RRG & ASSOCIATES
LAW OFFICES

RRG ASSOCIATES (FIRM UPDATE)

IN THE MATTER OF PATEL HYDRO POWER PRIVATE LTD & ORS AT NCLAT DELHI, COMPANY APPEAL (AT) NO. 137 OF 2021: RRG ASSOCIATES WHILE REPRESENTING PATEL HYDRO GROUP WERE SUCCESSFUL IN GETTING THE STAY OF THE IMPUGNED ORDER PASSED BY THE HON'BLE NCLT, MUMBAI. ALSO, WE REPRESENTED THEM IN THEIR AMALGAMATION SCHEME BEFORE THE NCLAT.

The Tribunal observed that the rights and liabilities of Secured and Unsecured Creditors were not getting affected in any manner by way of the proposed scheme as no new shares are being issued by the 'Transferor Company' and no compromise is offered to any Secured and Unsecured Creditors of the 'Transferee Company'.

Therefore, we are of the considered view that when the 'Transferor and Transferee Company' involve a parent Company and a Wholly Owned Subsidiary the meeting of Equity Shareholders, Secured Creditors and Unsecured Creditors can be dispensed with as the facts of this case substantiate that the rights of the Equity Shareholders of the 'Transferee Company' are not being affected. Therefore, we hold that obtaining 90% consent Affidavits from its unsecured Creditors is not required keeping in view the facts of the attendant case.

IN THE MATTER OF KIRAN SHAH (RP FOR KSL & INDUSTRIES LTD.) VS. ENFORCEMENT DIRECTORATE, KOLKATA AT NCLAT DELHI, COMPANY APPEAL (AT) (INS) NO. 817 OF 2021: RRG ASSOCIATES

REPRESENTED KIRAN SHAH, RESOLUTION PROFESSIONAL

The Hon'ble NCLAT in the captioned matter overruled its own landmark judgment of ***ED vs. Manoj Kumar Aggarwal (2021 SCC OnLine NCLAT 121)*** and held that IBC will not have an overriding effect on the proceedings initiated by the ED under the PMLA by attaching the property of the Corporate Debtor as "proceeds of crime". We are of the view that if there were conflicting opinions of the same court on the same subject matter, the same should have been referred to a larger bench as per the settled position of law.

IN THE MATTER OF UNION BANK OF INDIA (ERSTWHILE ANDHRA BANK) VS. BHARAT ALUMINUM COMPANY LTD & ANR IN THE SUPREME COURT OF INDIA, CIVIL APPEAL NO. 4841 OF 2021: RRG ASSOCIATES WHILE REPRESNTING BALCO WERE SUCCESSFUL IN GETTING ORDER UPHELD PASSED BY HON'BLE NCLAT

The Supreme Court upheld the judgment passed by the Hon'ble National Company Law Appellate Tribunal, settling the law in favour of invocation of Financial Bank guarantee during the moratorium period under section 14 of the IBC. The RRG & Associate successfully represented BALCO before the Supreme Court of India.

IN THE MATTER OF BHARAT ALUMINUM CO. LTD. VS. M/S J.P. ENGINEERS PVT LTD & ANR. AT NCLAT, NEW DELHI, COMPANY APPEAL (AT)(INSOLVENCY) NO. 759 OF 2020: RRG ASSOCIATES WHILE REPRESNTING BALCO WERE SUCCESFUL IN GETTING ORDER IN FAVOUR

The Hon'ble National Company Law Appellate Tribunal (NCLAT), was pleased to pass an order in our favour, stating that Bank guarantee can be invoked even during the moratorium period issued under section 14 of the IBC in view of the amended provision under section 14 (3)(b) of the IBC.

COMPANY LAW

1. NOTICE/CIRCULARS

SEBI PROHIBITS INVESTMENT ADVISERS FROM ADVISING ON UNREGULATED ENTITIES

SEBI vide press release dated 21.10.2021 barred investment advisers from advising on unregulated entities including crypto currencies and digital gold, among others in any manner. The said action have been taken after SEBI took cognizance of the fact that some registered investment advisers were continuously engaged "unregulated activities" by offering a platform for buying, selling and dealing in unregulated products which according to SEBI amounts to violation of provisions of Section 12(1) of SEBI Act, 1992.

SEBI APPROVED CHANGES TO THE FRAMEWORK GOVERNING RELATED PARTY TRANSACTION ("RPTS")

SEBI vide SEBI (Listing Obligations and Disclosure Requirement) (Sixth Amendment) Regulations, 2021 made certain

changes inter alia widening the definition of related party to include all persons or entity belonging to the promoter (P) or promoter group (PG) will be regarded as related party, irrespective of its shareholding in the listed entity, any person or entity holding, directly or indirectly, 20% or more of the equity shareholding in the listed entity w.e.f April 01, 2022, etc. Moreover, various combinations of transactions are included within the ambit of RPTs. The intent behind expanding the definition of RPT is to govern circular transactions, camouflaged or masked transactions where the transaction with an unrelated party is merely a pretext or smoke screen. In those cases, the provisions mandate lifting the veil and seeing the reality. Other changes include approval of shareholders for material RPTs, review of RPT by the Audit Committee and enhanced disclosure requirements to AC for prior approval for RPTs.

MCA GRANTS RELAXATION IN PAYING ADDITIONAL FEES IN CASE OF DELAY IN FILING FORM 8 BY LIMITED LIABILITY PARTNERSHIPS ("LLP")

MCA vide General Circular dated 26.10.2021 granted relaxations in paying additional fees in case of delay in filing Form 8 (the Statement of Account and Solvency) by LLPs and allowed the LLPs to file Form 8 (the Statement of Account and Solvency) for the Financial Year 2020- 2021 without paying additional fees upto December 30, 2021.

SEBI ISSUES CIRCULAR ON PUBLICATION OF INVESTOR CHARTER AND DISCLOSURE OF INVESTOR COMPLAINTS BY STOCK BROKERS

The SEBI vide circular dated December 2, 2021 published an Investor Charter wherein Stock Brokers have to inter alia provide details regarding services provided, investor's rights as well as do's and don'ts of investing in the stock market and grievance redressal mechanism. The charter also provides for 3-level grievance redressal mechanism and timelines for complaint resolution process at Stock Exchanges against Stock Brokers in order to observe highest standard of compliances and transparency. The circular will come into effect from January 1, 2022.

SEBI NOTIFIES SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS (THIRD AMENDMENT) REGULATIONS, 2021

The SEBI vide notification dated December 6, 2021, released the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Third Amendment) Regulations, 2021. SEBI made the said regulations to further amend the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Among other things, the new regulations have inserted a new clause in regulation 2, in sub regulation (1), after clause (f) namely (fa) that states "Delisting Regulations means the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2021"

MINISTRY OF CORPORATE AFFAIRS ("MCA") ISSUES CLARIFICATION ON HOLDING OF ANNUAL GENERAL

MEETING (AGM) THROUGH VIDEO CONFERENCE (VC) OR OTHER AUDIO VISUAL MEANS (OAVM)-REG.

The MCA vide circular dated December 8, 2021, while referring to the General Circulars dated May 5, 2020 and January 13, 2021, has allowed companies to conduct their AGMs on or before June 30, 2022 with requirements laid down in the General Circular dated May 5, 2020. The MCA also clarified that this should not be conferred as an extension of time for holding of AGMs by the companies under the Companies Act, 2013 and companies not adhering to the relevant timelines shall be liable to legal action under the appropriate provisions of the Act.

SEBI ISSUES CIRCULAR FOR PORTFOLIO MANAGEMENT SERVICES TO UNDERTAKE 10% TRANSACTIONS IN CORPORATE BONDS VIA REQUEST FOR QUOTE PLATFORM

The SEBI vide circular dated December 9, 2021 decided that on a monthly basis Portfolio Management Services ("PMS") shall undertake at least 10% of their total secondary market trades by value in Corporate Bonds ("CBs") in that month by placing quotes through one-to-one ("OTO") or one-to-many ("OTM") mode on the Request for Quote Platform of stock exchange ("RFQ"). This framework has been introduced in order to enhance transparency pertaining to debt investments by PMS in CBs and to increase liquidity on exchange platform. The PMS are permitted to accept the Contract Note from the stock brokers for transactions carried out in OTO and OTM modes of RFQ. The new framework will come into force with effect from April 1, 2022.

