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## REHABILITATION OF STRESSED MSMEs

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### INTRODUCTION

The Micro, Small and Medium Enterprises Development Act, 2006 (“**MSMED Act**”) was enacted with the vision to promote and provide support to the growth of the local industries categorised as micro, small and medium enterprises (“**MSMEs**”) based on their investment in machinery and yearly turnover.

Under the MSMED Act, an “enterprise” is defined as an industrial undertaking or a business concern or any other establishment, engaged in the manufacture or production of goods or in providing or rendering of services.[1] For classifying an enterprise as a micro, small or a medium enterprise, the government has issued the following criteria[2]:

- (i.) a **micro enterprise**, where the investment in plant and machinery or equipment does not exceed one (1) crore rupees **and** turnover does not exceed five (5) crore rupees.
- (ii.) a **small enterprise**, where the investment in plant and machinery or equipment does not exceed ten

(10) crore rupees **and** turnover does not exceed fifty (50) crore rupees; and  
(iii.) a **medium enterprise**, where the investment in plant and machinery or equipment does not exceed fifty (50) crore rupees **and** turnover does not exceed two hundred and fifty (250) crore rupees.

This piece focuses on the issues of rehabilitation of stressed MSMEs. It also discusses the legal and regulatory support available to MSMEs for debt reconstruction and recovery in general and specifically towards support provided to MSMEs amid COVID-19 by the recent executive measures taken by the Government and the Reserve Bank of India (“**RBI**”).

### MSMEs AND DEBT RESTRUCTURING

#### RBI on financing and recovery of debt from MSMEs

Although the MSMED Act promotes financing opportunities to the MSMEs, repayment of its dues by other entities and provisions for

### ABOUT THE FIRM

AKS Partners (formerly known as A.K. Singh & Co) is a law firm based in New Delhi (India) that provides a comprehensive range of legal services and solutions to domestic and international clients. The Firm offers a unique blend of the local knowledge to apply the regulatory, economic, political and cultural context to legal issues and develop case strategies. We regularly handle technically challenging and complex multi-jurisdictional matters. Our team is spearheaded by one of the highly recognised lawyers with extensive experience in international dispute resolution and strong government and diplomatic backgrounds. This experience gives us the deepest understanding of the key decision points that are critical in navigating complex & complicated matters and managing government regulations.

additional interest for delayed payment, it however does not provide for recovery of debt from the MSMEs itself.

In this regard, the RBI has, from time to time, issued separate directions and circulars. The Master Direction - Lending to Micro, Small & Medium Enterprises (MSME) Sector dated 27 July 2017 updated as on 25 April 2018 [3] ("**RBI Lending MD**") incorporates the updated guidelines / instructions / circulars issued by RBI to banks in matters relating to lending to MSMEs. The RBI Lending MD defines MSMEs as per the MSMED Act and any subsequent changes made to the definition as per the MSMED Act.

As regards debt restructuring mechanism, the RBI Lending MD refers to the Master Circular – Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances dated 1 July 2015 [4] which provides for the prudential norms for all kinds of debt and lending by banks. In addition to the above, a special framework is also provided by the RBI specifically for MSME called the Framework for Revival and Rehabilitation of MSME dated 17 March 2016 [5] ("**Framework**").

#### Framework for Revival and Rehabilitation of MSME

The Framework empowers the banks to put in place their own policy and provides for a robust measure for revival and rehabilitation of stressed MSME accounts. Further, it also provides for detailed timelines for the various process that can be carried out under the Framework. It provides for banks to categorize accounts under 3 sub-categories of Special Mention Accounts ("**SMA**") all in varying degrees, signifying that the account is on the verge of becoming a Non-Performing Asset ("**NPA**") if corrective action is not taken by the lenders and the borrowers. It also directs the banks to setup a committee for carrying out the actions under the Framework ("**Committee**"). The Committee is empowered to set into motion the appropriate corrective action plans ("**CAPs**") for the MSME, namely:

- Rectification
- Restructuring; and / or
- Recovery

Rectification: Under rectification, the Framework provides for the Committee to obtain a commitment from the borrower to regularise the account and provide specific actions that the borrower will undertake so as to remove the account from the SMA status.

This process is borrower driven with assistance and supervision provided by the Committee to enable increase in cash flow without any loss or sacrifice on the part of the existing lenders. The Committee also has the power to consider additional financing as part of this process but only in exceptional circumstances and only to aid the working capital requirement to increase the cash flow. This funding is to be used only for this purpose. Funding may be provided for other reasons as well but then the same would fall under the process of restructuring rather than rectification. Rectification is a one-time measure and repeated rectifications within a period of 1 (one) year would lead to the process being termed as a restructuring instead.

