The Bill sought to amend the Arbitration and Conciliation Act, 1996 (**Act**) with a view to achieve the following:

- To grant unconditional stay of enforcement of arbitral awards, where the underlying arbitration agreement, contracts or arbitral award is induced by fraud or corruption.
- To omit the Eighth Schedule of the Act which laid down the qualifications, experience, and norms for accreditation of arbitrators.
- To specify by regulations, the qualifications, experience, and norms for accreditation of arbitrators.

The Bill replaces an ordinance with same provisions passed on November 04, 2020.

Automatic stay on awards

The Act allowed a party to file an application, under Section 34 of the Act, to set aside an arbitral award. The Courts, generally, interpreted this provision to mean that an automatic stay was granted on an arbitral award under challenge, the moment an application for setting aside such arbitral award was made before a court.

However, in 2015, the Act was amended to state that an arbitral award would not be automatically stayed merely because an application is made to a court to set aside the arbitral award.

The Bill, introduced and passed in the Parliament, has specified that a stay may be granted on an arbitral award during the pendency of the setting aside application against the arbitral award, if the Court is satisfied of the following:

- The arbitration agreement was induced or effected by fraud or corruption; or
- The making of the award was induced or effected by fraud or corruption.

The Bill also specifies that the amendment will be effective retrospectively, i.e., from October 23, 2015.

Qualifications of arbitrators

Section 47 of the Act will be replaced by Section 43(J), which provides that certain qualifications, experience, and accreditation norms for arbitrators will be specified by the Regulations as decided by Arbitration Council of India

As a consequence, the Bill has omitted the Eighth Schedule of the Act. It has been stated in the Bill that the qualifications, experience, and norms for accreditation of arbitrators will be specified through regulations.

Our view

The purpose of the Arbitration and Conciliation (Amendment) Act, 2015 (**2015 Amendment**) wherein the automatic stay on arbitral award was done away with was to prevent parties from misusing the provisions of the Act under Section 34 as stall tactics to comply with the arbitral award.

However, with the re-introduction of the unconditional automatic stay on arbitral award albeit in cases of fraud and corruption seems to defeat the purpose the 2015 Amendment was seeking to achieve. Such that the establishing that the award/arbitration agreement was induced by fraud or corruption cannot be summarily decided. This amendment may lead to excessive litigation by parties to stall the execution of the award and end up defeating the purpose of quick resolution via arbitration. Further, the retrospective application of the Bill may open floodgates of litigation.

ICC ARBITRATION RULES, 2021

The Revised Rules of Arbitration (**2021 Rules**), which were proposed in December 2020 by the International Chamber of Commerce (**ICC**), prospectively come into force on January 1, 2021. The ICC Arbitration Rules 2017 (**2017 Rules**) will continue to apply to cases registered prior to January 1, 2021. The ICC Court President Alexis Mourre highlighted that the amendments in the 2021 ICC Rules are a step towards greater efficiency, flexibility, and transparency in ICC arbitrations. The following are the prominent revisions that will be incorporated vide the 2021 ICC Rules:

- **Article 1 – Reporting to the Court**

  The 2021 Rules mandate strict reporting of the decisions of the following authorities in the next session of ICC Court (unlike the 2017 Rules which provided a liberal approach of reporting in any of the future sessions):
  - President of the ICC Court
  - Committee appointed by the Court
  - Secretary General with respect to the impartiality of the Arbitrator
- **Article 5 – Time to respond to the request of Arbitration**

  A party is now given one day more to respond to the request of Arbitration, since the words 'within 30 days from the receipt' have been replaced by 'within 30 days from the following day of the receipt of the request'.
- **Article 7(5) ¬– Joinder of parties' post-constitution of Arbitral Tribunal**

  This article empowers an Arbitral Tribunal to decide on any request made by a party for adding further parties to the arbitration, subject to additional party(s) consent to the constitution of the Tribunal. The discretion would be in the hands of the Arbitral Tribunal, which will have to consider various factors as mentioned in the said provision, including ruling on its jurisdiction over the proposed additional party, timing of the request made, possible conflict of interests and the impact on the arbitration proceedings, if any.
- **Article 10 – Consolidation of arbitration proceedings**

  Article 10(b) has been amended and now provides much needed clarity with respect to consolidation being allowed in the following cases:
  - Where all parties agree to consolidation
  - Where all claims are made under the same arbitration agreement or agreements between different parties
  - Claims involving different parties which may not be under same arbitration agreement, provided that the dispute arises in connection with the same legal relationship and the arbitration agreements are compatible

Thus, the 2021 Rules now clarify that claims that are made under same arbitration agreement(s) can now be consolidated into a single arbitration proceeding.