SEBI ISSUES CIRCULAR ON CUTOFF TIME FOR GENERATION OF LAST RISK PARAMETER FILE (RPF) FOR CLIENT'S MARGIN COLLECTION PURPOSE AND MODIFICATION IN FRAMEWORK TO ENABLE VERIFICATION OF UPFRONT COLLECTION OF MARGINS FROM CLIENTS IN COMMODITY DERIVATIVES SEGMENT

The SEBI vide Circular dated December 16, 2021 under Section 11 (1) of the SEBI Act, 1992, issued that for commodity derivatives segment, clearing corporations shall send an additional minimum two snapshots for commodity derivative contracts which are traded till 9:00 PM and additional minimum three snapshots for the commodity derivatives contracts which are traded till 11:30/11:55 PM. Margins/EOD margins shall be determined as per the relevant RPFs. The said Circular shall be effective from January 15, 2022.

NOTIFICATION EMPOWERING INVESTORS THROUGH INVESTOR CHARTERS

SEBI vide notification dated January 17, 2022 notified that they have developed Investor Charters pertaining to the investor-related activities of various intermediaries in consultation with the concerned entities. Separate Investor Charters have been developed for stock exchanges, depositories, SEBI-registered intermediaries, and regulated entities, such as Stock Brokers, Depository Participants, Asset Management

Companies, Registrars and Transfer Agents, Investment Advisers, Research Analysts, Merchant Bankers, etc. SEBI is also considering, in consultation with regulated entities, the possibility of including alternate dispute resolution mechanisms in various agreements where appropriate.

NOTIFICATION REGARDING CIEPFA

Government notifies Investor Education and Protection Fund Authority CIEPFA") (Accounting, Audit, Transfer and Refund), Third Amendment, Rules, 2021: Ministry of Corporate Affairs vide notification dated December 28, 2021 has notified the IEPFA (Accounting, Audit, Transfer and Refund), Third Amendment, Rules, 2021 to amend Rule 6 IEPFA (Accounting, Audit, Transfer and Refund) Rules, 2016 which relates to manner of transfer of shares under sub-section (5) Of section 124 of Companies Act, 2013 to the 1EPF Fund.

NOTIFICATION REGARDING VAULT MANAGERS

SEBI notifies Securities and Exchange Board of India (Vault Managers) Regulations, 2021: SEBI vide notification dated December 31, 2021 has notified the SEBI (Vault Managers) Regulations, 2021 which allows bourses: (European Stock Exchanges) to set up a gold exchange in India. As per these regulations, the instrument representing gold will be called Electronic Gold Receipt ("EGR") which will be considered securities. Further, these EGRs will have clearing, trading and settlement processes like any other security.

NOTIFICATION REGARDING AMENDMENT OF REGISTRATION FEES

Rules to further amend the Companies (Registration Offices Fees) -Rules, 2011 Rules): MCA vide notification dated 11.01.2022, issued a notification in exercise by the powers conferred by sections 396, 398, 399,103 and 101 read with subsection (1) and (2) of Section 169 of the Companies Act, 2013, to further amend the Companies (Registration Offices and Fees) Rules, 2014, under which additional fee and higher additional fee in Certain Cases) shall be applicable for delay in filing forms other than for increase in Nominal Share Capital forms under Section 92/137 of the Act or forms for filing charges. The Rules shall come into force from 01.07.2022.

NOTIFICATION REGARDING PENALTY

Appointment of 01.07.2022 as the date on which provisions of Section 56 of The Companies (Amendment) Act 2020 (29 of 2020) shall come into force; MCA vide notification dated 1.10.2022, announced that 1st July will be the date on which provision of Section 56 of the Companies (amendment) Act, 2020, which talks about the penalty of fifty thousand Rupees on any default made in complying with the provisions of subsection (1) to (5), by the company and every officer.

SEBI NOTIFIES SEBI (ISSUE OF CAPITAL AND DISCLOSURE REQUIREMENTS) (AMENDMENTS) REGULATIONS, 2022.

The SEBI vide notification dated January 14, 2022 notified the amendments to Securities and Exchange Board of India (issue of Capital and Disclosure Requirements) Regulations, 2018. Regulation 2(I)III is amended to include “fraudulent borrowers" along with willful defaulters. Further the amendment inter alia inserts regulation, which provides additional conditions for an offer for sale of issued under regulation 6(2). The amendments will come into effect from the date of publication i.e. January 14, 2022. Amendment to sub-regulation (3A) of regulation 32, regulation 19, regulation 129, regulation I45, clause (10) and clause (15) of Part A of Schedule XIII and Schedule XIV shall come into force from April 1, 2022, for issues opening on or after April 1, 2022.

SEBI NOTIFIES SEBI (FOREIGN PORTFOLIO INVESTORS) (AMENDMENT) REGULATIONS, 2022:

The SEBI vide notification dated January 14, 2022 notified the amendments to the Securities and Exchange Board of India (Foreign Portfolio, Investors) Regulations, 2019. The amendment inter alia inserts Regulation 43B which grants the SEBI the power to grant exemption from strict enforcement of the regulations in the interest of investors and securities market it is satisfied that: (i) the noncompliance is caused due to factors beyond the-control of the entity; or (ii) the requirement is procedural or technical in nature. The amendments will come into effect from the date publication i.e. January 14, 2022.

SEBI NOTIFIES SEBI (SETTLEMENT PROCEEDINGS) (AMENDMENT) REGULATIONS, 2022:

The SEBI vide notification dated January 14, 2022 notified the amendments to the Securities and Exchange Board of India (Settlement Proceeding) Regulations, 2018. The amendment inter alia provides for revised proceeding conversion factor and base amount for alleged defaults on relation to disclosure under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997/2001.The amendments will come into effect from the date of publication i.e. January 14, 2022.

NOTIFICATION REGARDING ELECTRONIC GOLD RECEIPTS TO BE TREATED AS SECURITIES UNDER SCRA 1956:

SEBI vide notification dated December 24, 2021 (uploaded on January 10, 2022) has notified that an Electronic Gold Receipt “EGR") is an electronic receipt issued based on a deposit of physical gold in accordance with the regulations stipulated in Section 31 of the Securities and Exchange Board of India Act.

CIRCULAR REGARDING FRAMEWORK TO OPERATIONALIZE GOLD EXCHANGE IN INDIA:

SEBI vide circular dated January 10, 2022 has approved the framework of September 28, 2021 for the Gold Exchange and SEBI (Vault Managers) Regulations, 2021. The Central Government has declared electronic gold receipts to be securities under Section 20(h) (iia) of the Securities Contract (Regulation) Act 1956. Regulations for SEBI (Vault Managers) have been notified on

December 31. 2021: The following structure of transactions has been suggested:

A) First Tranche: Creation of EGR
B) Second Tranche: Trading of EGR on stock exchange/s
C) Third Tranche: Conversion of EGR into Physical Card.

RULES REGARDING PROCEDURE FOR HOLDING INQUIRY & IMPOSING RULES, 1995

SEBI notified Securities and Exchange Board of India (Procedure for Holding Inquire and Imposing Rules, 1995) SEBI vide notification dated 20.01.2022, while exercising the powers conferred by section 2 clause (da) and cause (0) of sub-section (2) of section 29 of the Securities and Exchange Board of India Act, 1992 (13 of 1992), made the rules for holding inquiries for the purpose of imposing penalty under Chapter VI-A of the Act. The rules shall come into force from the date of the publication in the Official Gazette.