Restructuring: The most detailed of the three CAPs that has been dealt with under the Framework is restructuring. Brief highlights of the process of restructuring as discussed in the Framework are as below:

- a) Committee is to determine the viability of restructuring.
- b) Shareholder to bear first loss of the enterprise rather than lenders.
- c) Decision to be taken by a majority of creditors (75% by value and 50% by number).
- d) Restructuring to be completed as per timelines under the Framework.
- e) Borrower should not be a wilful defaulter - certain exceptions carved out.
- f) Promoters to extend personal guarantee and provide non-disposal undertaking - Some non-core assets may be sold for restructuring the account.
- g) Inter-creditor agreement may be signed if there are more than one lender and this agreement may also outline the priority and / or the proportion of appropriation of repayment received from the borrower.
- h) Deviation from the plan by the borrowers to be treated as factor for initiating recovery process.

Recovery: The Committee has to periodically review the account for achievement / non-achievement of milestones as set out in the rectification or restructuring process by the Committee and shall consider initiating suitable measures, including recovery, if the process of rectification or restructuring does not work. The Committee may decide to move ahead and decide the best

process for recovery among the various legal and other recovery options available, with a view to optimizing the efforts and results. It is interesting to note that the Framework is as detailed as the Insolvency and Bankruptcy Code, 2016 ("**Code**") and provides a step-by-step guide for rehabilitation of MSME accounts. However, in 2021, within the Code, a new insolvency regime was provided for MSMEs discussed hereinbelow.

### PREPACK INSOLVENCY RESOLUTION PROCESS FOR MSMEs

The Central Government, on 04 April 2021 has promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 ("2021 Ordinance"), to provide for a separate insolvency regime for MSMEs, as defined under the MSMED Act. The 2021 Ordinance provides for a pre-packaged insolvency resolution process ("PIRP") for MSMEs. In furtherance of the same, the Insolvency and Bankruptcy Board of India ("IBBI") has released the IBBI (Pre-Packaged Insolvency Resolution Process) Regulations, 2021 and the Central Government (through Ministry of Corporate Affairs) has also formulated the Insolvency and Bankruptcy (Pre-Packaged Insolvency Resolution Process) Rules, 2021. These set of laws / rules collectively form the PIRP regime.

The PIRP regime is meant to provide an expedited and cost-effective insolvency resolution procedure for MSMEs.

### Concept of a PIRP Regime

The CIRP, at its core, is a debt restructuring process, which is an agreement between creditors and the insolvent entity to reorganize its liabilities [6]. A pre-packaged insolvency process is a form of alternative debt restructuring process. A "pre-packaged insolvency" refers to a system under which the basic plan for the revitalisation of an insolvent entity is pre-determined, prior to the distressed entity officially undergoing the insolvency resolution process. This is generally a debtor-driven, and debtor-in-possession process. The role of the Resolution Professionals ("**RP**"), in such cases, is to facilitate, rather than spearhead, the insolvency resolution process. It ensures that there are minimal hindrances to customers, suppliers, employees and other stakeholders of the stressed entity on account of the impending insolvency.

## **Process of PIRP**

*a) Initiation of PIRP:* A PIRP can be initiated only by a corporate debtor classified as a MSME under the MSMED Act [7]. A corporate debtor is a corporate person who owes a debt [8] and can be either of the following: (a) a company (including a one-person company and government companies); [9] (ii) an LLP; or (iii) any other person incorporated with limited liability under any law, not including a financial service provider. [10] Accordingly, an MSME which is a sole proprietorship, partnership, co-operative society, Hindu undivided family, etc., will not be eligible for a PIRP. Under the Companies Act, 2013 (“**CA 2013**”), a company is defined as one which has been incorporated under the CA 2013 or under any previous company law. [11] Accordingly, even a foreign owned and controlled MSME incorporated under Indian company laws [12] may initiate the PIRP.

An MSME may initiate a PIRP only upon occurrence of a default resulting in non-payment of a debt when either whole or any part of amount has become due and payable. [13] The present minimum default value in order to trigger PIRP is INR 10,00,000 (Ten Lakhs).

*b) Preparatory Steps:* For initiating the PIRP process, the corporate debtor i.e., the applicant must prepare certain documents such as Base Resolution Plan (“**BRP**”), certain declarations and proposals, resolution/special resolution, written consent and report of insolvency professional, and other requisite information. Thereafter, the applicant must convene a meeting of such Financial Creditors (“**FCs**”), who are not related parties of the corporate debtor. The FCs who are not related parties of the corporate debtor and have not less than 10% of the value of the total financial debt of such creditors may propose names of insolvency professionals. FCs, not being related parties, and representing not less than 66% of the debt due to such creditors must approve the proposal for selection of insolvency professional and the filing of the application. Finally, the application must be filed with all accompanying documentation with the adjudicating authority i.e., the National Company Law Tribunal (“**Adjudicating Authority**”).

*c) Moratorium and Public Announcement:* The Adjudicating Authority on admission of the application must declare a moratorium, appoint an RP, and cause a public announcement to be made by the RP within 2 (two) days of the commencement of the PIRP.