PASL Wind Solutions Pvt Ltd v. GE Power Conversion India Pvt Ltd

Civil Appeal No. 1647 of 2021 (Arising out of SLP (C) No.3936 of 2021)

The Supreme Court's decision in this matter is laudable as it settles the debate on empowering two Indian parties to freely choose a foreign seat of arbitration. This landmark judgement has in essence strengthened the legal position by reinforcing the principle of party autonomy. SC's judgement also clearly outlines the applicability of Section 2(2) of the Act to Section 9 application so that the parties are not rendered remediless.

Background facts

- The Appellant had issued three Purchase Orders (**PO**) to the Respondent for supply of six converters used in wind turbines. Owing to disputes regarding the expiry of the warranty of the said converters, the parties entered into a Settlement Agreement containing a dispute resolution clause (**Clause 6**). Arbitration clause specified that the disputes between them shall be resolved by arbitration in

Zurich in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (**ICC**). Disputes arose between the parties pursuant to the settlement agreement, whereby the Appellant issued a request for arbitration to ICC.

- In the arbitration proceedings, the Respondent filed a preliminary application objecting on the ground that as both the parties are Indians, the choice of foreign seat is invalid. The Appellant opposed the said application and asserted that there was no bar in law. The Respondent's objection was dismissed by the Arbitrator and this decision was accepted by both the parties. The Arbitrator decided that the venue will be Mumbai although the seat is in Zurich and consequently, an Award was advanced in favor of the Respondent.
- The Respondent then commenced enforcement proceedings under Sections 47 and 49 of Arbitration and Conciliation Act, 1996 (**Act**) before Gujarat High Court (**HC**) seeking enforcement of the Award as a foreign award in India and interim relief under Section 9 of the Act. At this stage, the Appellant blew hot and cold by arguing that choice of foreign seat by Indian parties is baseless. However, HC confirmed that two Indian parties can choose a foreign seat of arbitration although they cannot avail interim relief in Indian Courts.

Issues at hand?

- Whether two companies incorporated in India can choose a forum for arbitration outside India?
- Whether an Award made at such forum outside India, to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) applies, can be said to be a 'foreign award' under Part II of the Act and be enforceable as such?

Decision of the Court

- SC referred to *Mankastu Impex (P) Ltd. v. Airvisual Ltd*[1] and confirmed that Zurich was the judicial seat mutually agreed by the parties as explicitly set out in Settlement Agreement. SC dismissed challenge of the Appellant that by applying closest connection test, seat of arbitration will be Mumbai and reasoned that test will be applied only if it is ambiguous that a seat has been chosen either by parties or by tribunal.
- SC solidified the statement of law laid down in *Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc (**BALCO**)*[2] that Part I and Part II of the Act are fundamentally distinct. Using this as frame of reference, SC held the argument of the Appellant on Section 2(2) of the Act bridging the gap between the two parts of the Act, to be ill-conceived.
- SC juxtaposed Section 2(1)(f) defining 'International Commercial Arbitration' under the provisions of Part I with Section 44 dealing with 'International Commercial Arbitration" under Part II of the Arbitration Act and clarified that the former essentially revolves around one of the parties to the arbitration agreement who must be a foreign national or habitually resident outside India while the latter focuses exclusively on place/seat of Arbitration outside India. After careful perusal of Section 44 of the Act which incorporates the elements necessary for an award to be identified as a foreign award, SC advanced that the facts of this case fall within the blanket of this section.
- SC placed reliance on *Atlas Export Industries v. Kotak & Co **(Atlas Export)***[3] and held that a foreign award cannot be tossed out merely because it was made between two Indian parties, under pari materia provisions of the Foreign Awards Act.
- To answer the contentions raised by the Appellant with respect to Sections 23 and 28 of the Indian Contract Act, SC enunciated the principles furnished in Atlas Export, that when a dispute arises where both the parties are Indian, and if the contract has the effect of compelling them to resort to arbitration by foreign arbitrators and thereby impliedly excluding the remedy available to them under the ordinary law of India, the same is not opposed to public policy.
- Furthermore, SC upheld that two Indian parties can choose a foreign seat outside India for the purpose of resolving their disputes. SC also strongly emphasized that its observations in *TDM Infrastructure (P) Ltd v. UE Development India (P) Ltd **(TDM)***[4] were only for purpose of determining jurisdiction of the Court as envisaged under Section 11 of the 1996 Act and thus, cannot be relied on while deciding whether Part I or Part II of the Act will prevail.
- SC confirmed that an arbitration resulting in foreign awards will be enforceable only in a High Court under Section 10(1) of the Commercial Courts Act, and not in a district court under Section 10(2) or Section 10(3). SC immaculately applied Section 2(2) of the Act to grant the interim relief under Section 9 application in case of foreign award. Therefore, SC endorsed the judgement of HC except for its perspective on the unsustainability of Section 9 application. In the light of the above, the SC answered the issues in affirmative.