NOTIFICATION REGARDING LISTING OBLIGATIONS & DISCLOSURE REQUIREMENTS

SEBI passed regulations to amend the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.: In exercise of the powers conferred by section 11, sub-section (2) of Section 11A and Section 30 of the Securities and Exchange Board of India Act, 1992 (15 of 1992) read with section 31 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Board made a few regulations to further amend the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.

NOTIFICATION REGARDING AMENDMENT FOR ALTERNATIVE INVESTMENT FUNDS

SEBI makes regulations to further amend the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012.: In exercise of the powers conferred by sub-section (1) of Section 30 read with sub-section (1) of Section 11, clause (ba) and clause (c) of sub-section (2) of Section 11 and sub-section (1) and (1B) of Section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Board made the following regulations to further amend the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012 which includes renaming the regulations as the Securities and Exchange Board of India (Alternative Investment Funds) (Amendment) Regulations, 2022.

NOTIFICATION REGARDING AMENDMENT FOR CREDIT RATING AGENCIES

SEBI makes regulations to amend the Securities and Exchange Board of India (Credit Rating Agencies) Regulations, 1999.: The Board made the following regulations to further amend the Securities and Exchange Board of India (Credit Rating Agencies) Regulations, 1999, namely:—

1. These Regulations may be called the Securities and Exchange Board of India (Credit Rating Agencies) (Amendment) Regulations, 2022.

2. They shall come into force on the date of their publication in the Official Gazette.

3. In the Securities and Exchange Board of India (Credit Rating Agencies) Regulations, 1999—

I. In regulation 9, in clause (f), after the words "credit rating agency from" and before the words "rating of financial instruments", the words "carrying out any activity as may be specified by the Board or" shall be inserted.

IBBI ISSUES INSOLVENCY PROFESSIONALS TO ACT AS INTERIM RESOLUTION PROFESSIONALS, LIQUIDATORS, RESOLUTION PROFESSIONALS AND BANKRUPTCY TRUSTEES (RECOMMENDATION) (SECOND) GUIDELINES, 2021

The Insolvency and Bankruptcy Board of India ("IBBI") has issued guidelines aimed at curbing administrative delay in the CIRP. Accordingly, the guidelines require the formation of a Panel of Insolvency Professionals ("IPs") recommended by the IBBI, from which the AA can pick up any name for while issuing an appointment order. The key recommendations include, inter alia, preparation of a common Panel of IPs for appointment as Interim Resolution Professional, Liquidator, Resolution Professional and Bankruptcy Trustee, and sharing of the same with the Adjudicating Authority (i.e. NCLT and DRT). The Panel list is to be prepared Zone wise, based on the registered office of the IP and a new panel is to be re-constituted every six months. The Adjudicating Authority (AA) has the discretionary power to pick any name from the panel. These guidelines shall come into effect from January 1, 2022 and shall supersede the earlier Guidelines i.e the Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustee (Recommendation) Guidelines, 2021 issued on June 1, 2021.

2. JUDGMENTS

NCLT CANNOT ORDER PARTIES TO RESOLVE A DISPUTE WHILE EXAMINING A PETITION UNDER SECTION 7 IBC

ES Krishnamurthy vs. Bharath Hi Tech Builders Pvt. Ltd decided on 14 December, 2021.

The Supreme Court held that the AA and the Appellate Authority under IBC can encourage settlements but cannot direct them by acting as courts of equity. Further, the Court held that the AA while declining to admit the petition under Section 7 of the IBC acted outside the terms of its jurisdiction under Section 7(5) of the IBC.

THE RIGHT TO APPLY FOR WINDING UP OF A COMPANY BECOMES RECURRING IF CONDUCT OF THE AFFAIRS OF THE COMPANY IN A FRAUDULENT MANNER IS A CONTINUING PROCESS

***In the case of Devas Multimedia Private Ltd. V. Antrix Corporation Ltd. & Anr.*, dated January 17, 2022**

The Supreme Court vide judgment dismissed the appeal by Devas Multimedia against the orders passed by NCLT and NCLAT and observed that the main departure of the Companies Act, 2013 from the statutory regime of the 1956 Act, is the specific inclusion of fraud directly as one of the circumstances in which a company could be wound up. Section 271 of the 2013 Act lists out the circumstances in which a company may be wound up.

JUDGMENT CLEARING THE STANCE ON DOMINANT POSITION AND THE USE OF PREDATORY PRICING

***In the case of Meru Travels Solutions Pvt. Ltd. v. Competition Commission of India* January 07, 2022**

NCLAT vide judgment**,** observed that Ola's below cost pricing is not predatory in nature in order to eliminate competitors from the market, but rather to establish itself as an effective and reliable brand in the market and to also open up a latent market to its advantage through awareness campaigns, discounts, incentives, and gaining new customers and riders' confidence. Thus, an enterprise's market share is not sufficient to demonstrate its dominant position in the market; the size, economic power, independence from consumers, and vertical integration of the market and services of such enterprises also play an important role in determining whether or not an enterprise enjoys a dominant position.

IBC

1. *CIRCULARS/NOTIFICATIONS*

AN INSOLVENCY PROFESSIONAL HANDLING VOLUNTARY LIQUIDATION PROCESS IS NOT REQUIRED TO SEEK ANY NO OBJECTION CERTIFICATE/NO DUE CERTIFICATE FROM THE INCOME TAX DEPARTMENT

The Insolvency and Bankruptcy Board of India vide circular no. IBBI/LIQ/45/2021 dated November 15, 2021 inter alia clarified, as per the provisions of the Code and the regulations thereunder read with Section 178 of the Income Tax Act, 1961, an Insolvency Professional handling voluntary liquidation is not required to obtain a No Objection

Certificate ("NOC") or No Dues Certificate from ("NDC") the Income Tax Department. The procedure of obtaining such a NOC/NDC from the Income Tax Department takes up time, which is contrary to the Code's aim of time-bound completion of processes.

RBI ALLOWS FPIS TO INVEST IN DEBT SECURITIES ISSUES BY INFRASTRUCTURE INVESTMENT TRUSTS AND REAL ESTATE INVESTMENT TRUSTS

Pursuant to the announcement made in the Union Budget 2021- 22 that debt financing of Infrastructure Investment Trusts ("InvITs") and Real Estate Investment Trusts ("REITs") by Foreign Portfolio Investors ("FPI") will be enabled by making suitable amendments in the relevant legislations. Accordingly, it has been decided to permit FPIs to invest in debt securities issued by InvITs and REITs. FPIs can acquire debt securities issued by InvITs and REITs under the Medium-Term Framework ("MTF") or the Voluntary Retention Route ("VRR") and such investments shall be reckoned within the limits and shall be subject to the terms and conditions for investments by FPIs in debt securities under the respective regulations of MTF and VRR.

INTERNAL OMBUDSMAN TO BE APPOINTED BY NON-BANKING FINANCIAL COMPANIES ("NBFCS")

Deposit-taking NBFCs ("NBFCs-D") with 10 or more branches and Non-Deposit taking NBFCs ("NBFCs-ND") with asset size of Rs. 5,000 crore and above having public customer interface have been directed by the RBI to appoint Internal Ombudsman ("IO") at the apex of their internal grievance redress mechanism within a period of six months from the date of release of this direction. Exception from implementation of the concerned direction has been given to NBFCs not having public customer interface and certain types of NBFCs, viz., stand-alone Primary Dealers (PDs), NBFC - Infrastructure Finance Companies (NBFC-IFCs), Core Investment Companies (CICs), Infrastructure Debt Fund - Non-Banking Financial Companies (IDF-NBFCs), Non-Banking Financial Company – Account Aggregators (NBFCAAs), NBFCs under Corporate Insolvency Resolution Process, NBFCs in liquidation and NBFCs having only captive customers.