*d) Preparation of List of Claims and Information Memorandum:* The corporate debtor shall, within two days of the PIRP commencement date, submit to the RP a list of claims in the specified form, [14] containing the details of the respective creditors, their security interests and guarantees, if any, [15] and a preliminary information memorandum containing information relevant for formulating a resolution plan. [16]

*e) Meeting of the Committee of Creditors (“CoC”):* Based on the list of claims, the RP shall constitute a CoC within 7 (seven) days of the PIRP commencement date. The first meeting of the CoC shall be held within 7 (seven) days of its constitution. [17] A meeting of the CoC shall be convened as and when the resolution

professional considers it necessary, or if members comprising 33% of the voting shares of the CoC make a request to that effect. [18] The necessary quorum for a meeting shall be members of the CoC representing at least 33% of the voting share. [19]

*f) Resolution Plan:* Within 2 (two) days of the PIRP commencement date, the corporate debtor shall submit the BRP to the RP. The BRP shall then be forwarded to the CoC for consideration. The CoC may provide the corporate debtor an opportunity to revise the BRP prior to its approval. However, where the BRP is not approved by the CoC or where the BRP does not provide for the claims of the Operational Creditors, the RP shall invite prospective resolution applicants to submit resolution plans. These resolution plans shall, thereafter, be considered against the BRP by the CoC and the most suitable one shall be selected and sent to the Adjudicating Authority by the RP. The alternate resolution plans are adjudged on the basis of mathematical scoring systems that assign values to the resolution plans based on parameters approved by the CoC.

*g) Approval by Adjudicating Authority:* Once a resolution plan is approved by the CoC, the RP shall submit an application, along with a compliance certificate (confirming that the approved resolution plan complies with the provisions of the Code and any rules and regulations thereunder) to the Adjudicating Authority. The Adjudicating Authority shall within 30 (thirty) days of the receipt of the application approve the same and while granting such approval ensure that the resolution plan has provisions for its effective implementation. [20] Where no resolution plan is approved by the CoC or where the CoC has approved the termination of process, the RP shall file an application in the specified form [21] to the Adjudicating Authority for termination of process.

As is clear the PIRP remains a debtor driven model under the aegis of the Code to rehabilitate MSMEs. It provides much needed legislative support for MSMEs to stand back up on their feet. COVID-19 however has also created unique set of circumstances which has tremendously affected the revenue stream for MSMEs. In this regard, the RBI had issued several circulars to provide support to MSMEs, facing difficulties due to COVID-19. The same are discussed below.

## IMPACT OF COVID-19 ON MSMEs AND STEPS BY THE RBI AND THE GOVERNMENT

### RBI's Circular - Micro, Small and Medium Enterprises (MSME) sector – Restructuring of Advances, dated 11 February 2020 [22]

The circular dated 11 February 2020, extended the one-time restructuring of MSMEs advances that were allowed vide RBI circular Micro, Small and Medium Enterprises (MSME) sector – Restructuring of Advances dated 1 January 2019. Furthermore, a one-time restructuring of existing loans to MSMEs classified as 'standard' without a downgrade in the asset classification is permitted subject to the following conditions:

- a) Aggregate exposure (including non-fund-based facilities) of all lending institutions shouldn't exceed INR 25 Crores as on 1 January 2020;
- b) Borrower's account even in default has to be classified as 'Standard Asset' till the date of implementation of restructuring plan; and
- c) The borrower should be GST-registered on the date of implementation of plan.

Other instructions specified in the January 2019 circular shall remain valid.

### **Credit Guarantee Scheme for Subordinate Debt to Stressed / NPA MSMEs [23]**

This scheme was brought in force on 24 June 2020 and provided for creation of a fund to the tune of INR 4000 Crores by the name of Credit Guarantee Fund Trust for Micro and Small Enterprises (“CGFTMSE”). [24] CGFTMSE provided for guarantee cover for new funds infused towards equity of a stressed MSME undergoing the process of restructuring by the lending institutions as per applicable RBI guidelines. The eligible MSME undergoing restructuring would be those which were stressed as on 30 April 2020 and were standard as on 31 March 2018. [25]

The maximum amount of guarantee that would be covered under the CGFTMSE would be INR 75 Lakhs or 15% of promoter stake, whichever is lower. [26] 90% of the guarantee will be provided by the CGFTMSE and the remaining 10% shall be provided by the promoters. [27] The CGFTMSE was to be operated upto 31 March 2021, however, the same was extended upto 31 September 2021. [28]

### **RBI's Circular - Micro, Small and Medium Enterprises (MSME) sector – Restructuring of Advance dated 06 August 2020 [29]**

The circular dated 6 August 2020 (“**Framework 1.0**”) was issued to support the MSMEs by providing time relaxations and to align it with the erstwhile circular of 11 February 2020. Vide Framework 1.0, the existing loans to MSMEs were classified as 'standard' and to be restructured without a downgrade in the asset classification. Following changes were made in the Framework 1.0:

- a) The date to determine the aggregate exposure for lending institutions was extended from January 2020 to March 2020;
- b) The date to determine the restructuring plan was extended from December 2020 to March 2021; and
- c) The date of exemption limit in relation to GST registration was extended from January 2020 to March 2021.

