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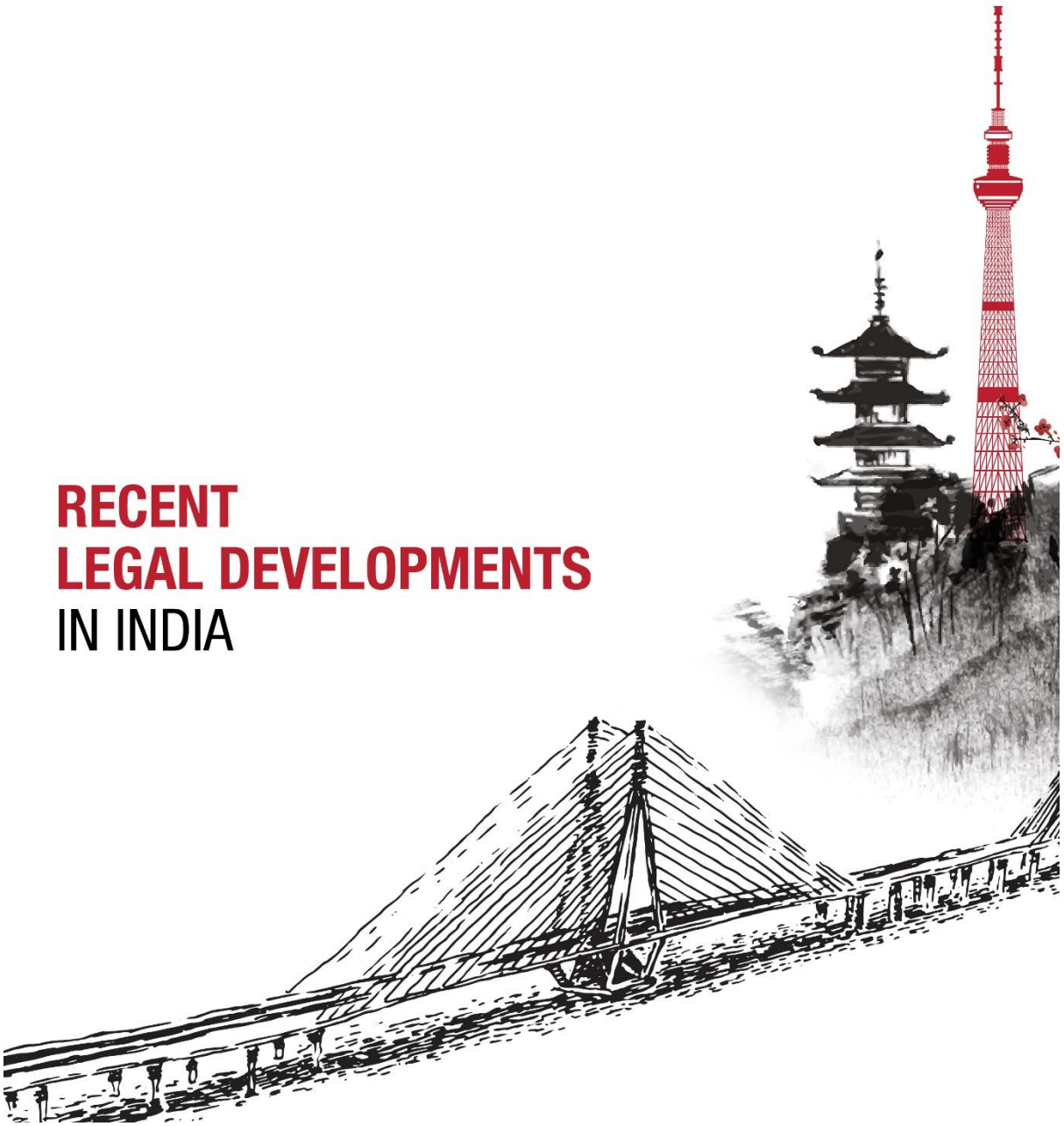

INDUSLAW 中文通讯

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1. 外国投資 – RBI による通知

1.1. 外国投資規則の改正:

インド準備銀行にバトンを戻す

財務省の管轄下にある経済局によって2020年7月27日に導入された2020年外国為替管理（非債務証書）（第3回改正）規則（「規則」）は、インドにおける外国直接投資（「FDI」）の監視と管理に関連する事項について、バトンをインド準備銀行（「RBI」）に戻すために規則を改正する。

主な改正

規則の主な変更点は以下のとおりである。

(a) RBI が規則を執行する権限を有することを規定する規則 2（A）の挿入

(b) 民間航空部門に関する改定外国投資政策は、提案されたエア・インディアへの投資引き揚げ計画を可能にする。

2. 企業と商取引

2.1. 2020 年会社（改正）法案の注目点

下院は、2020 年 9 月 19 日、インドにおける企業への事業のしやすさと暮らしやすさを促進する目的で、2013 年会社法に特定の変更を加える 2020 年会社（改正）法案（「法案」）を承認した。

法案による提案改正案の全体像

法案により導入提案されている重要な改正案は次のとおりである。

(a) 法に基づく特定の重大でない犯罪の非犯罪化、特に過失がいかなる悪意ある意図も欠いている、またはより豊かな公益を伴わない場合

(b) 既存の罰則の合理化

(c) 企業のコンプライアンス体制および事業運営の調和のとれた柔軟性の緩和を含むがこれらに限定されない、インドにおける事業のしやすさを促進するためのその他の変更および緩和

(d) 訴訟事件をより迅速かつ効果的に処理するための体制

法案による提案改正案は、律儀な利害関係者や企業がインドで事業を継続することを奨励するだけでなく裁判所の全体的な負担も軽減する。

2.2. 2019 年の消費者保護法と電子商取引規則の主な側面

概要

2020年7月15日、消費者問題・食料・公的分配省（「**省**」）は、消費者問題局（「**DCA**」）を通じて、2019 年消費者保護法（「**CPA 2019**」）の特定の規定が発効する 2020 年 7 月 20 日を特定の日として指定する通知を発行した。その後、2020 年 7 月 23 日、省は DCA を通じて、CPA 2019 の残りの規定が発効する日として 2020 年 7 月 24 日を指定して別の通知（2020 年 7 月 15 日および 2020 年 7 月 23 日通知をひとまとめにして「**告示施行**」）を発行した。事実上、告示施行により、CPA 2019 のすべての規定が通知され、有効になっている。CPA 2019 は、CPA 1986 を改正して、そっくりそのまま置き換えている。

さらに、電子商取引、直接販売における不公正な取引慣行を防止して消費者の利益と権利を保護する目的で、CPA 2019 は中央政府が必要に応じてそのような措置を講じることを許可している。前述の権限に従い、中央政府は 2020 年 7 月 23 日に消費者保護（電子商取

引）規則2020（「**電子商取引規則**」）を通知した。

CPA 2019によりもたらされた変更

電子商取引規則で解釈されるCPA 2019にもたらされたおもな精査は次のとおりである。

(a) 以下に義務と責任を課すことにより、さまざまな福祉指向条項が電子商取引規則によって実行された。（i）電子商取引企業- 市場中心および在庫中心の両方 （ii） 市場企業の販売者

(b) 製造物責任の概念の導入

(c) 新しい規制当局として新しい中央消費者保護機関の設立

(d) 「消費者」としてみなされる人の範囲の拡大

(e) 「不公正な契約」の概念の導入

(f) 広告および誤解を招く広告に裏書を含めること

3. 銀行取引と金融

3.1 RBIは新会社の優先部門融資を促進する

2020年8月6日の融資基準の大幅な変更においてRBIは、今後、新会社は優先部門融資に含まれることを発表した。この優先部門融資に含まれる詳細な融資額とガイドラインが待たれるが、改定は新会社が銀行から簡単にクレジットを入手できるようにすることを目指している。

3.2 デジタル融資基準に基づく銀行およびNBFCからのローン：公正な実施規則およびアウトソーシングガイドラインの順守

RBIは、デジタル融資基準を通じてローンを提供する銀行およびノンバンク金融会社（「**NBFCs**」）による、金融サービスの公正な実施規則およびアウトソーシングガイドラインの遵守を実質ともに繰り返し確実にするための通知（「**通知**」）を発行した

4. テクノロジー、メディア通信

4.1 小売決済する全インド傘下事業体承認のためのRBI基準

RBIは、2020年8月18日にプレスリリースを発行し、そのWebサイトに小売決済する全インド傘下事業体承認のための基準を掲載した。基準の目的は、小売決済システムに焦点を当てた全インド傘下事業体（「**傘下事業体**」）に資本を提供することである。RBIはまた、2021年2月26日の営業終了まで、傘下事業体の申請を募集している。