RBI ISSUES MASTER CIRCULAR ON GUARANTEES AND CO-ACCEPTANCE

The RBI released master circular on Guarantees and Co-acceptances relating to the conduct of guarantee business by banks. This circular shall be applicable to all Scheduled Commercial Banks, excluding Payments Banks and Regional Rural Banks. As per the new circular, various changes were made such as the banks should confine themselves to the provision of financial guarantees and exercise due caution with regard to performance guarantee business. Further, the banks should guarantee shorter maturities and leave longer maturities to be guaranteed by other institutions and no bank guarantee should normally have a maturity of more than 10 years. However, where banks extend long term loans for periods longer than 10 years for various projects, it has been

decided to allow banks to also issue guarantees for periods beyond 10 years.

RBI GRANTS GENERAL PERMISSION FOR INFUSION OF CAPITAL IN OVERSEAS BRANCHES AND SUBSIDIARIES AND RETENTION/ REPATRIATION/ TRANSFER OF PROFITS BY BANKS INCORPORATED IN INDIA

According to the existing practice, banks incorporated in India seek prior RBI approval for infusion of capital in their overseas branches and subsidiaries and retention of profits in, and transfer or repatriation of profits from these overseas centres. In order to provide operational flexibility to Scheduled Commercial Banks other than foreign banks, RBI has decided that such process can be done by mere approval from their board, provided they meet the regulatory capital requirements (including capital buffers). However, Banks have been mandated to report all such instances within 30 days of such action, to the Chief General Manager-in-Charge, Department of Regulation, Central Office, Mumbai.

RBI MAKES 'LEGAL ENTITY IDENTIFIER' MANDATORY FOR TRANSACTIONS 50 CRORES AND ABOVE

The RBI vide notification dated December 10, 2021 has mandated Legal Entity Identifier ("LEI"), a 20- digit number used to uniquely identify parties to financial transactions worldwide with an intent to improve the quality and accuracy of financial data systems. The LEI will be introduced in a phased wise manner. From October 1, 2022, AD Category I banks, are required to obtain the LEI number from the resident entities (non-individuals) undertaking capital or current account transactions of ₹50 crore and above (per transaction) under The Foreign Exchange Management Act, 1999.

RBI ISSUED THE PROMPT CORRECTIVE ACTION ("PCA") FRAMEWORK FOR NON-BANKING FINANCIAL COMPANIES ("NBFCS")

RBI vide Press Release No. 2021- 2022/1352 dated December 14, 2021 has put in place a PCA Framework for NBFCs, to further strengthen the supervisory tools applicable to NBFCs. This framework shall be applied to all deposit taking NBFCs (excluding Government Companies), all non deposit taking NBFCs in middle, upper and top layers [excluding - (i) NBFCs not accepting/not intending to accept public funds; (ii) Government Companies, (iii) Primary Dealers and (iv) Housing Finance Companies]. The PCA Framework shall come into effect from October 1, 2022, based on the financial position of NBFCs on or after March 31, 2022.

PROMPT CORRECTIVE ACTION (PCA) FRAMEWORK FOR NONBANKING FINANCE COMPANIES ("NBFCS")

The RBI vide notification dated December 14, 2021 issued prompt corrective action ("PCA") framework for NBFCs by introducing three risk threshold categories. According to the framework, RBI will put in place a PCA Framework on NBFCs if there is any breach of risk threshold wherein if the net non-performing assets is in between 6-9 percent (risk threshold 1), 9-12 percent (risk

threshold 2) & more than 12 percent (risk threshold 3). The PCA framework will exclude NBFCs not accepting/not intending to accept public fund, government companies, housing finance companies and primary dealers. The PCA framework for NBFCs will come into force on October 1, 2022, based on the financial position of NBFCs as on or after March 31, 2022.

2. JUDGEMENTS

LIMITATION PERIOD FOR FILING AN APPEAL UNDER SECTION 61, IBC

In ***V. Nagarajan v. SKS Ispat and Power Ltd.,*** the SC held that the limitation period for filing an appeal against an order under Section 61 of the Insolvency and Bankruptcy Code, 2016 ("the Code") would commence from the date of the pronouncement of the decision. The SC noted that the limitation period would not depend on the date the order was uploaded to the adjudicating authority's website. The SC concluded that the necessity of obtaining a certified copy for the purpose of filing an appeal before the National Company Law Appellate Tribunal cannot be waived. When such an application is filed, the period between the filing date and the date of receipt of the order is exempt from the limitation period under Section 12 of the Limitation Act, 1963

ENTIRE RESOLUTION PROCESS HAS TO BE COMPLETED WITHIN THE PERIOD STIPULATED UNDER SECTION 12 OF THE IBC

The Supreme Court ("SC") in ***Committee of Creditors of Amtek Auto Limited through Corporation Bank v. Dinkar T. Venkat Subramanian and Ors.***, (**2021 SCC SC 1151) decided on December 1, 2021** reiterated that the approved resolution plan has to be implemented at the earliest as mandated under the Insolvency and Bankruptcy Code, 2016 ("IBC"). The Corporate Insolvency Resolution Process ("CIRP") has to be completed within the period stipulated under Section 12 of the IBC and any deviation would defeat the object and purpose of providing such a time limit. However, the SC stated that the time limit can be condoned in view of the various litigations pending between the parties and in the peculiar facts and circumstances of the each case.

POWER TO ATTACH PROPERTY UNDER SECTION 5 OF THE PREVENTION OF MONEYLAUNDERING ACT, 2002 ("PMLA") CEASES ONCE MEASURES UNDER REGULATION 32 OF THE LIQUIDATION REGULATIONS 2016 ARE APPROVED BY ADJUDICATING AUTHORITY UNDER IBC

In the case of ***Nitin Jain Liquidator PSL Limited V. Enforcement Directorate through: Raju Prasad Mahawar, Assistant Director PMLA decided on December 15, 2021*** the DHC held that the power of the Enforcement Directorate ("ED") under PMLA to provisionally attach the properties of the corporate debtor would stand foreclosed once the Adjudicating Authority ("AA") comes to approve the mode selected in the course of liquidation. The court thus established primacy of IBC over PMLA in liquidation proceedings to this extent. The DHC further held that from the date when the

AA approves the sale of the corporate debtor as a going concern, the cessation as contemplated under Section 32A of the IBC will deemed to have come into effect.

AUTHORISED OFFICER OF THE SECURED CREDITOR IS NOT REQUIRED TO OBTAIN THE CONSENT OF THE BORROWER IN A CASE WHERE SALE OF THE SECURED ASSET IS BEING CONFIRMED AT A PRICE EQUAL TO THE RESERVE PRICE.

Mahipal Singh Yadav v. Union bank of India & another W.P. (c) 357/2022 decided on 24.01.2022. The Hon'ble High Court of Delhi has held that the authorised officer of the secured creditor is not required to obtain the consent of the borrower in a case where sale of the secured asset is being confirmed at a price equal to the reserve price. It has been held that the second proviso to Rule 9(2) of the Security Interest (Enforcement) Rules, 2002 puts no embargo against confirmation of a sale, where the highest offered price is equal to, or more than the reserve price. The Hon'ble Court has disagreed with the contrary view taken by the Division Bench of the Hon'ble Madras High Court in K. Raamaselvam and Others vs Indian Overseas Bank and Another, 2009 SCC Online MAD 1230 and has agreed with the view taken by the Hon'ble Kerala High Court in Varghese Ukken v. State Bank of India, 2010 SCC Online Ker 4745.

ARBITRATION AND CONCILIATION ACT, 1986

1. JUDGEMENTS

A FOREIGN AWARD CONTRARY TO THE PROVISIONS OF FEMA WOULD NOT AMOUNT TO VIOLATION OF FUNDAMENTAL POLICY OF INDIAN LAW

The High Court of Calcutta in ***EIG (Mauritius) Limited v. McNally Bharat Engineering Company Limited***., held that the mandate of Section 48(2)(b) of the Arbitration & Conciliation Act, 1996 ("A&C Act") requires only peripheral enquiry of the obvious and not a delve into the merits. Thus, if an award based on a reasonable and commercial interpretation of agreement violates FEMA, it cannot be said to be against the public policy of Indian Law. Further, the court observed that FEMA does not constitute fundamental policy of Indian law.