Framework 1.0 further directed that the asset classification of borrowers classified as standard may be retained as such, whereas the accounts which may have slipped into NPA category between 2 March 2020 and date of implementation may be upgraded as 'standard asset', as on the date of implementation of the restructuring plan.

With the resurgence of COVID-19 in India, the consequent containment measures may have further impacted the MSMEs. Hence, with the objective of alleviating the potential stress to MSMEs, RBI on 5 May 2021 has issued a fresh circular guaranteeing further support.

### **Resolution Framework 2.0 - Resolution of COVID-19 related stress of Micro, Small and Medium Enterprises (MSME) dated 05 May 2021 [30]**

The circular dated 5 May 2021 (“**Framework 2.0**”) extends the benefits conferred by erstwhile circulars and further permits restructuring of the existing loans availed by MSMEs without a downgrade in the asset classification, subjected to the below set out conditions:

- a) As per Gazette Notification dated 26 June 2020, the borrower should be categorised as an MSME. Additionally, these MSMEs should also be classified as 'Standard' as on 31 March 2021;
- b) The borrowers should be registered with the GST as on the implementation date of the restructuring. This will not apply to MSMEs that are exempted from the GST registration;

c) The borrower's account was not restructured in terms of the circular dated 6 August 2021, dated 11 February 2021 and dated 1 January 2021;

d) The borrower's account restructuring should be invoked by 30 September 2021 and be implemented within 90 (ninety) days of the said invocation;

e) Registration under the UDYAM Registration Portal is mandatory before the implementation date of the restructuring plan; and

f) Upon implementation of the restructuring plan, the lending institutions shall keep provision of 10% of the residual debt of the borrower.

Framework 2.0 further extends that the asset classification of borrowers categorised as 'Standard' shall be retained even though the existing accounts might have fallen into the bracket of NPA between the period 1 April 2021 and the date of implementation, may be upgraded as 'standard asset', as on the date of implementation of the restructuring plan. In order to avail these relaxations provided to MSMEs, the lending institutions have to mandatorily satisfy the precondition that these MSMEs have suffered the brunt of economic fallout due to COVID-19 which necessitated such measures. Further, the accounts provided relief under these

instructions shall be subject to subsequent supervisory review with regard to their justifiability on account of the economic fallout from COVID-19.

MSMEs having exposure, including non-fund-based facilities, of upto INR 25 Crores are eligible to be considered or qualified under Framework 2.0. However, the RBI has raised the loan restructuring threshold from INR 25 Crores to INR 50 Crores.

[31] The proposed restructuring can be invoked till 30 September 2021 and have to be implemented within the time span of 90 (ninety) days after the said invocation.

Lending institutions are permitted, as a one-time measure, to review the working capital sanctioned limits and / or drawing power of borrowers who were restructured in accordance with the MSME restructuring circulars, based on a reassessment of the working capital cycle, reduction of margins, and so on, without the same being treated as restructuring. Such decisions are to be taken by the lending institutions by 30 September 2021.

## CONCLUSION

Hence, we see that a detailed rectification, rehabilitation, and recovery process has been provided under the Framework which is largely creditor driven. Further, a comprehensive PIRP regime has been setup under the aegis of the Code to provide a debtor driven process for resolution of stressed MSMEs irrespective of the cause of the stress and finally with the unprecedented surge of COVID-19 affecting MSMEs, the RBI has announced measures to support stressed MSMEs attempting to safeguard their interests.

In summary, the reliefs provided by the RBI to the MSMEs by way of its various circulars and frameworks are as follows:

- Provision for banks to apply to a central government fund providing guarantee for the equity to be infused by the banks to the MSME's as part of the restructuring process.
- Guarantee cover for new funds has been infused towards equity of a stressed MSME undergoing the process of restructuring by the lending institutions.

c. Restructuring of existing loans to MSMEs classified as 'standard' without a downgrade in the asset classification has been permitted.

d. Loan restructuring threshold for the MSMEs has been increased from INR 25 Crores (25,00,00,000) to INR 50 Crores (50,00,00,000).

e. The asset classification of borrowers categorized as 'Standard' have been retained even though the existing accounts might have fallen into the bracket of NPA.

RBI assumed the role of a commander in this financial battle against the COVID-19 with the only agenda to keep the MSMEs afloat. These measures taken by the apex bank would strengthen the economy and provide much needed stimulus to MSMEs so that they can operate without worrying about the financial uncertainties. This window of extension for the earlier availed borrower would ease liquidity challenges and facilitate meeting the objective of inclusive growth.

## REFERENCES

[1] Section 2(3), MSMED Act.

[2] Notification S.O. 1702(E) dated 26 June 2020 issued under the MSMED Act, effective from 1 July 2020,

[https://msme.gov.in/sites/default/files/IndianGazette\\_0.pdf](https://msme.gov.in/sites/default/files/IndianGazette_0.pdf).