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[1] ARBITRATION PETITION NO. 32 OF 2018
[2] CIVIL APPEAL NO.7019 OF 2005
[3] (1999) 7 SCC 61
[4] ARBITRATION APPLICATION NO. 2 OF 2008

KLA Const Technologies v. Embassy of Islamic Republic of Afghanistan and Matrix Global Pvt Ltd v. Ministry of Education Federal Democratic Republic of Ethiopia

OMP(ENF)(COMM)82/2019 & OMP(EFA)(COMM)11/2016

The judgement of HC that the **Foreign State cannot claim sovereign immunity against the implementation of arbitral award arising out of commercial transaction** is a binding precedent and tremendously strengthens the roots of International Commercial Arbitration by clarifying an important position in law. By holding that prior consent of the Central Government under Section 86(3) of the CPC is not necessary, HC has placed an implied waiver thereon. This is a welcome move considering this will cut through the lengthy red-tape process and speed up the execution process of an arbitral award.

Background facts

- In this instance, the Court was simultaneously concerned with two petitions by way of which enforcement of arbitral awards against Foreign States was sought in India and thus, identical issues were to be answered.
- In the first petition, Embassy of Islamic Republic of Afghanistan (**Respondent**) awarded a contract to KLA Const Technologies (Petitioner) for rehabilitation of Afghanistan Embassy at New Delhi, on February 11, 2008. The contract contained an arbitration clause which was thereafter invoked by the Petitioner on February 10, 2012, at the time when disputes arose between the parties during the execution of work.
- Thereafter, the Petitioner filed a Petition under Section 11 of the Arbitration and Conciliation Act, 1996 (**Act**) before the SC in which the SC appointed a sole arbitrator on January 05, 2015 to adjudicate the disputes between the parties. The Respondent participated in the arbitration proceedings till July 24, 2017.
- However, thereafter, the Respondent failed to appear in the matter and the learned arbitrator proceeded to pass an ex-parte award dated November 26, 2018 (**Award**) wherein the claims of the Petitioner were partially allowed. The Respondent did not challenge the Award which attained finality, but neither did it make any payment to the Petitioner in terms of the Award. Accordingly, by way of the present Petition filed before the Delhi High Court (**HC**), the Petitioner sought enforcement of the Award.
- In the second petition, on June 25, 2012, Matrix Global Pvt Ltd (**Petitioner**) was contracted to supply and distribute books at a fixed rate to Ministry of Education of Ethiopia (**Respondent**). The Respondent not only failed to clear the legitimate balance dues of the Petitioner but also cancelled the Contract by a letter dated April 24, 2014. Accordingly, the Petitioner initiated arbitration proceedings to recover the balance amount against the respondent and a sole arbitrator was appointed under UNCITRAL Arbitration Rules on December 04, 2014.
- The Respondent chose not to participate in the arbitration proceedings and, accordingly, the learned arbitrator passed an *ex-parte* award (**Award**) on October 25, 2015. The Respondent did not challenge the award dated October 25, 2015 and thus, the same attained finality. Accordingly, by way of the present Petition filed before HC, the Petitioner sought enforcement of the Award.

Issues at hand?

- Whether the prior consent of Central Government is necessary under Section 86(3) of the Code of Civil Procedure (**CPC**) to enforce an arbitral award against a Foreign State?
- Whether a Foreign State can claim Sovereign Immunity against enforcement of arbitral award arising out of a commercial transaction?