IF PRE-ESTIMATED DAMAGES AGAINST EXTENSION OF TIME IN A

CONTRACT ARE WAIVED, SUBSEQUENT IMPOSITION OF SUCH DAMAGES AGAINST EXTENSION WOULD REQUIRE CLEAR ACCEPTANCE BY THE PARTIES

In ***Welspun Specialty Solutions Ltd. v. ONGC Ltd., (Judgment dated 13.11.2021 in CIVIL APPEAL NO. 6834 OF 2021)*** the Supreme Court ("SC") while upholding an Award which denied damages on account of waiver of liquidated damages against extension of time. The SC reiterated that merely having a clause providing for time to be essence of the contract would not make time of the essence unless such intention is clear from the contract and its performance. The SC held that when an extension of time is provided and pre-estimated damages is waived at the time of such extension expressly, then in case of subsequent extensions, liquidated damages cannot be imposed unless clearly accepted by the parties.

UNDER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 THE COURT CANNOT REMIT THE MATTER BACK TO ARBITRAL TRIBUNAL, BUT CAN ONLY ADJOURN THE CHALLENGED PROCEEDING FOR LIMITED PURPOSE UNDER SECTION 34(4)

The High Court of Judicature at Allahabad in ***M/s P.N. Garg, Engineers & Contractors vs. Chief Engineer, Bhopal Zone, Sultania Infantry Lines Bhopal,*** held that the Arbitrator cannot remit the matter back to tribunal after setting aside the Arbitral Award in accordance with Section 34 of the A&C Act. Such order would be beyond the legislative mandate of Section 34. The court further held that the purpose of adjournment under Section 34(4) of the A&C Act is to give arbitral tribunal an opportunity to remove the defects in Award which might lead to setting aside of the said Award and this opportunity is available prior to the setting aside of Award and not afterwards.

WHETHER AN ARBITRATION CLAUSE THAT ALLOWS THE ARBITRATION PROCEEDING TO BE ABANDONED AT THE WILL OF ONE PARTY WOULD BE VALID IN LAW?

Tata Capital Finance Limited v. Shri Chand Construction and Apartment Pvt. Ltd. (Judgment dated 24.11.2021 in FAO(OS) 40/2020) The High Court of Delhi held that an arbitration agreement that confers unequal power on one party to unilaterally abandon the arbitration proceedings, would be invalid in law, as such an agreement would lack 'mutuality', which is an essential feature of an arbitration agreement. The court further held that an arbitration agreement which provides for arbitration of the claims of one party and providing for a remedy of court or any other for a for the claim of the other party would also be invalid in law as the same would not only result in splitting of the claims and cause of action but also in the multiplicity of proceedings and conflicting decisions on the same cause of action.

WHETHER A PARTY CAN FILE A WRIT PETITION AGAINST AN ORDER REFERRING THE PARTIES TO ARBITRATION UNDER SECTION 8 OF THE ACT?

Arun Srivastava v. M/S Larsen & Toubro Ltd.* (*Judgment dated 09.11.2021 in CM(M) 1520/2018) The High Court of Delhi held that a petition under Article 227 would not be maintainable against an order referring the parties to arbitration under Section 8. The court observed that no provision for appeal against an order allowing Section 8 application is there in the act, therefore, the legislative intent is clear in terms that if there is a valid arbitration agreement, the court must refer the parties to arbitration and all the issues related to existence and validity of the arbitration agreement must be raised before the tribunal.

WHETHER THE ARBITRAL TRIBUNAL COULD CONDUCT A COMPREHENSIVE EXAMINATION OF THE TERMS OF THE CONTRACT WHILE ADJUDICATING AN APPLICATION FOR INTERIM MEASURES UNDER SECTION 17 OF THE ACT?

L&T Finance Limited v. Dm South India Hospitality Private Limited (Judgment dated 08.11.2021 in ARB. A. (COMM.) 14/2020) The High Court of Delhi held that an arbitral tribunal while adjudicating on a Section 17 application for interim measures is not supposed to conduct a detailed examination of the terms of the contract. Doing so would amount to pre-trial determination of the issues and would be detrimental to the concept of a dispassionate arbitral process. The tribunal acts on equity and is required to keep in mind a *prima facie* case, balance of convenience, and irreparable injury, while deciding an application for interim measures. It further held that the appellate court is not required to reassess the evidence and, would not interfere with the discretion of the tribunal unless, the reasoning of the tribunal is *ex-facie* perverse or patently illegal.

WHETHER THE ARBITRATOR COULD AWARD INTEREST, REGARDLESS OF AN AGREEMENT OF THE PARTIES TO CONTRARY?

Union of India v. Manraj Enterprises (Judgment dated 18.11.2021 in CIVIL APPEAL NO. 6592 OF 2021) The Supreme Court held that the Arbitral Tribunal cannot award interest if the parties have expressly prohibited the grant of any such interest. The arbitrator is a creature of the contract therefore, cannot act contrary to the terms of the contract in terms of Section 28 and 31(7) of the Act.

WHETHER AN AGREEMENT BETWEEN THE PARTIES CAN MAKE THE 2015 AMENDMENT TO THE ARBITRATION ACT, 1996 APPLY RETROSPECTIVELY?

Ratnam Sudesh Iyer v. Jackie Kakubhai Shroff (Judgment dated 10.11.2021 in CIVIL APPEAL NO. 6112 OF 2021) The Supreme Court held that a general phrase in a contract cannot override the legislative intent of an amendment to apply it prospectively. The court relied on the Judgment of the apex court in *BCCI v. Kochi Cricket, Ssangyong v. NHAI* and *HCC v. UOI* to reiterate that the 2015 Amendment Act would only apply to proceedings commenced after 23.10.2015. The mere inclusion of the words ‘or any amendment thereto’ in the agreement would not make the

amendment to Section 34 of the Act apply to arbitral proceedings commenced before the amendment.

WHETHER THE UNILATERAL APPOINTMENT OF THE ARBITRATOR CAN BE CHALLENGED FOR THE FIRST TIME IN A SECTION 34 PETITION?

Kanodia Infratech Limited v. Dalmia Cement (Bharat) Limited (Judgment dated 08.11.2021 in O.M.P. (COMM) 297/2021) The High Court of Delhi held that a party who has actively participated in the arbitral proceedings, cannot challenge the unilateral appointment of the arbitrator, for the first time under Section 34 petition. Failure of the party to raise the objection at the earliest possible opportunity under Section 11, 12(5), 14, 15 and 16 of the Act, would deprive him to challenge the appointment under Section 34 application.

WHETHER THE COURT COULD DECREE A CLAIM IN AN APPEAL AGAINST AN ORDER UNDER SECTION 34 OF THE ACT?

Punjab State Civil Supplies Corporation Ltd. v. Ramesh Kumar and Co. (Judgment dated 13.11.2021 in Civil Appeal No 6832/2021) The Supreme Court held that the power of the High Court while exercising jurisdiction under Section 37 against an order under Section 34 is different from that of the First Appellate Court in a Civil Suit. The court clarified that in arbitration appeal, the court is only required to determine the validity of the order under Section 34, it cannot go to the extent of decreeing a claim.

WHETHER A PARTY COULD RAISE A NEW GROUND OF CHALLENGE IN APPEAL UNDER SECTION 37?

State Of Chhattisgarh v. M/s Sal Udyog Private Limited (Judgment dated 08.11.2021 in CIVIL APPEAL NO. 4353 OF 2010) The Supreme Court held that a party is not barred from raising a new ground of challenge in appeal. The Court held that ground of 'patent illegality' is equally available under Section 37 of the Act and the same ground can be raised for the first time in appeal as well. There is nothing in the act which restrict the application of Section 34(2A) application to Section 34 petition only.