[3] 'Master Direction - Lending to Micro, Small & Medium Enterprises (MSME)'

<[https://www.rbi.org.in/Scripts/BS\\_ViewMasDirections.aspx?id=11060](https://www.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=11060)> accessed 1 July 2021.

[4] 'Master Circular - Prudential Norms on Income Recognition, Asset Classification and Provisioning Pertaining to Advances - 1 July 2015'

<[https://www.rbi.org.in/Scripts/BS\\_ViewMasCirculardetails.aspx?id=9908#an7](https://www.rbi.org.in/Scripts/BS_ViewMasCirculardetails.aspx?id=9908#an7)> accessed 1 July 2021.

[5] 'Framework for Revival and Rehabilitation of Micro, Small and Medium Enterprises (MSMEs) - 17 March 2016'

<<https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=10304>> accessed 1 July 2021.

[6] Black's Law Dictionary Free Online Legal Dictionary 2nd Ed., The Law Dictionary, at <http://www.freelawdictionary.org/debt-restructuring/> (last accessed on 15 May 2021).

[7] Section 54A(1), Code.

[8] Section 3(8), Code.

[9] Section 2(62), CA 2013; Proceedings under the Code can be initiated against government companies only if such companies do not perform any sovereign functions, see Hindustan Construction Company Limited & Anr v. Union of India, 2019 SCC OnLine SC 1520.

[10] Section 3(7), Code.

[11] Section 2(20), CA 2013.

[12] Connect Residuary Private Limited v. RICOH India Limited; C.P. (IB)-156/(MB)/2017.

[13] Section 3(12), Code.

[14] Form P10, 2021 Regulations.

[15] Section 54G(1)(a), Code.

[16] Section 54G(1)(b), Code.

[17] Section 54I, Code.

[18] Regulation 27, 2021 Regulations.

[19] Regulation 31(1), 2021 Regulations

[20] Section 54L(1), Code.

[21] Form P13, 2021 Regulations.

[22] 'RBI Circular on Micro, Small and Medium Enterprises (MSME) Sector - Restructuring of Advances, Dated 11 February 2020' <<https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NT1600B934B214B1647D49F167B6E7F1564C1.PDF>>.



[23] 'Credit Guarantee Scheme for Subordinate Debt (CGSSD)' <<http://www.dcmsme.gov.in/Subdebt-FINAL-Guidelines-24.06.2020.pdf>> accessed 4 July 2021.

[24] ibid 5(ii) Distressed Assets Fund.

[25] ibid 5 (v) Eligible Borrower.

[26] ibid 5(iv) Credit Facility.

[27] ibid 5(vi) Guarantee Cover.

[28] 'Credit Guarantee Scheme for Subordinate Debt (CGSSD) Extended Upto 30.09.2021' <<https://www.pib.gov.in/PressRelease/framePage.aspx?PRID=1709091>> accessed 2 July 2021.

[29] 'RBI Circular on Micro, Small and Medium Enterprises (MSME) Sector - Restructuring of Advances - 6 August 2020' <<https://rbidocs.rbi.org.in/rdocs/Notification/PDFs/NT17996B01058D314E1FA0CD74067DE933AD.PDF>>.

[30] <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12086&Mode=0>

[31] 'Resolution Framework - 2.0: Resolution of Covid-19 Related Stress of Micro, Small and Medium Enterprises (MSMEs) - Revision in the Threshold for Aggregate Exposure' <<https://rbidocs.rbi.org.in/rdocs/Notification/PDFs/REC21MSMES67B4E963A5AA42AAB17E25A39880F062.PDF>> accessed 3 July 2021.

## NEWS AND UPDATES

JULY 2021

### DOMESTIC ARBITRATION

#### **PROVISIONS OF LIMITATION ACT, 1963 ("LIMITATION ACT") APPLICABLE TO ARBITRATION PROCEEDINGS INITIATED UNDER SECTION 18(3) OF THE MICRO, SMALL AND MEDIUM ENTERPRISES DEVELOPMENT ACT, 2006 ("MSMED ACT"):**

The Supreme Court of India ("SC") in *M/s. Silpi Industries v. Kerala State Road Transport Corporation and Another* has held that the provisions of the Limitation Act will apply to arbitration proceedings initiated under Section 18(3) of the MSMED Act. The SC referred to Section 43 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act"), which is applicable to arbitrations under the MSMED Act, and held that as per Section 43 of the Arbitration Act, the Limitation Act is applicable to arbitrations, as it applies to proceedings in court. The SC also held that the MSMED Act, being a special statute, will have an overriding effect vis-à-vis the Arbitration Act, which is a general Act.

#### **PRIOR CONSENT OF CENTRAL GOVERNMENT IS NOT NECESSARY UNDER SECTION 86(3) OF THE CODE OF CIVIL PROCEDURE, 1908 ("CPC") TO ENFORCE ARBITRAL AWARD AGAINST FOREIGN STATE:**

The High Court of Delhi ("DHC") in *KLA CONST Technologies Pvt. Ltd. v. The Embassy of Islamic Republic of Afghanistan* has held that a foreign state cannot claim sovereign immunity against enforcement of an arbitral award arising out of a commercial transaction. The DHC observed that Section 86 of the CPC is of limited applicability and the protection thereunder would not apply to cases of implied waiver.