傘下事業体は主に、ATM、ホワイトラベルPoS、Aadhaarに基づいた決済、送金サービスなどの小売スペースでの新しい決済システムの設定、管理、運用に対して責任を負っている。

4.2 ドラゴンの飼いならし：ダイヤモンドゲームにおけるインドによる慎重な動き

近年、インドと中国の間で発生した前例のない経済的および国境を越えた緊張の観点から、電気情報技術省は、2020年6月29日に、インドの主権と完全性、インドの防衛、国家の安全と公秩などの理由をあげてプレスノートを発表し、59の申請を止めた。

5. エネルギー、インフラストラクチャー、天然資源

5.1. 2020年提案電力市場規制の注目点

2003年の電気事業法第178条で解釈される第66条および国家電力政策の下で与えられるその権限を行使して、中央電力規制委員会は、2020年7月18日付通知を通じて2020年CERC（電力市場）規則（「**電力市場規則**」）の草案を発行した。

提案電力市場規制の適用範囲は、電力取引所、電力取引所以外の市場参加者、および店頭取引市場にまで及ぶ。

6. 雇用法

6.1. ハリヤーナー州政府が 1948 年工場法を改正する

ハリヤーナー州政府は、1948年の工場法を改正し、労働時間に関連する特定の新しい規定を導入することを提案していた。これにより、女性労働者が夜間に働くことが認められ、複雑な犯罪などが発生することであろう。2018年8月28日付2018年の工場（ハリヤーナー改正）法案を参照のこと。

6.2. 産業紛争とその他の特定の法律（カルナタカ州改正）2020 年条例の主な絡み合った影響

2020 年 7 月 31 日、カルナタカ州知事は、カルナタカ州での事業活動のしやすさを促進して押し上げるために、産業紛争とその他の特定の法律（カルナタカ改正）2020 年条例（「**条例**」）を公布した。この条例は、カルナタカ州の労働法に特定の重要な雇用者に優しい改革をもたらしている。

6.3. 経済活動を促進するための州政府による労働法改正イニシアティブ

COVID-19 がインドの経済成長の鈍化につながったため、連邦（中央）政府の他に州政府も労働法および雇用法の改正による、とりわけ雇用者の経済的負担を軽減するための労働時間の免除の付与や法定基準の引き上げなどさまざまな措置の導入を開始した。

7. 訴訟および紛争の解決

7.1. 第 29 条 A（1）の遡及的適用：デリー高等裁判所が問題を解決する

第 29 条 A は、1996 年の仲裁および調停法に基づいて開始された仲裁手続の完了スケジュールを定めた 2015 年の仲裁および調停法（改正）法（「2015 年改正法」）として 2015 年に導入された。仲裁裁判所が仲裁を開始した日から 12 か月以内に仲裁裁判所（「**仲裁裁判所**」）による裁定を行う義務を規定した当該条項は、両当事者の同意によりさらに 6 か月の期間を延長することができる。

ONGC Petro Additions Limited 対 Ferns Construction Co. Inc.の訴訟において、デリー高等裁判所は、事実上手続き的である第 29 条 A のその後新たに導入された規定にもかかわらず、2015 年 10 月 23 日以降に開始された仲裁手続に将来を見越して適用されるであろうと判断した。

8. 政府および規制

8.1. 2020 年新教育政策 - パラダイムシフト

2020 年 7 月 29 日、連合内閣はインドの学校と高等教育システムを変革するために 34 年前の 1986 年国家教育政策に取って代わる 2020 年国家教育政策を承認した。NEP は著名な科学者である K.Kasturirangan 博士の議長の下で「国家教育政策草案委員会」によって提出された報告書に基づいている。

**上記表題の詳細な分析については、添付ニュースレターの対応するパラグラフを参照のこと。

1. FOREIGN INVESTMENT – NOTIFICATIONS BY THE RBI[1]

1.1 AMENDMENT TO FOREIGN INVESTMENT RULES:

PASSING THE BATON BACK TO THE RESERVE BANK OF INDIA

INTRODUCTION

When the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (the "**Rules**") were first notified in the latter half of 2019, the Rules revised the long standing regime in relation to monitoring and management of foreign direct investment ("**FDI**") in India, which had historically been the responsibility of the Reserve Bank of India (the "**RBI**"). The Rules made a departure and mandated that the RBI consult with the government of India in relation to several matters concerning FDI. The Foreign Exchange Management (Non-debt Instruments) (Third Amendment) Rules, 2020[2] (the "**Third Amendment**") introduced on July 27, 2020 by the Department of Economic Affairs under the ambit of Ministry of Finance, further amend the Rules to pass the baton back to the RBI for matters relation to monitoring and management of foreign direct investment ("**FDI**") in India.

KEY AMENDMENTS

The key changes to the Rules are mentioned below.

Insertion of Rule 2(A):

The Third Amendment has introduced a new rule, Rule 2(A) to the Rules. The new rule provides that the RBI shall be the authority that will administer the Rules. Accordingly, the RBI will now have the power to issue such directions, circulars, instructions, clarifications, as it may deem necessary, for effective implementation of the Rules.

Originally, the Rules provided that the RBI shall act in consultation with the government of India while exercising various powers. The Third Amendment has now removed the words "*..and in consultation with the Central Government..*" from Rule 3 and Rule 4 of the Rules. On account of this removal, the RBI will not have to consult with the government of India for disposal of applications filed by: (i) a person resident outside India seeking permission for undertaking FDI in India; and (ii) an Indian entity, in relation to receipt of FDI, respectively.

Revised foreign investment policy for the civil aviation sector:

(i) *Air transport services*.

Prior to the Third Amendment, eligible non-resident entities apart from overseas citizens of India ("**OCIs**") and non-resident Indians ("**NRIs**"), were allowed to invest upto 49% under the automatic route, in the equity instruments of an Indian company engaged in the business of: (i) scheduled air transport service or domestic scheduled passenger airline; or

[1] Reserve Bank of India or RBI is the central bank of India. Its primary responsibility is to regulate the monetary policy of the Indian economy

[2] The Third Amendment can be accessed at http://egazette.nic.in/WriteReadData/2020/220699.pdf

(ii) regional air transport service.[3] However, OCIs and NRIs had the option to invest upto 100% under the automatic route, in the equity instruments of such companies. As per Serial No. 9.5(c) of Schedule I of the Rules, foreign airlines had to comply with additional requirements to own up to 49% (forty nine percent) stake in Indian companies, operating scheduled and non-scheduled air transport (including seeking of government approval, clearance from Ministry of Civil Aviation for import of technical equipment, among others). The earlier regime had also provided that such additional compliances will not apply in case of NRIs and OCIs. However, with the Third Amendment, while the aforesaid benefits continue to be available to NRIs, it shall no longer be available to OCIs.

The removal of the relaxation provided to the OCIs ensures consistency with the provisions of the Aircraft Rules, 1937 (the "**Aircraft Rules**"). The Third Amendment provides a note below the revised Serial No. 9.3 of Schedule I of the Rules, which clarifies that, to operate a scheduled air transport service, an air operator certificate is required, which is only provided to a company or a body corporate:

(a) which is registered and has its principal place of business within India;

(b) whose chairman and at least two-thirds of directors are citizens of India; and

(c) whose substantial ownership and effective control is vested in Indian nationals.[4]

(ii) *Other conditions in relation to civil aviation*.

Through the Third Amendment, the government of India has clarified the FDI regime for the civil aviation sector. The revisions made to Serial No. 9.5 of Schedule 1 of the Rules are as follows:[5]

(a) in relation to the business of operating cargo airlines, helicopter and seaplane services, the foreign airlines can now only invest into the equity of *Indian companies and not in any other entity involved in such business*;

(b) in relation investment by a foreign airline, the cap of 49% of foreign investment, for investment into an Indian company (*operating scheduled and non-scheduled air transport services*), shall include investments by foreign institutional investors (FIIs) and foreign portfolio investment (FPIs);

(c) investment in M/s Air India Limited ("**Air India**"), by NRIs who are Indian nationals shall not be subject to the sectoral cap of 49% and such NRIs shall be permitted to invest in Air India upto 100% under the automatic route;

[3] Series Number 9.3, Schedule 1 of the Rules.
[4] Paragraph I, Schedule XI of the Aircraft Rules.
[5] Rule 5(ii) of the Third Amendment.

(d) it has been clarified that substantial ownership and effective control of Air India shall continue to be vested in Indian nationals, *as stipulated in Aircraft Rules*;

(e) the foreign investment caps mentioned under Serial No. 9.2 (which relates to investments in airports) and 9.3 of Schedule I of the Rules (*which relates to air transport services*) will be applicable if there is no investment by a foreign airline in the entity receiving such foreign investment; and

(f) as also mentioned above, the relaxation provided to OCIs in relation to investments by foreign airlines, are now removed.