Decision of the Court

- At the outset, the HC kept the principles laid down in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Ltd*[5] as a frame of reference to outline that an arbitral award passed in an international commercial arbitration held in India, would be inferred as a 'Domestic Award' under the Act and would be enforceable under Section 36 thereunder.
- The HC placed its reliance on decisions in the matter of *Nawab Usman Ali Khan v. Sagarmal*[6], *Uttam Singh Duggal & Co Pvt Ltd v. United States of America, Agency of International Development*[7],

[5] CIVIL APPEAL NO.7019 OF 2005
[6] 1965 AIR 1798
[7] 22 (1982) DLT 25

Ethiopian Airlines v. Ganesh Narain Saboo[8] to demonstrate that the normative core of the enactment of the Arbitration and Conciliation Act is the exclusion of the strict rigors of the CPC, except for certain limited instances.

- HC stated that the applicability of the provisions of Section 86(3) of the CPC in relation to an arbitral award would violate the three main principles of the Act - speedy, inexpensive, and fair trial by an impartial tribunal; party autonomy; and minimum Court intervention. Further, the HC also remarked that the Respondents who voluntarily entered into a commercial contract containing an arbitration agreement with the petitioners, are not entitled to claim Sovereign Immunity to defeat the legitimate claims of the petitioners and placed its reliance on the following decisions, in support thereof: *Rahimtoola v. Nizam of Hyderabad*[9], *Trendtex Trading Corporation v. Central Bank of Nigeria*[10] & *Birch Shipping Corp v. The Embassy of the United Republic of Tanzania*[11].
- Furthermore, HC clarified that the commercial contract involving arbitration agreement between a party and the Foreign State is an implied waiver by the Foreign State and, thus, clasps its hands from hoisting a shield against an enforcement action centered on the principle of Sovereign Immunity.
- HC highlighted that the purpose and nature of the transaction of the Foreign State plays a fundamental role in determining whether the transaction, and the contract influencing the same, clearly represent commercial activity or whether the same is an instance of an operation of Sovereign Authority. The Court also stated that arbitration being a consensual and binding mechanism of dispute settlement, it cannot be contended by a Foreign State that its consent must be sought once again at the stage of enforcement of an arbitral award against it, while ignoring the fact that the arbitral award is the culmination of the very process of arbitration which the Foreign State has admittedly consented to. The Court opined that allowing the Foreign States to impede the fulfilment of arbitral awards based on its foundation of being a Foreign State, will profoundly jeopardize the International Commercial Arbitration.
- Therefore, HC answered the issues in negative and concluded that both the petitions for enforcement of the arbitral awards are maintainable.

Inox Renewables Ltd v. Jayesh Electricals Ltd

CIVIL APPEAL NO. 1556 OF 2021 (Arising out of SLP (C) No.29161 of 2019)

The SC's judgement that the **parties may change the seat of arbitration without any written arrangement by mutual consent which is recorded by the Arbitrator in his award**, allows the parties to change the venue flexibly and instantly as per their convenience. The flexibility in conducting arbitral proceedings is exactly what makes it more preferential/attractive than typical court proceedings. However, it is this very flexibility that makes it binding on both the parties.

Background facts

- A Purchase Order (**PO**) dated January 28, 2012 was entered into between Gujarat Fluorochemicals Ltd (**GFL**) and Jayesh Electricals Ltd (**Respondent**) for the manufacture and supply of power transformers at wind farms. Clause 8.5 of the PO states that all disputes arising out of the PO would be referred to arbitration by a three-member tribunal. Further, it was stated that the venue of the arbitration would be Jaipur and the exclusive jurisdiction would lie with the courts in Rajasthan.
- By way of a Business Transfer Agreement (**Agreement**), a slump sale of the entire business of GFL took place in favor of Inox Renewables Ltd (**Appellant**). It is pertinent to note that the Respondent was not a party to the aforesaid Agreement. Clauses 9.11 and 9.12 of the Agreement designated Vadodara as the seat of the arbitration between the parties, vesting the courts at Vadodara with exclusive jurisdiction qua disputes arising out of the Agreement.
- Thereafter, disputes arose between the parties and the Respondent filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 (**Act**) before the High Court of Gujarat (**HC**) who passed an Order appointing Justice CK Buch (Retd.) to act as the Sole Arbitrator to resolve all disputes arising between the parties out of the PO.
- Subsequently, on July 28, 2018, the Arbitrator passed an award in favor of the Respondent, awarding a sum of INR 38,97,150 plus INR 31,32,650 as the interest on the awarded amount from March 10, 2017 till the date of the Award as well as INR 2,81,000 as quantified costs. Future interest was also awarded at 15% from the date of Award till the date of payment. Dissatisfied by the Award, the Appellant challenged the same by instituting a Petition under Section 34 of the Act in the Commercial Court at Ahmedabad. Vide an Order dated April 25, 2019, the Court disposed of the

[8] CIVIL APPEAL No. 7037 of 2004
[9] 1957 3 All E.R 441
[10] [1977] 1 QB 529
[11] 507 F. Supp. 311 (1980)

same, thereby accepting the case of the Respondent by referring to Clauses 9.11 and 9.12 of the Agreement and stated that the courts at Vadodara alone would have exclusive jurisdiction.