#### **INTERIM RELIEF GRANTED BY AN ARBITRATOR DOES NOT CONSTITUTE AN INTERIM AWARD AND CANNOT BE CHALLENGED UNDER SECTION 34 OF THE ARBITRATION ACT:**

The Calcutta High Court ("CHC") in *Lindsay International Private Limited v. IFGL Refractories Limited* has held that interim relief granted by an arbitrator does not constitute an interim award and cannot be challenged under Section 34 of the Arbitration Act.

### RECENT THOUGHT LEADERSHIP

[Interplay Between The Scope Of Correction And Setting Aside Of An Arbitral Award Under The Arbitration & Conciliation Act, 1996](#)

[Discretion Of Courts Under Section 27 Of The Arbitration & Conciliation Act, 1996](#)

### RECENT UPDATE

We are proud to share that **AKS Partners** has been shortlisted as a finalist for **Boutique Law Firm of the year** and **Mr. Sonal Kumar Singh** as been shortlisted as a finalist for **Managing Partner of the year** in the **Indian Law Awards 2021, Asian Legal Business**

In this case, the arbitrator had rejected a party's application for amendment of the counter-statement seeking introduction of counter-claims/equitable set-off by said party. The CHC held that the impugned order did not constitute an 'interim award' as defined under Sections 29(1)(c) and 31(c) of the Arbitration Act, and therefore, could not be challenged under Section 34 of the Arbitration Act.

### **REJECTION OF AMENDMENT TO APPLICATION UNDER SECTION 34 OF THE ARBITRATION ACT CANNOT BE APPEALED UNDER SECTION 37 OF THE ARBITRATION ACT:**

The High Court of Bombay ("BHC") in *Oil & Natural Gas Corporation Ltd. v. Swiber Offshore Construction Pte. Ltd. and Another* has held that there should be setting aside or refusal to set aside the award under Section 34 of the Arbitration Act for the appeal to lie under Section 37(1)(c) of the Arbitration Act. The BHC observed that there is a difference between refusing an amendment to take a ground of challenge and rejecting the entire application finally under Section 34 of the Arbitration Act. The BHC further noted that if the rejection of an application for an amendment to the petition under Section 34 of the Arbitration Act is held to be appealable, it will lead

to an anomalous situation wherein a party intending to delay the proceedings would keep filing applications for amendment and, upon rejection, file an appeal praying for postponement of the petition under Section 34 of the Arbitration Act.

### **INTERNATIONAL ARBITRATION**

#### **BRAZIL SIGNS THE SINGAPORE CONVENTION ON SETTLEMENTS ARISING FROM MEDIATION:**

On 04.06.2021, Brazil signed the Singapore Convention on Mediation ("Singapore Convention"), which provides a uniform framework for settlement agreements put in writing resulting from mediations entered in one of the contracting states. Under the Singapore Convention, a party can enforce such settlement agreements in the courts of any contracting state, provided that the settlement agreement was issued in that or in another contracting state. Moreover, the party can invoke the settlement agreement in any contracting state, to prove that the matter was already resolved.

#### **ARBITRATION FOUNDATION OF SOUTH AFRICA ("AFSA") LAUNCHES NEW INTERNATIONAL ARBITRATION RULES:**

The AFSA International Arbitration Rules came into effect on 01.06.2021. The rules follow the introduction of the South African International Arbitration Act in 2017, and are intended to improve AFSA's management of international cases and make their resolution easier. The rules were prepared by a panel of experts to reflect international best practice. The rules expressly provide for a party to the arbitration to make use of third-party funding, provided the existence and identity of the third-party funder is disclosed to the tribunal, secretariat and other parties involved as soon as possible. The rules allow tribunals to hold hearings in person or by "any other means" they consider appropriate, including video and phone conferences or a combination of methods. This allows the tribunal to be more flexible in the manner in which it conducts hearings, particularly in the context of the COVID-19 pandemic.

## **COMPANY LAW AND IBC**

### **DIRECTOR IDENTIFICATION NUMBER (“DIN”) CANNOT BE DEACTIVATED SOLELY FOR DISQUALIFICATION UNDER SECTION 164 (2) OF THE COMPANIES ACT, 2013 (“CA 2013”):**

The High Court of Kerala (“KHC”) in Zacharia Maramkandathil Mohan and Others v. Union of India has held that disqualification of directors under Section 164(2) of CA 2013 is not to be applicable retrospectively to the period before CA 2013 came into force. The KHC also observed that the DIN allotted under Rule 10 of the Companies (Appointments and Qualifications of Directors) Rules, 2014, is not liable to be deactivated or cancelled solely for the reason that possessors of said DIN stand disqualified for appointment/reappointment as directors of companies by operation of Section 164(2) of CA 2013.