IMPLICATIONS

The implications of the Third Amendment can be summarized in the manner provided below.

(i) With the enactment of the Third Amendment, the administration and formulation of foreign investment rules has been shifted back from the government of India to the RBI. However, the Third Amendment has not revised all the provisions of the Rules which provided for consultation with the government of India. The Rules still maintain either the requirement of consultation with or formulation of policies by, the government of India, for several matters like gifts from NRIs to other non-residents, permissible time period beyond prescribed timelines for transfers by NRIs or OCIs, and rules regarding investments by foreign venture capital investors. Hence, introduction of Rule 2A to the Rules to grant administrative powers to the RBI, may not be enough to avoid complications that may arise in the interpretation of the Rules on account of such dual control.

(ii) In addition to the restoration of powers of the RBI, the Third Amendment has essentially incorporated the changes introduced by Press Note 02 of 2020.[6]

(iii) The earlier restriction on foreign investment not exceeding 49% in Air India has been relaxed but only for NRIs, who are Indian Nationals.

(iv) While NRIs continue to enjoy the benefit of investing under 100% automatic route into air transport services, such benefit will no longer be available to OCIs.

INDUSLAW VIEW

The primary rationale for the introduction of the Third Amendment is to pivot the administration of the rules in relation to FDI, back to the RBI. The extension of the powers of the RBI and the restoration of its independence

6 https://dipp.gov.in/sites/default/files/pn2_2020.pdf

is a welcome move, given that RBI, with its prior experience and expertise in handling the process for FDI, is arguably the more appropriate authority to administer the Rules. However, in light of the Third Amendment and restoration of powers to RBI, the motivation of the government of India to enact the Rules (in replacement of the Foreign Exchange Management (Transfer of Issue of Security by a Person Resident outside India) Regulations, 2017) which granted the government of India more powers for administering the Rules earlier, becomes unclear.

The Third Amendment also paves way for the proposed disinvestment plans for Air India, as NRIs, who are Indian nationals, are now eligible to invest upto 100% under the automatic route in Air India. This relaxation will aid in making Air India a professionally managed airline in-line with its global peers.

Despite the positive undertone of the Third Amendment, there could be further complications in the interpretation of the Rules, as the role of the government of India has not been rolled back completely, thereby leading to a situation where there could be a regime of dual control. Like many of its predecessors, the functionality of the Third Amendment will be tested in the manner the government implements the same in terms of letting RBI reclaim its position as the primary administrator of the Rules.

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2. CORPORATE AND COMMERCIAL

2.1 HIGHLIGHTS OF THE COMPANIES (AMENDMENT) BILL, 2020

INTRODUCTION

Lok Sabha [7] on September 19, 2020 passed Companies (Amendment) Bill, 2020 (the "**Bill**"), to introduce certain modifications to the Companies Act, 2013 (the "**Act**") with a view to promote ease of doing business and ease of living to corporates in India[8]. The proposed amendments under the Bill are based on the recommendations submitted by the Company Law Committee (the "**Committee**"), which was formed with representatives from the industry chambers, professional institutes and legal fraternity. The mandate of the Committee was relatively wide-ranging including envisaging various reforms to the Act such as reviewing offences, introducing mechanisms to reduce burden on courts, ensuring effective disposal of cases, improving functioning of various authorities under the Act and suggesting other changes with the objective of promoting ease of doing business in India [9]. The Committee submitted its report to the union minister, Ministry of Corporate Affairs ("**MCA**") on November 14, 2019. The recommendations of the Committee were largely based on re-categorization of certain criminal compoundable offences into civil wrongs carrying civil liabilities[10], rationalization of penalties, mechanisms for reducing the overall

[7] Lok Sabha is the lower house of the India's bicameral Parliament.
[8] Page 3, Para 1, Committee Law Report, 2019.
[9] Page 11, Para 1.4, Committee Law Report, 2019.
[10] Page 3, Para 1, Committee Law Report, 2019.

pendency of disputes and certain other ancillary changes to address emerging issues impacting the working of corporates in the country[11].

OVERVIEW OF THE PROPOSED AMENDMENTS UNDER THE BILL

Some of the important amendments that have been proposed to be introduced by the Bill are discussed below.

Overhaul of penalties

The Bill aims to overhaul the penalty regime for various non-compliances, as currently contemplated under the Act in a 3 (three) fold manner:

(a) **Removal of imprisonment and/or substitution with monetary penalty**

The Committee recommended omission of certain offences under the Act as it was felt that such offences can be sufficiently dealt with under other prevailing laws such as the Insolvency and Bankruptcy Code, 2016 (the "**Code**"). It was also highlighted by the Committee that in the event any vacuum is created because of the deletion of an offence from the relevant Section of the Act, Section 450 of the Act (which deals with punishments where no other penalty is prescribed), can always be resorted to[12]. Accordingly, certain offences contemplated under the Act, such as defaults in relation to: (i) compliance with the provisions of the Act dealing with variation of shareholders rights[13]; (ii) publication of the order of the National Company Law Tribunal ("**Tribunal**") for reduction in shares[14]; and (iii) compliance with the orders of the Tribunal in respect of debentures[15], amongst others, have been proposed to be omitted from the Act. Additionally, with respect to certain other non-grave offences punishable with imprisonment and/or with monetary penalty, the Bill has proposed substitution of such offences with monetary penalty only. In this respect, offences such as default in compliance by a company: (i) while purchasing its own securities[16]; (ii) for registration of charges[17]; (iii) in maintaining registers, filing returns or taking other necessary steps regarding declaration of significant beneficial ownership[18]; and (iv) in maintaining books of account to be kept by the company[19], which currently contemplate imprisonment and/or monetary penalty for defaults, are proposed to be substituted solely with monetary penalties, as applicable. The rationale for introducing such modifications is to decriminalise minor procedural or technical lapses under the Act into civil wrongs and reduce the overall pendency of the courts by

[11] Page 11, Para 1.3, Committee Law Report, 2019.
[12] Page 26, Para 3.1, Committee Law Report, 2019.
[13] Penalty under Section 48 (5) of the Act.
[14] Penalty under Section 66 (11) of the Act.
[15] Penalty under Section 71 (11) of the Act.
[16] Penalty under Section 68 (11) of the Act.
[17] Penalty under Section 86 (1) of the Act.
[18] Penalty under Section 90 (11) of the Act.
[19] Penalty under Section 128 (6) of the Act.

removing the criminality in case of defaults, the commission of which is not linked with any *malafide* intention on the account of the wrong-doer and/or does not involve larger public interest[20].

(b) **Reduction in amount of penalty**

The Bill also aims to reduce the penalties for certain offences such as non-maintenance of register of members[21], failure to file annual return within the prescribed timelines[22], failure to file resolutions and agreements in terms of the Act[23] and non-compliance of provisions relating to unpaid dividend account [24] and such modifications to the Act have been proposed as a part of providing a further ease of living to corporates living in the country[25].

(c) **Dealing with certain offences in an alternate framework**

The Committee was of the view that for certain offences under the Act, the proposition of replacing such offence with monetary penalty and/or mere rationalization of penalties may not achieve the intended result. Therefore, the Committee perceived that it may be worthwhile to device an alternate mechanism to address the concerns created by such offences in order to better achieve the desired objective of such provisions. Based on such suggestions of the Committee, an alternate framework for certain offences has been proposed to be introduced. For instance, one such proposed amendment relates to a situation where, if a company fails to abide by the order of the Regional Director under Section 16(1) [26] of the Act, (requiring rectification of the name of the company on the grounds that such name is identical or similar to an existing company, or a registered trademark), within 3 (three) months of passing of such order, then in place of imposing civil liability on the company, an auto-generated name shall be assigned to such company, which name the company shall be bound to use until it gets it changed through due process as per the provisions of the Act. The other provisions of the Act where such alternate mechanisms have been proposed, include provisions relating to non-compliance with order of compounding of the Tribunal or the Regional Director[27], non-cooperation of promoters, directors and employees with the company liquidator [28] and company liquidator not serving the order of dissolution to

[20] Page 36, Para 3, Statement of Objects and Reasons of the Bill.
[21] Penalty under Section 88 (5) of the Act.
[22] Penalty under Section 92 (5) and (6) of the Act.
[23] Penalty under Section 117 (2) of the Act.
[24] Penalty under Section 124 (7) of the Act.
[25] Page 36, Para 3, Statement of Objects and Reasons of the Bill.
[26] Rectification of name of Company.
[27] Penalty under Section 441 (5) of the Act.
[28] Penalty under Section 284 (2) of the Act.