PROVISO TO SECTION 36 OF INDIAN ARBITRATION AND CONCILIATION ACT, 1996 ("A&C ACT") PROVIDES THAT COMPLIANCE UNDER ORDER 41 RULE 5(5) OF THE CPC IS TO BE FULLY AND MANDATORILY FOLLOWED

The Calcutta High Court in ***Fair Deal Supplies Limited vs. R. Piyarelall Iron and steel Pvt. Ltd.*** held that under Section 36 of the A&C Act, the Court is required to take due regard to the provisions relating to grant of stay of a money decree under the Code of Civil Procedure, 1908 ("CPC"). The proviso to section 36 of A&C Act makes it abundantly clear that compliance under Order 41 Rule 5(5) of the CPC is to be fully and mandatorily followed. However, in exceptional circumstances the court may consider undue hardship and grant stay with a reduced amount of security.

THE DISCRETION TO AWARD COSTS UNDER SECTION 31A OF THE ARB ACT, 1996 IS NOT SUBJECT TO THE AGREEMENT BETWEEN THE PARTIES UNLESS THAT AGREEMENT IS ENTERED INTO AFTER THE DISPUTES HAVE ARISEN

The Delhi High Court ("DHC"), in ***Union of India v. Om Vajrakaya Construction Company (Judgment dated 20.12.2021 in O.M.P. (COMM) 299/2021)*** held that the provisions of a contract cannot be read to override the provisions of Section 31A (5) of the A&C Act unless the parties enter into such a contract after the disputes have arisen. The DHC held that the terms of an agreement providing that the parties would bear their own costs, would amount to an agreement that a party would bear part of the costs (as provided under Section 31A(1)), and such an agreement entered into before the disputes have arisen would not be valid under Section 31A(5).

WHETHER THE COURT WHILE EXERCISING THE JURISDICTION UNDER SECTION 11 CAN DETERMINE IF THE ARBITRATION AGREEMENT CORRELATE WITH THE DISPUTE?

Avantha Holdings Limited v. CG Power and Industrial Solutions Limited (Judgment dated 06.12.2021 in ARB. P. 361/2020) The High Court of Delhi declined to refer the parties to arbitration after coming to the conclusion that subject matter of the dispute is outside the scope of arbitration agreement. The Court relied on the judgments of the Supreme Court in *Vidya Drolia* to hold that limited scope of examination of arbitration agreement at pre-arbitral stage also includes an *ex-facie* view on the arbitrability of dispute and the court can decline to refer the parties to arbitration if it finds that the dispute does not correlate to the arbitration agreement.

WHETHER A PARTY CAN APPROACH THE TRIBUNAL UNDER A SPECIAL STATUTE IN RELATION TO AN ISSUE THAT HAS ALREADY RAISED BEFORE THE ARBITRATOR APPOINTED BY THE HIGH COURT?

M.P. Housing and Infrastructure Development Board v. K.P. Dwivedi (Judgment dated 03.12.2021 in Civil Appeal No. 6768/2021) The Supreme Court held that a party who participated in the arbitral proceedings and voluntarily raised an issue before the arbitrator appointed by the High Court, cannot re-agitate the same before a tribunal constituted under a special statute. The arbitral proceedings before the arbitrator appointed by the Court would not be *non-est*, after the participation of the parties without any demur or objection, the doctrine of *'Issue Estoppel'* would apply and the party would be precluded from raising the same issue again.

WHETHER THE FACILITATION COUNCIL COULD PASS AN AWARD WITHOUT CONDUCTING THE ARBITRAL PROCEEDINGS?

Jharkhand Urja Vikas Nigam Limited v. The State of Rajasthan (Judgment dated 15.12.2021 in CIVIL APPEAL NO.2899 OF 2021) The Supreme Court held that as per the provisions of the MSMED Act read with the Arbitration Act, the Facilitation Council, on the failure of the conciliation proceedings can only refer the parties to arbitration and not pass an award. The arbitration and facilitation cannot be clubbed together to pass an award. Such an order would be patently illegal and would not constitute an award within the meaning of the Arbitration Act.

HIGH COUNT CANNOT ENTER INTO THE MERITS IN AN APPEAL UNDER SECTION 37 ARBITRATION AND CONCILIATION ACT, 1996

The SC in the case of ***Haryana Tourism Ltd. Vs Ms Kandhari Beverages Ltd***, held that that a High Court cannot enter into the merits of the claim in an appeal under Section 37 of the Arb Act. The Court reiterated the settled position of law that an Award can only be set aside under Section 31 or 37 of the Arb Act. If it falls under the exceptions of being contrary to public policy, interest of India, justice or morality, or if it is patently illegal.

AWARD CAN'T BE CHALLENGED ON GROUND WHERE ARBITRATOR FAILED TO APPRECIATE FACTS

Atlanta Limited vs. Union of India (UOI) (18.01.2022 - SC) MANU/SC/0059/2022, it was observed that Arbitral award shall not to be challenged on the ground that the arbitrator had drawn his own conclusion or had failed to appreciate facts.

THE SUPREME COURT OF INDIA ("SUPREME COURT) IN /-PAY CLEARING SERVICES PRIVATE LIMITED VS ICICI BANK LIMITED HAS HELD THAT IT IS NOT OBLIGATORY TO REMIT A DISPUTE TO THE ARBITRAL TRIBUNAL MERELY BECAUSE AN APPLICATION IS FILED UNDER SECTION 34(4) OF THE ARBITRATION AND CONCILIATION ACT, 1996 ("ACT").

FACTUAL BACKGROUND:

Upon disputes arising between the parties regarding the termination of contract, the matter was referred to a sole arbitrator. An award ("Award") was passed by the sole arbitrator in favour of I-Pay Clearing Services Private Limited ("1-Pay"). ICICI Bank Limited ("ICICI Bank") challenged the Award under section 34(1) of the Act contending that the sole arbitrator awarded damages without recording any finding on the issue of whether the contract was illegally terminated by ICICI Bank. Pertinently, I-Pay filed an application under section 34(4) of the Act seeking directions for adjourning the proceedings for a period of three months and directing the sole arbitrator to issue appropriate directions/ instructions/ additional reasons and/or take necessary and appropriate action in respect of the Award. The Bombay High Court dismissed the application filed by I-Pay under Section 34(4) of the Act and held that the defect in the Award was not curable. Aggrieved by the order of dismissal, I-Pay filed an appeal

before the Supreme Court, impugning the decision of the Bombay High Court.

ISSUE:

The issue involved in the instant case was whether an award can be remitted to the arbitrator under section 34(4) of the Act in cases where the arbitral award does not provide any reasoning and/or suffers from gaps in the reasoning.

ARGUMENTS:

I-Pay contended that it suffered losses of over Rs. 50,00,00,000/-due to the illegal termination of the agreement by ICICI Bank. By placing reliance on Kinnari Mullick v. Ghanshyam Das Damani, Dyna Technologies Pvt. Ltd. V. Crompton Greaves Ltd" and Som Datt Builders Limited v. State of Kerala®, I-Pay argued that lack of reasons or gaps in reasoning is a curable defect under Section 34(4) of the Act and therefore, the Award ought to be remitted to the arbitrator to enable the arbitrator to provide sufficient reasons in favour of his findings. On the other hand, ICICI Bank, which had objected to the Award by way of its petition under Section 34(1) of the Act, argued that the arbitrator had failed to record any findings to show that ICICI Bank illegally terminated the contract and that the arbitrator did not consider the relevant documentary evidence while deciding on the issue of illegal termination of contract. In light of this, ICICI Bank submitted that the Award is patently illegal and such, the purported defect cannot be cured.