- Aggrieved by the Order dated April 25, 2019, the Appellant filed a Special Civil Application before the HC. In its judgment dated October 9, 2019, the HC referred to Clause 8.5 contained in the PO and held that as the exclusive jurisdiction is presented to the courts at Rajasthan, the appropriate court would be the court at Jaipur. However, despite this finding, it found no error in the Commercial Court's decision dated April 25, 2019 and dismissed the Special Civil Application (Impugned Judgment)
- The Appellant filed an Appeal challenging the aforesaid Order of the HC before the Supreme Court (**SC**)

Issue at hand?

- Whether the change in venue/place in arbitration by mutual agreement would result in the said changed venue becoming the seat of arbitration?

Decision of the Court

- The Appellant relied upon the principles laid down by SC in *BSG SGS SOMA JV v. NHPC Ltd*[12] **(BGS SGS)** and stressed that the arbitrator had confirmed in the arbitral award that the venue/place of arbitration was shifted by mutual consent to Ahmedabad, because of which the place of arbitration or seat of arbitration became Ahmedabad, resulting in the courts at Ahmedabad having exclusive jurisdiction. The Respondent averred to this by stating that in the absence of a written agreement between the parties, the place of arbitration cannot be switched even by mutual agreement and leaned on *Videocon Industries Ltd v. Union of India & Anr*[13] (**Videocon**) and *Indus Mobile Distribution Pvt Ltd v. Datawind Innovations Pvt Ltd*[14] (**Indus Mobile**).
- Further, the Respondent strongly insisted that the Sole Arbitrator's finding that the venue was shifted by mutual consent from Jaipur to Ahmedabad had reference only to Section 20(3) of the Act and thus, the seat of the arbitration was always secured at Jaipur. The Respondent also stated that as per Clause 8.5, the jurisdiction of Courts in Rajasthan is independent of the venue being at Jaipur.
- At the outset, the SC perused Clause 12.3 of the Award which explicitly spells out that by mutual agreement, parties have specifically shifted the venue/place of arbitration from Jaipur to Ahmedabad. Thus, the SC held that the Respondent's submissions that this could only have been done by written agreement and that the Arbitrator's finding refers only to a convenient venue and not the seat of arbitration, does not hold much water.
- The SC carefully browsed through BGS SGS (supra) and concluded that since the seat is chosen as Ahmedabad in the instant case, it is equivalent to an exclusive jurisdiction clause, thereby conferring the courts at Ahmedabad with exclusive jurisdiction to deal with the arbitration. The SC also referred to the judgements relied on by the Respondent and held that the parties may commonly arrive at a seat of arbitration and may change the seat of arbitration by mutual consensus which is recorded by the Ld. Sole Arbitrator in his Award to which no challenge is made by either party.
- The SC dismissed the argument of the Respondent that the Sole Arbitrator's finding that the venue was shifted by mutual consent from Jaipur to Ahmedabad had reference only to Section 20(3) of the Act by advancing that the 'venue' being shifted from Jaipur to Ahmedabad is really a shifting of the venue/place of arbitration with reference to Section 20(1), and not with reference to Section 20(3) of the Act.
- With regards to the Respondent's argument that the courts at Rajasthan alone would have exclusive jurisdiction, the SC clarified that Clause 8.5 must be read as whole as the Courts in Rajasthan have been vested with jurisdiction only because the seat of arbitration was to be at Jaipur. Furthermore, once the seat of arbitration is substituted to be at Ahmedabad by mutual agreement, the Courts at Rajasthan are no longer vested with jurisdiction as exclusive jurisdiction is now vested in the Courts at Ahmedabad, given the change in the seat of arbitration.
- In light of the above, the SC set aside the Impugned Judgment and referred the parties to the courts at Ahmedabad for the adjudication of the Section 34 petition.