Registrar of Companies ("**RoC**")[29].

Delisting and listing of companies

The Bill seeks to empower the Central Government to exclude certain companies in consultation with Securities and Exchange Board of India from the definition of 'listed companies' [30] under the Act. The objective of according such flexibility to the Central Government is to exclude such private companies that list their debt securities on a recognized stock exchange upon their allotment on private placement basis, thereby falling under the definition of a 'listed company' under the Act [31] . The Committee was of the view that the existing provisions may dis-incentivise private companies from seeking listing of their debt securities due to stringent regulation of the listed companies as compared to the unlisted private companies, even though doing so may be in the best interests of the company[32].

The Bill further provides for permitting listing of certain companies on permitted stock exchanges in permissible foreign jurisdictions or such other jurisdictions, as may be provided by the rules framed in this regard[33].

Introduction of chapter on producer companies

The Bill seeks to amend Section 465 of the Act, dealing with aspects relating to producer companies. 'Producer companies' primarily refer to companies that are engaged in businesses such as the production, harvesting, procurement, grading, pooling, handling, processing, marketing, selling or exporting primary produce or generation, transmission, distribution of power or such other activities, as prescribed under the Companies Act, 1956. Currently, producer companies [34] are bound to follow the requirements as set out in Part IXA of the Companies Act, 1956 until a special legislation is enacted for such producer companies. The Committee suggested that instead of a new law to be enacted *vis-a-vis* the producer companies, modifications to the Act should be made so as to provide for the governance of such producer companies. Accordingly, the Bill provides that provisions similar to Part IXA of the Companies Act, 1956 should be inserted into the Act[35] to provide for matters relating to the governance of producer companies. Broadly, such provisions deal with incorporation, management, general meetings, share capital and membership rights, finance, accounts and audit, loans to members and investment and amalgamation and merger of producer companies.

Relaxations pertaining to corporate social responsibility

The Bill provides that the companies which have corporate social responsibility spending obligation up to INR 50,00,000 (Indian Rupees fifty lakhs) will no longer be required to constitute the corporate social responsibility committee in accordance with the Act and the functions of such

[29] Penalty under Section 302 (4) of the Act.
[30] Section 2 (52) of the Act.
[31] Page 43, Para 2.4, Committee Law Report, 2019.
[32] Page 43, Para 2.6, Committee Law Report, 2019.
[33] Proposed amendment to section 23 of the Act, Page 2, Para 5 of the Bill.
[34] "Producer Company" means a body corporate having objects or activities specified in section 581B and registered as Producer Company under the Companies Act, 1956. Similar definition is incorporated in the Bill.
[35] Page 46, Para 4.4, Committee Law Report, 2019.

committee provided under the Act shall be required to be discharged by the board of directors of such company [36]. Further, in order to accord some leverage to companies which have spent an amount over and above the required amount to be spent on corporate social responsibility activities statutorily in a given financial year, the Bill seeks to permit such companies to set off the excess amount spent towards its corporate social responsibility obligation in such number of succeeding financial years and in such manner, as may be prescribed [37]. The rationale for such change is to ensure that static financial thresholds do not come in the way of corporate-driven socio-economic development and environmental conservation. [38] In line with the above, once the Bill is duly passed, the Central Government may make suitable amendments under the Companies (Corporate Social Responsibility Policy) Rules, 2014 to provide for the necessary nuances relating to the above.

Moving defaults under the Code

The Bill proposes to substitute sub-section (6) of Section 348 of the Act which imposes monetary penalties on the company liquidator for non-compliance of the provisions relating to information on pending liquidation as set out in Section 348 of the Act, by a new provision that if a company liquidator, who is an insolvency professional, is in default in complying with the provisions of the aforesaid Section, then the default shall be deemed to be a contravention punishable under the Code, and the rules and regulations framed thereunder. The Bill further seeks to omit the penalty [39] imposed on the company liquidator for conduct of audit by a person not qualified to act as auditor[40] from the Act.

Other Notable amendments that have been proposed under the Bill

The Bill seeks to introduce the following additional changes into the Act:

(a) **Remuneration to non-executive directors**

Section 197(3) of the Act provides that a company having no profits or inadequate profits in a financial year, shall not pay any sum by way of remuneration (exclusive of any fees payable in accordance with the Act) to its directors (including any managing or wholetime director or manager), except in accordance with the provisions of Schedule V of the Act which *inter alia* provides the limit on the remuneration of 'managerial persons' in case of losses or inadequacies in profit. Further, Section 149 of the Act while dealing with the remuneration of independent directors, does not provide for remuneration by a company in case of losses or inadequacies in profit. In this regard, the Committee was of the view that the commitment of the non-executive directors and independent directors towards a company is often underappreciated and therefore, the non-executive directors and independent

[36] Section 135 (1) of the Act.
[37] Page 37, Statement of Objects and Reasons of the Bill.
[38] Page 55, Para 13.2, Committee Law Report, 2019.
[39] Section 348(7) of the Act.
[40] Page 41, Notes on Clauses of the Bill.

directors should be appropriately compensated for their valuable time and efforts even in case of inadequacy of profits or incurrence of losses, as such compensation is permitted for executive directors. It was felt that inconsistency in payment of remuneration in case of inadequacy of profits or losses to executive directors *vis-à-vis* non-executive directors (including independent directors) would dis-incentivize the latter[41]. To this extent, the Bill seeks to amend Section 149 and 197 of the Act to include non-executive directors and independent directors (as applicable) at appropriate places [42] to bring parity in remuneration of the non-executive directors with the executive directors and independent directors [43] . To illustrate, say a company has agreed to pay an 'x' amount to an executive director and a 'y' amount to a non-executive director or independent director and such company has incurred losses or has inadequate profits, then pursuant to the existing provisions of the Act, such company will be able to provide remuneration of the 'x' amount to its executive directors only in accordance with Schedule V of the Act. Once, the proposed amendments are incorporated into the Act, such company will be able to provide the agreed 'y' remuneration to the non-executive directors and independent directors as well, subject to the provisions of Schedule V of the Act (as amended).

However, the Bill has not proposed any changes to Schedule V of the Act as of now and accordingly, once the Bill is passed, there may be amendments required to be carried out in Schedule V of the Act to effectuate the changes in the above provisions.

(b) **Exemption to certain classes of companies**

The Bill seeks to empower the Central Government to exempt certain companies in certain respects, by amending the following provisions of the Act:

(i) Amendment to Section 89: The Committee noted that the Act *vide* Section 90(1), empowers the Central Government to exempt certain class of companies from declaration of significant beneficial ownership and accordingly, proposed that similar exemption should also be provided for declaration of beneficial ownership under Section 89 of the Act. Further, on the recommendations of the stakeholders, the Committee also noted that such empowerment would enable the Central Government to

[41] Page 48, Para 6.4, Committee Law Report, 2019.
[42] Proposed amendments are suggested by introducing a proviso to section 149 (9) and amendment to 197(3) of the Act.
[43] Page 48, Para 6.4, Committee Law Report, 2019.

exempt declaration of beneficial interest for an Indian company that may raise global depository receipts in International Financial Services Centre in Gujarat International Finance Tec-City[44]. In light of the above rationale, the Bill seeks to enable the Central Government to exempt any class of persons from undertaking the compliances as set out in Section 89 of the Act which *inter alia* deals with declaration of beneficial interest in shares.

(ii) Insertion of Section 393A: The Bill proposes to insert a new Section 393A in the Act with a view to empower the Central Government to exempt any classes of foreign companies or companies incorporated outside India or to be incorporated outside India, from the applicability of the provisions of Chapter XXII of the Act relating to manner of governance of companies incorporated outside India. Such change has been introduced on the basis of the recommendations of the stakeholders and the International Financial Services Centre ("**IFSC**") Task Force as IFSC is deemed to be a foreign jurisdiction [45] and such exemptions will promote ease of doing business to corporates and provide a congenial atmosphere for companies to undertake business in India.

(c) **Lesser penalties for certain classes of companies**

The Bill seeks to extend the benefit of reduced penalties which was earlier available to small companies and one person companies to start-ups and producer companies as well. Such entities will now be liable to face reduced penal consequences (to the extent of not be more than one-half of the penalty specified in such provisions subject to a maximum of INR 2,00,000 (Indian Rupees two lakhs) in case of a company and INR 1,00,000 (Indian Rupees one lakh) in case of an officer who is in default or any other person, as the case may be) for any offence contemplated under the Act. Earlier, such protection was available only to small companies and one person companies under Section 446B of the Act for the limited purposes of failing to comply with the provisions of sub-section (5) of Section 92, sub-section (2) of Section 117 or sub-section (3) of Section 137[46].