DECISION:

At the outset, the Supreme Court distinguished the decisions cited by I-Pay in favour of its arguments and held that section 34(4) can only be invoked to record reasons on the finding already given by the arbitrator and/or to fill the gaps in the reasoning of the award. Relying on Income Tax Officer, A Ward, Sitapur v. Murlidhar Bhagwan Das5 and J. Ashoka v. University of Agricultural Sciences and Ors.6 the Supreme Court at the outset distinguished between the terms 'findings' and 'reasons'. The Supreme Court observed that a "Finding is a decision on an issue and 'reasons' are the links between the materials on which certain conclusions are based and the actual conclusions". Furthermore, the Supreme Court observed that under section 34(4), discretion is vested with the Courts for remitting the matter to the arbitral tribunal and therefore, merely filing a section 34(4) application does not ipso facto imply that the matter ought to be remitted to the arbitral tribunal. Since the arbitrator had not rendered any finding on the contentious issues in the Award, I-Pay is precluded from resorting to the relief under Section 34(4) of the Act to remit the matter back to the arbitrator for correction. As the Award was made without reasons on the issues raised by the parties before the arbitrator, the same is patently illegal and cannot be corrected and/or modified under Section 34(4) of the Act.

THE SUPREME COURT OF INDIA IN ELLORA PAPER MILLS LTD VS STATE OF MADHYA PRADESH (2022 SCC ONLINE SC 8) HAS HELD THAT AN ARBITRAL TRIBUNAL CONSTITUTED IN TERMS OF AN ARBITRATION AGREEMENT EXECUTED PRIOR TO

THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015 WILL BECOME DE JURE INELIGIBLE TO PERFORM ITS FUNCTIONS IF IT VIOLATES THE PROVISIONS AGAINST BIASED AND PREJUDICIAL APPOINTMENT OF ARBITRATORS UNDER SECTION 12(5) READ WITH THE SEVENTH SCHEDULE OF THE ARBITRATION AND CONCILIATION ACT, 1996.

BACKGROUND:

Ellora Paper Mills Limited participated in the tender for supply of cream wove paper and duplicating paper, which was issued by the State of Madhya Pradesh and was successfully awarded the contract by way of a Supply Order dated September 22, 1993. Disputes arose between the parties and subsequently, the matter was referred to arbitration. The arbitral tribunal was constituted in the year 2001 and consisted of the officers of the State of MP. Ellora filed its objection to the constitution of the arbitral tribunal and also filed an application under section 13 of the Act. The said application was rejected by the arbitral tribunal by way of an order dated February 2, 2001. Thereafter, Ellora filed an application before the High Court under section 14 read with section 11 and 15 of the Act challenging the constitution of the arbitral tribunal as being violative of section 12(5) of the Act, which was inserted by the 2015 Amendment to the Act. The High Court rejected this application by holding that section 12(5) does not have a retrospective application. Feeling aggrieved, Ellora filed an appeal before the Supreme Court.

ARGUMENTS:

Ellora placed reliance on Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd Vs. Ajay Sales & Suppliers(2021 SCC Online SC 730) and submitted that the constitution of the arbitral tribunal is contrary to the provisions of Section 12(5) read with Seventh Schedule to the Act, which prohibits appointment of persons with a vested interest in the outcome of the dispute as arbitrators. Moreover, it submitted that the tribunal was constituted in 2001, but it did not commence proceedings as they were stayed until 2017. On the other hand, the State of the MP argued that the High Court rightly rejected the application as the provisions of the 2015 Amendment cannot be applied retrospectively.

DECISION:

The Supreme Court observed that even though the arbitral tribunal was constituted in 2001, the proceedings did not commence until 2017. It referred to Jaipur Zila wherein it was held that “when the arbitration clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond the pale of the arbitration agreement.” Moreover, the Supreme Court observed that the order of the High Court was contrary to the Supreme Court’s judgements in TRF Limited Vs. Energo Enginerring Projects Ltd (2017 8 SCC 377, Bharat Broadband Network Ltd Vs. United Telecoms Ltd(2019) 5 SCC 755 and Jaipur Zila. Accordingly, the Supreme Court held that the arbitral tribunal was ineligible to be appointed in view of the proscription under Section 12(5) read with Seventh Schedule to the Act.

OTHER SECTOR UPDATES

CHARGE CAN BE CREATED ON THE INTERESTS OF THE PARTNER IN A LIMITED LIABILITY PARTNERSHIP (LLP) UNDER ORDER XXI RULE 49 OF CPC BY A DECREE OF THE COURT

In the case of ***IDBI Trusteeship Services Ltd. & Anr. vs. Mid-City Infrastructure Pvt. Ltd. & Ors.,*** the High Court of Bombay, while pronouncing on the execution application for creating a charge on the interests of a Partner (judgment debtor) in an LLP, observed that although Section 4 of the Indian Partnership Act, 1932 does not apply to a LLP, Order XXI Rule 49 of the Civil Procedure Code ("CPC") does not restrict its scope to a partnership under the Indian Partnership Act, 1932. Hence, by a decree of the Court against the firm or against the Partner, under Order XXI Rule 49 of the CPC a charge can be created on the interests of a partner or the firm in the LLP.

SC UPHOLDS THE CONSTITUTIONALITY OF BINDING EFFECT OF PROVISIONS OF THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016 ON ONGOING PROJECTS AT THE TIME OF COMMENCEMENT OF THE ACT

In ***M/s Newtech Promoters and Developers Pvt. Ltd. v. State of UP & Ors.*** the SC held that the Parliament has consciously enacted the Real Estate (Regulation and Development) Act, 2016 ("RERA") with retrospective effect in order to ensure that the real estate projects shall be undertaken in an efficient and transparent manner. Further RERA is a beneficial legislation which seeks to protect the financial interest of buyers. As a result of this retrospective application any contractual obligation would be nullified if it is contrary to the provisions of RERA. With the said analysis and while adopting the principles of purposive construction, the SC held a declared retrospective application of the provisions of RERA constitutional under Article 14 & 19 (1) (g) of the Constitution.

INTENT TO TARGET INDIAN MARKET IS TO BE EXAMINED WHILE EXERCISING LONG ARM JURISDICTION TO ISSUE INJUNCTIVE DIRECTION

The High Court of Delhi in the case of ***Tata Sons Pvt. Ltd. vs. Hakunamatata Tata Founders & Ors,*** held that in order to exercise long arm jurisdiction to issue any injunctive directions to the defendants located outside India, with no physical Indian presence and, which would operate to the prejudice of non-resident defendants can be passed by Indian Courts only if two considerations are met. The considerations are whether the website of the defendants is interactive and whether it discloses an overt intent to target the Indian market.

APPLICATION BY AN OBSTRUCTOR RAISED REGARDING RIGHT, TITLE OR INTEREST IN THE PROPERTY, DURING EXECUTION PROCEEDINGS BY A DECREE HOLDER, TO BE ADJUDICATED BY THE EXECUTING COURT

The SC in the case of ***Bangalore Development Authority ("BDA") v. N. Nanjappa & Anr.*** while allowing the appeal raised by BDA, held that since BDA

submitted its objections in the execution proceedings itself, the same needs to be adjudicated by the executing court at that stage only, considering the application under Order XXI Rule 97 or Rule 99 CPC. Therefore, effectively establishing that in lieu of Order XXI Rule 101 CPC, an application filed under Order XXI Rule 97 with respect to resistance or obstruction claiming right, title or interest in the property have to be determined by the Court dealing with the execution application.

NO REQUIREMENT OR JUSTIFICATION FOR THE CHIEF METROPOLITAN MAGISTRATE ("CMM") TO FIX A TIME LIMIT FOR TAKING POSSESSION OF THE SECURED ASSET UNDER SECTION 14 OF SARFAESI ACT

In the case of ***Housing development finance corporation ltd. v. Rajesh Kumar & Ors,*** the DHC there is no requirement or justification for the CMM to fix a time limit for taking possession of the secured asset while exercising jurisdiction under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act"). Further, the DHC held that in view of Section 34 of the SARFAESI Act, a civil court does not have jurisdiction to adjudicate the rights of a secured creditor or the enforcement of such rights by the secured creditor. Such rights can only be challenged by the borrower or any affected person before the Debts Recovery Tribunal under Section 17 of the SARFAESI Act.