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[12] CIVIL APPEAL NO. 9307 OF 2019 (Arising out of SLP (CIVIL) No. 25618 of 2018)
[13] CIVIL APPEAL NO.4269 OF 2011 (Arising out of SLP(C) No.16371 of 2008)
[14] CIVIL APPEAL NOS. 5370-5371 OF 2017 (Arising out of SLP (CIVIL) No. 27311-27312 OF 2016)

ANALYSIS OF RESTRICTIVE COVENANTS WITHIN EMPLOYMENT AGREEMENTS

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Employment agreements, especially at senior management level, are becoming increasingly complex considering the ever-increasing need for protecting trade secrets and business know-how. Consequently, boards and senior management have been imposing restrictive covenants in employment agreements that restrict employees by using non-disclosure, non-compete, non-solicit, non-poaching and garden leave clauses.

Employment contracts contain either positive covenants (agreements to do something that restrict the employee) or direct restrictive covenants (agreements not to do something, which are meant to keep employees contractually bound even post-termination). Stakeholders remain divided on the enforceability and efficacy of restrictive covenants.

While interpreting section 27 of the Indian Contract Act, 1872, and article 19(1)(g) of the constitution, courts have strived to draw a fine balance between industry requirements and personal rights, in deciding the enforceability of restrictive covenants. For example, restraining an employee from future employment opportunities through a non-compete clause can be considered unenforceable under public policy. However, the argument for enforcing non-compete through non-solicit and non-disclosure of the know-how and trade secrets learned while using the resources of the employer is equally compelling.

In India's highly competitive job market, employers are selective when examining the knowledge and additional value an employee can bring, especially in IP-driven sectors. Therefore, is it possible to justify employment agreements prohibiting the employability of an employee for a defined period, or restricting the sector of employability, thus preventing use of proprietary knowledge and trade secrets? There is no straitjacket formula, though the Supreme Court has provided clarity to a large extent.

The court in *Niranjan Shankar Golikari v The Century Spinning and Manufacturing Co Ltd*[15] held that restrictive covenants are not in restraint of trade unless the terms of such restraints are unreasonable, unconscionable, excessively harsh, unreasonable, or one-sided. However, in Percept *D'Mark (India) Pvt Ltd v Zaheer Khan & Anr*[16], the court held that a restrictive covenant is not in restraint of trade during the term of employment, but it becomes unenforceable post-employment. In *Superintendence Company of India v Krishan Murgai*[17], the court held, '*a contract of this class [restraint of trade] is prima facie void, but it becomes binding upon proof that the restriction is justifiable in the circumstances as being reasonable from the point of view of the parties themselves*'.

The Delhi High Court in *Le Passage To India Tours & Travels Pvt Ltd v Deepak Bhatnagar*[18], in considering the validity of such restrictive clauses held, *'the court is required to give a construction to the covenant so as not to be greater than necessary to protect the employer nor be unduly harsh and oppressive on the employee.'*

Judicial precedents reflect that restrictive covenant must provide a safety net to employers to protect their businesses, while upholding employees' fundamental rights. Employers must follow certain equity-based principles in weighing the enforceability of restrictive covenants. First, non-compete clauses should be territorially limited or should be for a reasonable duration. Second, employees may be given monetary benefits during the restraint period. Third, mentioning liquidated damages in employment agreements could be a valuable deterrent preventing breach of restrictive covenants. Fourth, the employer must urge the employee to obtain independent legal advice regarding the implications of the employment agreement and its covenants and give the employee a list of competing businesses prior to their joining. Finally, but perhaps most importantly, the employer must not use a boilerplate, one-sided take-it-or-leave-it agreement for every class of employee.

While there is an inherent lacuna in the codified law, with a limited capacity for determining the validity and enforceability of such restrictive covenants, employers have been urging the increasing need to enforce restrictive covenants through ever more ingenious methods. A strong argument in favor has been the vital need to guard enterprise value through reasonable methods.

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[15] 1967 AIR 1098
[16] Appeal (CIVIL) 5573-5574 of 2004
[17] 1980 AIR 1717
[18] IA Nos. 15636/2013, 16770/2013 & 16817/2013 in CS(OS) 1881/2013

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CONTACT US

www.hsalegal.com

mail@hsalegal.com

HSA Advocates

PAN INDIA PRESENCE

New Delhi
Email: newdelhi@hsalegal.com

Mumbai
Email: mumbai@hsalegal.com

Bengaluru
Email: bengaluru@hsalegal.com

Kolkata
Email: kolkata@hsalegal.com