### **COMPANIES (ACCOUNTING STANDARDS) RULES, 2021:**

The Central Government, after consultation with the National Financial Reporting Authority, has made the Companies (Accounting Standards) Rules, 2021 (“Rules”), which will come into force on the date of their publication in the official gazette. The Rules provide

that every company [other than companies on which Indian Accounting Standards as notified under Companies (Indian Accounting Standards) Rules, 2015 are applicable] and its auditor(s) shall comply with the Accounting Standards in the manner specified in the Annexure to these Rules.

### **COMPANIES (INDIAN ACCOUNTING STANDARDS) AMENDMENT RULES, 2021:**

The Central Government has amended the Companies (Indian Accounting Standards) Rules, 2015. The amended rules inter-alia provide that to qualify for recognition as part of applying for the acquisition method, the identifiable assets acquired and liabilities assumed must meet the definitions of assets and liabilities in the Framework for the Preparation and Presentation of Financial Statements in accordance with Indian Accounting Standards issued by the Institute of Chartered Accountants of India at the acquisition date. This amendment shall come into force on the date of its publication in the official gazette.

### **SECURITIES CONTRACTS (REGULATION) (AMENDMENT) RULES, 2021:**

The Central Government has amended the Securities Contracts (Regulation) Rules, 1957. The amended rules inter-alia provide that if a public company is desirous of getting its securities listed on a recognised stock exchange, the minimum offer and allotment to public in terms of an offer document shall be at least such percentage of each class or kind of equity shares or debentures convertible into equity shares issued by the company equivalent to the value of five thousand crore rupees and at least five per cent of each such class or kind of equity shares or debenture convertible into equity shares issued by the company, if the post issue capital of the company calculated at offer price is above one lakh crore rupees.

### **RELAXATION OF TIME FOR FILING FORMS RELATED TO CREATION OR MODIFICATION OF CHARGES UNDER THE CA 2013:**

In continuation of the Ministry of Corporate Affairs (“MCA”) general circular No. 07/2021 dated 03.05.2021 pertaining to extension of time for filing forms related

to creation or modification of charges under the CA 2013, the MCA has decided to change the last dates of filing from 31.05.2021 and 01.06.2021 to 31.07.2021 and 01.08.2021 respectively in the aforementioned circular. This shall be without any prejudice to any belated filings that may have already been made along with additional fees/ad valorem fee.

### **CLARIFICATION ON PASSING OF ORDINARY AND SPECIAL RESOLUTIONS BY COMPANIES UNDER THE CA 2013:**

In continuation of the MCA's General Circulars No. 14/2020 dated 08.04.2020, No.17/2020 dated 13.04.2020, No.22/2020 dated 15.06.2020, No.33/2020 dated 28.09.2020, and No. 39/2020 dated 31.12.2020, after due examination, the MCA has decided to allow companies to conduct their extraordinary general meetings through video conferencing or other audio-visual means, or transact items through postal ballot in accordance with the framework provided in the aforesaid Circulars upto 31.12.2021.

### **COMPETITION COMMISSION OF INDIA ("CCI") APPROVES ACQUISITION OF THE ZUARINAGAR PLANT OF ZUARI AGRO CHEMICALS LIMITED BY PARADEEP PHOSPHATES LIMITED:**

The CCI has approved the

acquisition of the Zuarinagar plant of Zuari Agro Chemicals Limited ("ZACL") by Paradeep Phosphates Limited ("PPL"). The proposed combination envisages acquisition of Zuarinagar, Goa plant of ZACL by PPL, as a result of which, PPL shall acquire business of developing and manufacturing urea and non-urea fertiliser products presently being carried out by ZACL at the Zuarinagar, Goa Plant. PPL, part of the Adventz Group, is engaged mainly in the manufacture and sale of non-Urea fertilizers, namely, di-ammonium phosphate and NPK fertilizers. ZACL, a public listed company, is also a part of the Adventz Group, and is primarily engaged in the development and manufacturing of fertilizers in India.

### **CCI APPROVES ACQUISITION BY ADANI GREEN ENERGY LIMITED OF SB ENERGY HOLDING LIMITED:**

The CCI has approved the acquisition of SB Energy Holding Limited ("Target") by Adani Green Energy Limited ("Acquirer"). The proposed combination envisages the acquisition of the entire (i.e., 100%) shareholding of the Target by the Acquirer from the Target's existing shareholders. The Target is engaged in generation, supply and sale of electricity and energy produced from renewable sources.

## **MISCELLANEOUS**

### **DHC ISSUES PRACTICE DIRECTIONS IN RESPECT OF BANK GUARANTEES REQUIRED BY THE COURT AND HAS ALSO NOTIFIED PROFORMA FOR SUMMONS FOR SETTLEMENT OF ISSUES IN COMMERCIAL DISPUTE:**

The directions with regards to the bank guarantees are given as per the decision of the DHC dated 02.06.2021 in the case of Ircon International vs. Hindustan Construction Co. Ltd. According to the directions, it has been stated that a clause of term shall be necessarily incorporated in every Bank Guarantee furnished by a party in the High Court for release of the amounts deposited. Additionally, the DHC has also notified the proforma for 'Summons for Settlement of Issues in a Suit Relating to Commercial Disputes' pursuant to the directions in the case of Mothers Pride Education Institution Pvt. Ltd. v. Smt Shukla Sehgal dated 11.05.2021.