(d) **Timeline for rights issue**

Section 62 of the Act, governs the rights issue process and provides that the offer for further issue of shares which is given to existing shareholders of the company shall be exercisable only for a specific time period which shall not be less than 15 (fifteen) days but

[44] Page 51, Para 9.2, Committee Law Report, 2019.
[45] Page 52, Para 9.3, Committee Law Report, 2019.
[46] Failure to (i) file annual return; (ii) file resolutions and agreements; and (iii) failure to file financial statements, respectively.

not exceed 30 (thirty) days from the date of the offer. The Bill seeks to fasten the rights issue process in line with market practices, by reducing the mandatory timelines to be provided for exercising such rights under Section 62 of the Act by empowering the Central Government to provide for a shorter timeline in this respect[47]. Upon, such proposed amendment being incorporated in the Act, we may expect changes in the relevant rules arising from the Act or through a notification/circular setting out the shorter time period.

(e) **Exemption from filing resolutions**

The Bill seeks to extend the benefit of exemption [48] from filing of a resolution with the RoC, for grant of loans, or giving guarantee or providing security in respect of loans[49], as currently available to the banks, to non-banking finance companies and housing finance companies. Such amendments have been proposed with the intention of securing the confidentiality obligations and reducing the burden of the non-banking finance companies from additional compliances, as such companies engage in lending activities on a regular basis in their ordinary course[50].

(f) **Constitution of NCLAT Benches**

The Bill seeks to introduce a new section 418A in the Act in order to provide for constitution of benches of the National Company Law Appellate Tribunal ("**NCLAT**") which will ordinarily sit in New Delhi or such other place, as the Central Government may in consultation with the chairperson, notify. Such introduction of benches to NCLAT is with the view to enable creation of specialized benches of the NCLAT considering the variety and amount of matters that are to be dealt with by the NCLAT[51].

INDUSLAW VIEW

The Bill has been promulgated with a view to foster the initiative of the Government for ease of doing business and ease of living of corporates in India by introducing changes to the Act. Owing to the COVID-19 pandemic, the Bill has not yet been passed by the Lok Sabha, however, it can be expected that the Bill would be approved by both houses of the Parliament with suitable modifications, if required. Broadly, the changes proposed in the Bill are aligned with the principle of providing ease of doing business to corporates in India, and deal with the following:

(a) Decriminalization of certain non-grave offences under the Act, especially in cases where the defaults are devoid of any malafide intention, or do not involve larger public interest;

[47] Page 52, Para 10, Committee Law Report, 2019.
[48] Exemption as provided in second proviso of sub-section (3), in clause (g) of section 117 of the Act.
[49] Loans availed under clause (f) of sub-section (3) of section 179 of the Act.
[50] Page 53, Para 11.3 Committee Law Report, 2019.
[51] Page 47, Para 5.2, Committee Law Report, 2019.

(b) Rationalization of existing penalties;

(c) Other modifications and relaxations to promote ease of doing business in India including but not limited to easing the compliance framework for companies and according flexibility for running of businesses; and

(d) Framework for faster and effective disposal of cases.

The proposed amendments under the Bill will not only encourage honest stakeholders and corporates to continue their business in India but also reduce the overall burden of the courts. Further, considering the present situation of COVID-19, where a substantial number of companies are facing losses, it becomes imperative for the Government to introduce a more flexible framework for the corporates and stakeholders to smoothly run their business in India and accordingly, the proposed amendments introduced by the Bill are a welcome move.

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2.2 KEY FACETS OF THE CONSUMER PROTECTION ACT, 2019 AND E-COMMERCE RULES

INTRODUCTION

The erstwhile Consumer Protection Act, 1986 and the rules and regulations framed thereunder (the "**CPA 1986**") were formulated with a view to protect the interests of the consumers and prescribed a mechanism for settlement of consumer disputes.

With the dynamics revolving around buying and selling of products and services changing rapidly in light of advancement in technology and increasing use of e-commerce, there was a dire need to suitably amend and update the laws pertaining to consumer protection in India. Accordingly, on August 06, 2019, the Parliament of India passed the landmark Consumer Protection Bill, 2019, with the objective of providing timely and effective administration of both consumers and sellers, taking into account modern advancements in the mediums of commerce. The Consumer Protection Act, 2019 (the "**CPA 2019**") was published in the official gazette of India on August 09, 2019. However, the provisions of the CPA 2019 did not immediately come into effect.

On July 15, 2020, the Ministry of Consumer Affairs, Food and Public Distribution (the "**Ministry**"), through the Department of Consumer Affairs (the "**DCA**"), issued a notification appointing July 20, 2020 as the date from which certain provisions of the CPA 2019 shall come into effect. Thereafter, on July 23, 2020, the Ministry through the DCA issued another notification, appointing July 24, 2020 as the date from which the remaining provisions of the CPA 2019 shall come into effect (the July 15, 2020 and July 23, 2020 notifications, collectively the "**Enforcement Notifications**"). Effectively, by virtue of the Enforcement Notifications, all the provisions of the CPA 2019 have now been notified and are effective. The CPA 2019 amends and replaces the CPA 1986 in its entirety.

Further, for the purposes of preventing unfair trade practices in e-commerce, direct selling and also to protect the interest and rights of consumers, the CPA 2019 allows the Central Government to take such measures as may be required [52]. Pursuant to the aforesaid powers, the Central Government has notified the Consumer Protection (E-Commerce) Rules, 2020, on July 23, 2020 (the "**E-Commerce Rules**").

CHANGES BROUGHT ABOUT BY THE CPA 2019

Some of the major overhauls that have been brought forth in the CPA 2019 read with the E-Commerce Rules have been provided below:

Providing more teeth to e-commerce transactions

Although the provisions of CPA 1986 were deemed comprehensive enough to also apply to e-commerce entities, there were no specific provisions in this respect under CPA 1986. The CPA 2019 defines 'e-commerce' as the buying or selling of goods or services including digital products over digital or electronic network, which is further categorised into marketplace and inventory-based models of e-commerce. This definition is aligned with the present definition of 'e-commerce' under the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (the "**NDI Rules**"). It is important to note that the CPA 2019 defines services to include, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information. Accordingly, among other platforms, platforms providing services such as ride-hailing and hospitality may also be governed by the provisions of CPA 2019 and the E-Commerce Rules, if such services are provided for a fee.

A variety of welfare-oriented provisions have been implemented by the E-Commerce Rules by imposing duties and liabilities on: (i) e-commerce entities – both marketplace-based (the "**Marketplace Entities**") and inventory-based; and (ii) the sellers on Marketplace Entities. We have categorized the impact on these entities in further detail below:

E-commerce entities

All e-commerce entities are required to be incorporated in the form of a company under the Act or a foreign company or an office, branch or agency outside India owned or controlled by a person resident in India. It may be worthwhile to note that the E-Commerce Rules also apply to an e-commerce entity which is not established in India, but systematically offers goods or services to consumers in India, thereby expanding the scope of applicability of these rules to foreign owned e-commerce platforms. All e-commerce entities are required to comply with a host of obligations, including the following[53]:

(a) Unfair trade practise: E-Commerce entities are required to refrain from any unfair trade

[52] Please refer Section 94 of CPA 2019.

[53] Please refer Rule 4 of E-Commerce Rules.

practice [54], whether in the course of business on its platform or otherwise. In this context, unfair trade practice refers to such trade practice which adopts any unfair method or unfair or deceptive practice for the purpose of promoting the sale, use or supply of any goods or for the provision of any service. Such practices may include: (a) manipulating the price of goods or services offered on the e-commerce platform in such a manner so as to gain unreasonable profit; (b) making arbitrary classification of consumers to offer discounts; (c) publishing misleading representations concerning the characteristics of products; (d) refusing to take back or withdraw defective goods or deficient services and refusing to refund the consideration; or (e) disclosing to third parties any personal information given in confidence by the consumer unless such disclosure is made in accordance with the provisions of applicable law (this may also lead to consequences under the Information Technology Act, 2000 (the "**IT Act**") and its corresponding Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011). Considering that the definition of 'unfair trade practices' includes a host of practices/ actions pertaining to a buy and sale transaction, e-commerce entities need to be careful about any statement, information or representation about a product being sold through their platforms.

(b) Level playing field: E-commerce entities can neither manipulate the price of the goods or services offered on its platform in such a manner as to gain unreasonable profit, nor discriminate between consumers of the same class or make any arbitrary classification of consumers. This is in line with the NDI Rules which state that e-commerce entities providing marketplace shall not directly or indirectly influence the sale price of goods or services and shall maintain level playing field. The aspect of ensuring a level playing field by the e-commerce entities is further reinforced by the fact that the obligations of the e-commerce entities to maintain a level playing field is not only vis-à-vis the sellers on their platform, but also the consumers who purchase goods or avail services through their platform.