IF THE BORROWER'S PROPOSALS WERE OTHERWISE CONSIDERED, SARFAESI PROCEEDINGS ARE NOT INVALIDATED DUE TO THE BANK'S FAILURE TO RESPOND TO OBJECTIONS

The SC in ***Arce Polymers Private Limited v. M/s. Alpine Pharmaceuticals Private Limited and Others,*** held that a creditor's or bank's failure to respond to the borrower's objections as per Section 13(3A) of the SARFAESI Act does not entitle the debtor to discretionary relief. If the Court is satisfied that the creditor has considered the debtor's representation and given it adequate time to repay the debt such proceedings are not invalidated. The Borrower can challenge other measures, steps and procedures which preceded the ultimate sale, even if barred by the limitation period of forty five days.

WRIT OF MANDAMUS CANNOT BE ISSUED FOR DIRECTING THE BANK TO GRANT BENEFIT OF 'ONE-TIME SETTLEMENT' ("OTS") TO BORROWER

In the case of ***Bijnor Urban Cooperative Bank Limited, Bijnor vs Meenal Agarwal,*** the SC held writ of mandamus cannot be issued by a High Court in exercise of powers under Article 226 of the Constitution of India, directing a financial institution bank to positively grant the benefit of OTS Scheme to a borrower. The SC also observed that any financial institution cannot be compelled to accept a lesser amount under the OTS. A borrower cannot as a matter of right, pray for grant of benefit of OTS and, it is always to be presumed that the financial institution/bank shall take a prudent decision whether to grant the benefit or not.

IN CASE OF A CIVIL SUIT, HIGH COURT CANNOT DIRECT THE IMPLEADMENT OF AN ADDITIONAL DEFENDANT

The SC in the case of ***IL&FS Engg. And Constructions Co. v. Bhargavarna Constructions & Ors.,*** while setting aside the HC judgment, held that the plaintiff is the 'dominus litus' as per settled proposition of law. No issue was raised before the trial court on nonjoinder of parties. Therefore, the SC observed that whether an application of impleadment of an additional defendant would be maintainable or not was required to be first considered and decided by the HC. The SC directed the HC to consider a catena of decisions by the SC on how to deal and decide a first appeal under Section 96 and Order XLI Rule 31 of CPC, and remanded the appeal back to the HC for fresh consideration on merits.

WRIT PETITION IS NOT MAINTAINABLE AGAINST A PRIVATE FINANCIAL INSTITUTION FOR PROCEEDINGS UNDER SARFAESI ACT:

In the case of ***Phoenix ARC Private Limited Vs. Vishwa Bharati Vicha Mandi,*** the SC held that the writ petition filed against the private financial institution under Article 226 of the Constitution of India to take actions against financial institution under Section 13(1) of the SARFAESI Act cannot be maintained. The Court further observed that the private financial institution cannot be said to perform public functions which are normally assigned to State authorities, hence. the writ jurisdiction of the Court is not invocable.

COMPETITION COMMISSION CAN PROBE ANTI-COMPETITIVE ASPECTS OF RES EXTRA COMMERCIUM BUSINESSES LIKE LOTTERY.

The SC in the case of ***Competition Commission of India v. State of Mizoram and Or***., held that even though lottery is a regulated commodity under the Lotteries (Regulation) Act, 1998, anticompetitive elements (such as "those that may arise during the tendering process) in the business related to lotteries would continue to be governed by the Competition Act, 2002. There was no bar on the Competition Commission of India to investigate anti-competitive practices like bid rigging, collusive bidding and cartelization in the tendering process for lottery business, which is in the nature res extra commerciun.

NOTING OF THE HON'BLE SUPREME COURT WHERE DAUGHTER OF MALE HINDU ENTITLED TO HER FATHER'S SELF-ACQUIRED AND INHERITED PROPERTY.

Arunachala Gounder (Deceased)Vs Ponn usamy (Decided – 20/01/2022)

The Hon'ble Supreme Court, after looking into the Hindu Succession Act, 1956 ("Act"), Judgments, facts and old customary Hindu Laws held that since the property in question is admittedly a self-acquired property, it shall be inherited by way of inheritance and the property shall not devolve by survivorship. The Court mentioned that being Class-I heirs of the father, she shall also be considered as the heirs and shall

be entitled to 1/5th Share in each of the suit property.

The Hon'ble Court looked into the situation where the women dies intestate and noted that if a female Hindu dies intestate without leaving any issue, then the property inherited by her from her father or mother would go to the heirs of her father whereas the property inherited from her husband or father-in-law would go to the heirs of the husband and in case a female Hindu dies leaving behind her husband or any issue, then Section 15(1)(a) comes into operation and the properties left behind including the properties which she inherited from her parents would devolve simultaneously upon her husband and her issues as provided in Section 15(1)(a) of the Act.

The Court mentioned that the source from which a woman inherits the property is always important and that would govern the whole situation. Otherwise persons who are not even remotely related to the person who originally held the property would acquire rights to inherit that property and that would defeat the intent and purpose of 15(2) of the Act, which gives a special pattern of succession. Present appeal was allowed and the impugned judgment and decree passed by the Trial Court and confirmed by the High Court were set aside.

MINISTRY OF MICRO, SMALL AND MEDIUM ENTERPRISES

Notification

The Ministry of Micro, Small and Medium Enterprises amends Notification No. S.O. 2119(E) dated June 26, 2020. The amendment modifies Paragraph 7(3), which specifies "Registration of existing enterprises" for extending the validity of enterprises registered prior to 30th June, 2020 and shall continue to be valid only for a period up to the 31st day of March 2022.

SECTION 5 OF THE LIMITATION ACT; 1963 IS NOT APPLICABLE TO THE INSTITUTION OF CIVIL SUITS

The SC in the case of ***Sunil Kumar Maity v. State Bank of India & An.,*** held that Section 5 of the Limitation Act does not apply to the institution of civil suit in the Civil Court. Section 5 of the Limitation Act, 1963 provides that an appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he, had sufficient cause for not preferring the appeal or making the application within such period. Accordingly, the SC set aside the judgment passed by the NCDRC in which it observed that the complainant would be at liberty to seek remedy in the competent Civil Court.

COVID 19: SUPREME COURT EXTENDS THE PERIOD OF LIMITATION FOR FILING OF CASES

In Re: Cognizance for extension of limitation, the Supreme Court on January 10, 2022 extended the period of limitation for filing of cases and appeals under all general and special laws across India in view of the rising number of Covid-19 cases. A Bench led by Chief Justice of India NV Ramana restored its March 23, 2020 and April 27, 2021 orders putting in abeyance statutory

limitation periods following a plea filed by the Supreme Court Advocates-on-Record Association (SCAORA). The apex court had earlier ordered that the period from March 15 last year till October 2, 2021 shall stand excluded from computing the period of limitation.

However, as per orders passed by it in September 2021, the relaxation granted on the limitation period for filing court cases in view of the pandemic came to an end on October 2 last year. The Supreme Court had on March 23, 2020 invoked its plenary power under Article 142 of the Constitution to extend the limitation period indefinitely for appeals from courts or tribunals on account of the pandemic with effect from March 15, 2020.

On March 8, 2021, it had said the country was "returning to normalcy" and had decided to end the extension of the limitation period which was granted in March 2020 to the litigants due to the pandemic. However, on April 27, 2021, it took note of the second wave of the pandemic and again relaxed the statutory period for filing petitions, including election petitions, under the Representation of the People Act, 1951.

The order dated 23.03.2020 is restored and i n continuation of the subsequent orders dated 08.03.2021, 27.04.2021and 23.09.20 21, it is directed that the period fro m15.03.2020 till 28.02.2022 shall stand excl uded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi - judicial proceedings. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022 notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. Also, in the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days. That longer period shall apply.

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