## **DHC MODIFIES GUIDELINES FOR EXPEDITING EXECUTION OF DECREES, AWARDS:**

The DHC in *M/S Bhandari Engineers and Builders Pvt Ltd v. M/S Maharia Raj Joint Venture and Others* has modified the guidelines issued by it with regards to the execution of decrees and awards by directing the lower courts to expedite the proceedings within one year of their institution. The DHC observed that an inordinate delay would frustrate the decree holders from reaping benefits of the decrees passed in their favour. The DHC directed that the executing court shall, on the first date of hearing, issue notice to the judgment-debtor, attach the assets of the judgment-debtor and direct the judgment-debtor to deposit the decretal amount within 30 days of the receipt of the notice. The DHC further directed that in the event of default of the judgment-debtor to file the affidavit, the court shall consider detention of the judgment-debtor in civil prison for a term not exceeding three months under Order XXI, Rule 41(3) of the CPC.

## **RIGHT IN TRADEMARK ONCE RELINQUISHED CANNOT BE CLAIMED UNLESS TERMS OF RELINQUISHMENT REVOKED:**

The DHC in *Ampa Cycles Private Limited v. Jagmohan Ratra* has held that once a person expressly relinquishes the rights to a trademark, the same cannot be claimed again, directly or indirectly, unless the terms of the dissolution deed are novated or revoked. The DHC also observed that if rights are assigned to a third party, they cannot be restrained from exercising those rights by the relinquishee in ordinary circumstances. The DHC explained that waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. The DHC thus observed that where one party has made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship.

## **NET WORTH OF BIDDER'S SISTER CONCERN NEED NOT BE FACTORED TO COMPUTE BIDDER'S WORTH IF TAKEOVER IS NOT COMPLETE:**

The DHC in *SRSC Infra Private Limited v. National Highways Authority of India* has held that in order to evaluate the financial eligibility of a bidder in a tender award process, the net worth of such bidder's sister concern should not be considered to estimate the net worth of the bidder, if the takeover of the sister concern is not complete. In this case, the DHC held that the bidder and its sister concern were separate entities and takeover was yet not complete.

## **DHC CREATES NEW NOMENCLATURE FOR CASES INVOLVING INTELLECTUAL PROPERTY RIGHTS ("IPR") DISPUTES:**

The DHC has issued an office order creating a new nomenclature for cases related to IPR disputes, which shall come into effect immediately. According to the new nomenclature, 'Writ Petition (C)' will now be termed as 'Writ Petition (C)-IPD'. In the same manner, 'Civil Misc. (Main)' will also have the 'IPD' suffix attached to it.

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Earlier this month, the DHC had created an Intellectual Property Division to deal solely with cases related to IPR cases.

## **TENDER CONDITIONS STIPULATING EXTENSION OF CONTRACT CANNOT BE CHALLENGED AT A BELATED STAGE:**

The BHC in Perfect Alloys and Steel Limited and Another v. Union of India and Others has held that when a bidder participates in a tender process with full knowledge that there exists a condition of extension of contract by one year in favour of the successful bidder at the sole discretion of the tendering authority, the challenge to tender condition regarding extension cannot be entertained at a belated stage at the instance of the bidder who participated in the tender process and was the unsuccessful bidder.

## **NO LIMITATION PERIOD UNDER SECTION 10 OF THE LIMITATION ACT FOR RECOVERY OF ASSETS OF PARTNERSHIP FIRM WHICH ARE IN THE HANDS OF SURVIVING PARTNER:**

The BHC in Hasina Mohamed Shafik Lalje and Others v. Fatima

Correa Nee Fatima Yakubali has held that there is no period of limitation prescribed in view of Section 10 of the Limitation Act for recovery of the assets of a partnership firm which are in the hands of the surviving partner upon dissolution of said firm. The BHC observed that no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.

## **SUBSTANTIVE REMEDY DOES NOT GET EXTINGUISHED UNDER THE LAW OF LIMITATION:**

The KHC in The Assistant General Manager, State Bank of India v. S. Saradamani and Others has held that the law of limitation only bars judicial remedy, and that the substantive right itself survives and continues to be available in other ways. The KHC clarified that the rules of limitation are not meant to destroy the rights of parties. The KHC also clarified the scope of Section 17 of the

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Limitation Act, and explained that Section 17 of the Limitation Act is only applicable when it is established that the applicant could not have discovered the mistake sooner with reasonable diligence. The KHC observed that if a considerable interval of time has elapsed between the alleged mistake and its discovery, and the mistake could have been discovered much earlier with reasonable diligence, then Section 17 of the Limitation Act is not applicable.

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## AWARDS & RECOGNITIONS