(c) Grievance redressal: E-commerce entities are required to establish an adequate grievance redressal mechanism and appoint a grievance officer for consumer grievance redressal in a time efficient manner. This may however lead to some anomaly in the manner of resolving the grievances of the consumers, as

[54] Please refer Section 2(47) of CPA 2019.

even the sellers operating on the Marketplace Entity's platform are required to establish a similar grievance redressal mechanism. This may potentially lead to a situation of passing the buck and shirking of responsibility amongst the seller and the e-commerce entity. It would be beneficial if the Ministry comes up with adequate clarifications in this respect in order to distinguish the circumstances under which a consumer would have recourse to the grievance redressal mechanism of the seller and of the e-commerce entity, as currently, these aspects remain unanswered.

(d) Cancellation charges: E-commerce entities are prohibited from imposing cancellation charges on consumers who choose to cancel their order after confirming purchase unless similar charges are also borne by the e-commerce entity, if they cancel the purchase order unilaterally for any reason. To this end, the e-commerce entities (specifically, Marketplace Entities) may need to enter into back to back arrangements with the seller under the terms of contracts with the sellers, vis-a-vis the cancellation terms offered to the consumers, so that such e-commerce entities are able to recover such charges from the sellers, in the event the cancellation was necessitated due to defaults on the part of the seller or the seller's inability to supply such products or services.

(e) Affirmative consent: E-commerce entities must only record the consent of a consumer for the purchase of any goods or service offered on its platform where such consent is expressed through an explicit affirmative action, and no such consent should be recorded automatically, including in the form of pre-ticked checkboxes. This draws special attention to the aspect of 'suggested products' or 'you may also want to buy' options which are provided by e-commerce platforms to the consumers with pre-ticked check boxes on those products, to lure consumers into buying such products in the course of placing their orders. With the introduction of these obligations, the e-commerce entities may not be allowed to bundle such products automatically with pre-ticked options other than for the products specifically opted for by the consumer.

(f) Payment methods: E-commerce entities are required to effect all payments towards accepted refund requests of the consumers as prescribed by the Reserve Bank of India or any other competent authority within reasonable timelines and furnish exhaustive information on available payment methods, the security of those payment methods, any fees or charges payable by users, the procedure to cancel

regular payments under those methods, charge-back options, if any, and the contact information of the relevant payment service provider. In this regard, the actual processing of the refund within the required time frame shall be the duty of the seller. The e-commerce entity's role shall stand restricted to facilitating the refund and returns process and effecting payments for accepted refunds (by the seller) in accordance with the guidelines of the Reserve Bank of India. This is also in line with the provisions contained in the NDI Rules.

Marketplace Entities

In addition to the aforesaid obligations applicable to all e-commerce entities, there are certain obligations specific to Marketplace Entities which are a subset of e-commerce entities, as discussed below:

(a) Undertaking from sellers: Marketplace Entities are mandatorily required to require sellers to furnish appropriate undertakings with respect to the specifications and descriptions of the products. Towards this end, the Marketplace Entity should undertake measures to ensure that it does not itself make false or misleading statements in the form of advertisements which may probably fall within the purview of 'unfair trade practices' under the CPA 2019.

(b) Information regarding sellers and parameters for ranking of goods: Marketplace Entities are required to furnish and provide to the consumers detailed information about the sellers, including contacts details and any rating or other aggregated feedback. Additionally, Marketplace Entities are required to provide an explanation of the main parameters which are most significant in determining the ranking of goods or sellers on their platform and relative importance of those main parameters. This would effectively require adoption of an advanced system by Marketplace Entities to establish a uniform system of gradation of the products and the sellers on their platforms.

(c) Other essential information: Amongst other information, Marketplace Entities are required to provide information on their platforms which enables consumers to make an informed decision. Such information should include information relating to return, refund, exchange, warranty and guarantee, delivery and shipment, modes of payment, and grievance redressal mechanism, and any other similar information which may be required by consumers to make informed decisions.

(d) Differential Treatment: Marketplace Entities are required to include in their terms and conditions a description of any differentiated treatment that is

being given or might be given between goods or services or sellers of the same category, in line with the objective of creating a level playing field.

(e) Record of relevant information: A record of information is required to be maintained by Marketplace Entities which allows for the identification of all sellers who have repeatedly offered goods or services that have previously been removed or access to which has previously been disabled under certain applicable laws such as Copyright Act, 1957, the Trade Marks Act, 1999 or te IT Act. However, no Marketplace Entity shall be required to terminate the access of such seller to its platform but may do so on a voluntary basis.

Any Marketplace Entity may be eligible to avail an exemption from liability under the E-Commerce Rules as an 'intermediary', pursuant to Section 79(1) of the IT Act provided that it complies with sub-sections (2) and (3) thereof and also with the provisions of the Information Technology (Intermediary Guidelines) Rules, 2011 (the "**Intermediary Rules**").[55] In terms of Section 79(1) of the IT Act, an intermediary (in the present case, the Marketplace Entity) is exempted from liability arising on account of any third party information, data, or communication link made available or hosted by it, irrespective of any other provision contained in any other law which may be in force (including the E-Commerce Rules), that imposes such liability. However, the above exemption from liability shall be available to the Marketplace Entity, subject to its compliance with the following requirements as mentioned in sub-section (2) of Section 79 of the IT Act: (i) the function of Marketplace Entity is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or (ii) (a) the Marketplace Entity does not initiate the transmission; (b) the Marketplace Entity does not select the receiver of the transmission; (c) the Marketplace Entity does not select or modify the information contained in the transmission; and (d) the Marketplace Entity observes due diligence while discharging its duties under the IT Act and the Intermediary Rules and any other guidelines that the Central Government may prescribe in this behalf.

However, the immunity from liability will not be available to the intermediary in terms of the IT Act if it is linked in the commission of the unlawful act and/ or upon receiving actual knowledge, or on being notified by the Government agency that any information, data or communication link residing in, or connected to a computer resource controlled by it is being used to commit the unlawful act, it fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Due to the limited role played by the Marketplace Entities in the market, there is a need to provide certain exemptions to them in order to protect them from large adversarial implications due to acts of third parties.

[55] Please refer Rule 5(1) of E-Commerce Rules.

In the event certain Marketplace Entities do not squarely fall within the contours of sub-section (2) of Section 79 of the IT Act, such Marketplace Entities will not be able to take benefit of the exemption available thereunder and the E-Commerce Rules.

Sellers selling on platforms of Marketplace Entities

The sellers selling on the platforms of Marketplace Entities are specifically mandated to ensure certain compliances including in terms of providing product specifications, providing information/ advertisement to consumers, refund and exchange policies, grievance redressal mechanism and having transparency of dealings with e-commerce entities, etc., in addition to the general provisions of the CPA 2019[56].

Impact on inventory-based e-commerce entities

The kind of duties imposed on these entities are also similar to the duties imposed on a seller operating on the platforms of Marketplace Entities.

Product Liability

One of the crucial additions in CPA 2019 is the introduction of the concept of product liability. 'Product liability' refers to the responsibility of a 'product manufacturer', 'product service provider' or 'product seller', of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating thereto.

Categorization of sellers for attribution of product liability

The CPA 2019 has introduced three distinct buckets for categorising sellers, namely:

(a) Product Manufacturer[57]: A 'product manufacturer' means a person who: (i) makes any product or its parts; or (ii) assembles parts made by others; or (iii) puts his own mark on any products made by any other person; or (iv) makes a product and places such product for commercial purpose; or (v) designs, produces, fabricates, constructs or re-manufactures any product before its sale; or (vi) being a product seller of a product, is also a manufacturer of such product;

(b) Product Service Provider[58]: A 'product service provider' in relation to a product, means a person who provides any service in respect of such product. In this regard, it may be worthwhile to examine whether an e-commerce entity may be classified within the contours of a 'product service provider'. The definition of the term 'service' provided under the CPA 2019 means service of any description which is made available to potential users but does not include the rendering of any service free of charge. Accordingly, e-commerce entities that merely provide a platform to facilitate the seller and consumer to transact, may

[56] Please refer Rule 6 of E-Commerce Rules.
[57] Please refer Section 2(36) of CPA 2019.
[58] Please refer Section 2(38) of CPA 2019.

not be construed to be product service provider, as technically, the e-commerce platform does not charge the consumer for providing such services and such services are provided 'free of charge'. However, e-commerce entities that provide consumers services such as logistics and warehousing and charge the consumer for such services, may not be able to take the benefit of falling outside the scope of 'product service provider' under the CPA; and

(c) Product Seller[59]: A 'product seller' in relation to a product, means a person who in the course of business, places such product for commercial purpose and includes: (i) a manufacturer who is also a product seller; (ii) a service provider, but does not include: (a) a seller of immovable property, unless such person is engaged in the sale of constructed house or in the construction of homes or flats; (b) a provider of professional services in any transaction in which, the sale or use of a product is only incidental thereto, but furnishing of opinion, skill or services being the essence of such transaction; (c) a person who: (I) acts only in a financial capacity with respect to the sale of the product; (II) is not a manufacturer, wholesaler, distributor, retailer, direct seller or an electronic service provider; (III) leases a product, without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor. In this regard, it remains to be tested whether online platforms that offer real estate intermediary services, by engaging in the business of facilitating the sale of properties by providing access to the platform on which the seller and consumer transact, will be covered within the ambit of 'product seller' (or not).

Actions on product liability and tests for determining liability

The CPA 2019 entitles a complainant to initiate a product liability action against a product manufacturer or a product service provider or a product seller, as the case may be, for any harm that may have been caused to him on account of a defective product having been provided to such complainant[60]. In this regard, a 'product liability action' refers to a complaint which can be filed by a person before the concerned adjudicating authority for claiming compensation for the harm caused to him. The CPA 2019 lays down certain criteria for determining the liability of product manufacturers, product service providers and product sellers[61]. Additionally, the CPA 2019 also provides for certain exceptions to the rule of product liability, such as the product being misused, altered, or modified (in the case of product seller).[62]

[59] Please refer Section 2(37) of CPA 2019.
[60] Please refer Section 83 of CPA 2019.
[61] Please refer Sections 84, 85 and 86 of CPA 2019.
[62] Please refer Section 87 of CPA 2019.

In this regard, it may be imperative to note that the concept of product liability may create some concerns for Marketplace Entities, as they may be construed to be playing the role of product service providers under certain circumstances (*as discussed above*). It may also be noted that the CPA 2019 defines 'harm' to include mental agony or emotional distress attendant to personal injury or illness or damage to property.

Constitution of a new Central Consumer Protection Authority as the new regulator

The CPA 2019 has constituted a Central Consumer Protection Authority (the "**CCPA**")[63] to regulate and enforce the provisions of CPA 2019 with emphasis being on protection of consumer interests. A complaint may be forwarded either in writing or in electronic mode to the CCPA[64]. Upon receiving any such information or complaint, or upon receiving directions from the Central Government, or of its own accord, the CCPA may undertake investigation [65] through a separate investigation wing of its own. It is also interesting to note that the CCPA has also been included in the definition of 'complainant'[66], thereby allowing them to act as a guardian of the consumers and initiate class action suits on behalf of the consumers on matters such as those relating to unfair trade practises or misleading advertisements. On July 24, 2020, the Ministry constituted the CCPA as a body corporate having its headquarters at New Delhi.

Widening the scope of persons covered as 'consumers'[67]

Under the CPA 1986, the definition of a 'consumer' was rather narrow and did not explicitly cover consumers buying through e-commerce portals, although it was deemed that a consumer who buys goods or procures services through e-commerce portals would be covered under such definition. The CPA 2019 has made the definition inclusive and clarificatory, so as to include a consumer who buys any goods or hires any services through electronic means or by teleshopping or direct selling or multi-level marketing. Accordingly, the purchasers of products sold through various e-commerce websites, such as Amazon, Flipkart, Nykaa, Myntra, etc. in India stand explicitly included within the definition of a 'consumer'.

Further, the E-Commerce Rules provide for the definition of 'user' which extends to any person who accesses or avails any computer resource of an e-commerce entity. It is interesting to note that as per the definition contained in the E-Commerce Rules, a user may not necessarily be a 'consumer' in terms of the CPA 2019 and essentially all provisions of the CPA 2019 in relation to sale of goods and services lie vis-à-vis the consumers. Consequently, a 'user' may not be able to initiate any action against an e-commerce entity under the CPA 2019 in case of any grievances, until and unless such user gets categorized as a 'consumer'. It may be interesting to note that even though a user is not a classified as a 'complainant' for the purposes of CPA 2019, such user may be able to forward a letter or notice to the CCPA to bring into its notice any information related to the e-commerce entities and/ or the sellers, which may

[63] Please refer Section 10 of CPA 2019.
[64] Please refer Section 17 of CPA 2019.
[65] Please refer Section 19 of CPA 2019.
[66] Please refer Section 2(5) of CPA 2019.
[67] Please refer Section 2(7) of CPA 2019.

be misleading to the general public or qualifies as unfair trade practice. Since the CCPA is vested with the right to take *suo moto* action against issues relating to violations of consumer rights or unfair trade practices, it may be able to take cognizance of such matters, initiate investigations and take appropriate actions against such entities.

Unfair contracts

The CPA 2019 has introduced the concept of 'unfair contracts' which includes all such contracts, between a manufacturer or trader or service provider on one hand, and a consumer on the other, which are heavily weighed against the interest of the consumers[68]. The CPA 2019 allows room to the consumers to file complaints against such unfair contracts[69]. Contracts which may have unfairly worded clauses such as those that are in the nature of imposing on the consumer any unreasonable charge, obligation or condition which puts such consumer to disadvantage may fall within the ambit of 'unfair contracts' and consumers can initiate action in terms of the CPA 2019 in relation to such contracts.

Inclusion of 'endorsements' under advertisement and misleading advertisements

Under CPA 2019, endorsements involving any depiction of the: (a) name, signature, likeness or other identifiable personal characteristics of an individual (such as influencers/ celebrities); or (b) name or seal of any institution or organisation, which makes the consumer to believe that it reflects the opinion, finding or experience of the person making such endorsement, have been brought under the scope of 'advertisement', thereby making the endorsers also face adverse consequences under the CPA 2019 for issuance, demonstration or communication of certain misleading information [70] . As a consequence, endorsers may be more proactive in ensuring that the advertisement does not issue misleading information and may choose to obtain adequate protection in the form of watertight contracts from their clients. Earlier under the CPA 1986, there were no specific provisions that attributed liability to endorsers for misleading advertisements, although some complaints have been filed against endorsers under provisions of the Indian Penal Code, 1860.

Further, the CCPA has been vested with the authority to take actions against false or misleading advertisements, including passing orders to discontinue such advertisement, issue corrective advertisement or to modify the same in such manner and within such time as may be decided by the CCPA, imposing penalties which may extend up to INR 50,00,000 (Indian Rupees Fifty Lacs), imprisonment which may extend up to 2 years and prohibiting the endorser of a misleading advertisement from endorsing any particular product or service for a period of up to 3 years.[71] In contrast, the CPA 1986 merely contemplated the issuance of a corrective advertisement to neutralize the effect of the misleading advertisement.

INDUSLAW VIEW

[68] Please refer Section 2(46) of CPA 2019.
[69] Please refer Section 2(6)(i) of the CPA 2019.
[70] Please refer Sections 2(1), 2(18) and 21 of CPA 2019.
[71] Please refer Sections 21 and 89 of CPA 2019.

With the evolution of trade, it had become imperative to amend the law relating to protection of the consumers. E-commerce is a dynamic and intricate market and our laws need to not only keep pace with the ever-changing dynamics but also provide for eventualities in the near future to prevent modern forms of unfair trade and unethical business practices and provide for larger accountability. The CPA 2019 is an attempt by the Government to address issues such as unfair trade practices by prohibiting the manipulation of the price of goods or services, and the discrimination between sellers, and consumers of the same class. The CPA 2019 provides for easier access to avail relief by providing for a stronger consumer redressal mechanism as well as easing the procedures of filing complaints by consumers. The CPA 2019 has even gone a step further by the introduction of mediation and creation of the CCPA which can take *suo moto* cognizance of matters for the well-being of consumers.

The amendment to the e-commerce rules under the FDI Policy, 2017 in December, 2018 and which rules have now been subsumed under the NDI Rules, provided for the concept of level playing field which has now been elaborated under the E-Commerce Rules. The e-commerce rules under the NDI Rules provide that the responsibility of after-sales and warranty or guarantee of goods and services sold shall vest with the sellers. The E-Commerce Rules in addition to being aligned with the NDI Rules on this aspect, go further to elaborate the principle that the sellers should ultimately be responsible for defective goods or services. However, at the same time, the E-Commerce Rules recognise that the e-commerce entities play an important role as an intermediary and therefore levy an added level of responsibility on the e-commerce entities in the shape of grievance redressal and access to seller information among other things.

The introduction of the concept of product liability under CPA 2019 has underpinned the accountability of product manufacturers, product service providers and product sellers in ensuring worthy quality of goods and services in the market and is a step towards removing errant sellers from selling counterfeit, adulterated and spurious goods in the market, which were a major cause of concern. It may now become extremely essential for e-commerce entities to establish a significant internal compliance review mechanism in order to circumvent the adversities of being faced with liabilities on account of any defaults of the sellers operating on the e-commerce platforms and this may also necessitate significant interfacing between the Marketplace Entities and the sellers to ensure that required compliances are given effect to. It is in this context that the CCPA can play a constructive role to ensure a level playing field between the e-commerce entities, sellers, consumers and the brick and mortar stores.

The CPA 2019 will be tested and we will see the development of judicial literature under the CPA 2019. The effectiveness of the measures introduced under the CPA 2019 will depend upon the seamless functioning of the administrative machinery put in place for enforcement of the provisions of CPA 2019.

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3. BANKING AND FINANCE

3.1 RBI ACCELERATES START-UPS INTO PRIORITY SECTOR LENDING

INTRODUCTION

In a significant shift in its lending norms, RBI on August 06, 2020 has announced that going forward, start-ups will be included in Priority Sector Lending ("**PSL**").[72] While the detailed outlay and guidelines on the inclusion are awaited, the revision aims to ensure that start-ups have access to easy credit from banks.

HIGHLIGHTS

Till now, priority sector included micro, small and medium enterprises ("**MSME**"), agriculture, export credit, education, housing, social infrastructure, and renewable energy amongst others. Under the PSL guidelines, banks are required to provide 40% of Adjusted Net Bank Credit to PSL.[73] Inclusion of start-ups in PSL will allow them to access bank credit which otherwise is difficult to procure due to risk profile attached to their projects.

Prior to this inclusion, start-ups could qualify for PSL if they also fell under MSME category and met conditions of profitability and creditworthiness applicable to MSMEs. The revision in PSL guidelines will open up more funds to be lent to start-ups, distinct from MSMEs.

INDUSLAW VIEW

We believe that the inclusion of start-ups in PSL will reduce their cost of capital by allowing them better access to bank credit. Going forward, equity infusion will not be the only route to follow when start-ups need funds for working capital requirements, and this will greatly ease the risk of ordinary shareholders being wiped out due to 'down-rounds'. Although traditional lenders do not look favourably at start-ups, it will be interesting to see if they are ready to diversify their risk appetite and lend to start-ups which do not meet traditional security / collateral / cashflow requirements.

The inclusion will also expand the scope for start-ups and emerging businesses in various sectors to tap newer sources of funding. The RBI provides for various modes of collaboration between banks and non-banking financial companies ("**NBFCs**"), and one such mode is lending by banks to NBFCs for on-lending to certain priority sectors. Currently, the RBI allows bank credit to registered NBFCs for on-lending to MSMEs and agriculture sector (subject to certain conditions), to be classified as PSL.[74] It is expected that the same recognition will be extended to NBFCs on-lending to start-ups.

The RBI has recognised the need to inject mainstream debt capital into the start-up ecosystem to prevent it being

[72] Available at: https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=50174.

[73] Available at: https://www.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=10497.

[74] Available at: https://www.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=10497.

blown away by the pandemic. There is an expectation that the conditions for a start-up to be sanctioned loans as PSL will be aligned with the criteria for MSMEs, and be more relaxed compared to the criteria set out in the COVID-19 Start-up Assistance Scheme[75]. The move will act as a booster for the start-up ecosystem and we hope that the moral hazard inherent in aggressive lending can be dispensed with in this unusual year at least.

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3.2 LOANS SOURCED BY BANKS AND NBFCs OVER DIGITAL LENDING PLATFORMS: ADHERENCE TO FAIR PRACTICES CODE AND OUTSOURCING GUIDELINES

INTRODUCTION

The RBI recently issued a notification[76] (the "**Notification**") to reiterate and ensure compliance of the Fair Practices Code and outsourcing guidelines for financial services, in letter and spirit, by banks and NBFCs providing loans through digital lending platforms.

This Notification comes in the backdrop of the emerging developments in the financial sector in India, with banks and NBFCs lending to customers such as retail individuals, small traders and other borrowers, both, directly through their own digital platforms as well as under outsourcing arrangements with third party digital lending platforms.

PROVISIONS OF THE NOTIFICATION

The Notification, which seeks to address the non-transparency and violation of extant guidelines on the outsourcing of financial services issued to banks and NBFCs, comes in response to certain observations[77] regarding non-disclosure by online lending platforms of the names of actual lending banks/NBFCs, exorbitant interest rates being charged to borrowers, non-transparent methods to calculate interest, harsh recovery practices, and unauthorised use of personal data in respect of transactions pertaining to digital delivery in credit intermediation.

Accordingly, the RBI has issued the following instructions through the Notification, to reiterate its guidelines and norms for banks and NBFCs engaging digital lending platforms as their agents to source borrowers and/or to recover dues:

(a) Names of digital lending platforms engaged as agents must be disclosed on the website of banks and NBFCs.

(b) Digital lending platforms engaged as agents must be directed to disclose upfront to the customer, the name of the bank and/or NBFCs on whose

[75] Available at: https://sidbi.in/files/announcements/COVID19_Scheme_Details.pdf.

[76] 'Loans Sourced by Banks and NBFCs over Digital Lending Platforms: Adherence to Fair Practices Code and Outsourcing Guidelines' dated June 24, 2020 available at https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11920&Mode=0.

[77] A news report indicates that several customers have complained on social media platforms about intimidation and harassment by collection agents of digital lending platforms, including naming and shaming, fake legal notices and repeated 'harassment' calls. News Report available at https://tech.economictimes.indiatimes.com/news/internet/loans-apps-turn-nightmare-for-borrowers/76166706.

behalf they are interacting with the customer.

(c) Sanction letter must be issued to borrower on the letter head of the concerned bank and/or NBFCs, immediately after sanction of loan and prior to execution of loan agreement. Further, a copy of loan agreement, along with all enclosures quoted therein must be furnished to all borrowers at the time of sanction/disbursement of loans.

(d) Banks and NBFCs must ensure effective oversight and monitoring over the digital lending platforms engaged by them and adequate efforts must be made towards creation of awareness about the grievance redressal mechanism.

The RBI has specifically provided that any violation in this regard by banks and NBFCs, including NBFCs registered to operate on 'digital-only' channels as well NBFCs registered to operate on both digital and brick-mortar channels, will be viewed strictly.

INDUSLAW VIEW

With the proliferation of digital lending platforms in India, the RBI through the Notification, has re-emphasized on the ultimate responsibility of banks and NBFCs with respect to compliance of regulatory instructions in outsourcing of activities, including over digital lending platforms.

By re-vesting the ultimate responsibility of regulatory compliance by such lending platforms on banks and NBFCs, the Notification is expected to bring about increased transparency with regard to credit intermediation and induce banks and NBFCs to more actively mandate their digital lending partners to comply with the extant regulatory framework. This move will prompt digital lending platforms who are presently not in compliance with the extant regulatory framework, to make operational and strategic changes.

Changes to the user-interface on websites and mobile applications of digital lenders can be expected, for a more prominent display of terms and conditions (including applicable broad-based interest rates) to potential borrowers before sanctioning of loans, which may otherwise go unnoticed in the fine print. Digital lending platforms that provide immediate disbursement of loans to borrowers' accounts (for instance, unsecured, shorter-duration and small-ticket loans), will need to overcome operational challenges with additional documentation norms as prescribed under the Notification. Changes to the grievance redressal mechanism vis-à-vis banks, NBFCs and digital lending platforms, to make them more robust and effective for borrowers, are also likely to be implemented.

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4. TECHNOLOGY, MEDIA TELECOMMUNICATION

4.1 RBI FRAMEWORK FOR AUTHORIZATION OF PAN-INDIA UMBRELLA ENTITY FOR

RETAIL PAYMENT

INTRODUCTION

RBI issued a Press Release on August 18, 2020, placing on its website a 'framework for authorization of pan-India umbrella entity for retail payments' (the "**Framework**") [78] . The objective of the Framework is to set-up a pan-India umbrella entity/entities ("**Umbrella Entity**") focusing on the retail payment systems. The RBI has also invited applications for the Umbrella Entity till the closing of business on February 26, 2021.

The Umbrella Entity would primarily be responsible for setting up, managing and operating new payment system(s) in the retail space, including ATMs, White Label PoS, Aadhaar based payments and remittance services.

BACKGROUND

At present, the National Payments Corporation of India (the "**NPCI**"), a not-for-profit company set up in December 2008, operates as an umbrella organization for retail payment systems in India. The RBI acknowledged that, over a decade, the NPCI has grown in scale and scope of its operations. By virtue of the numerous payment systems that it operates, the NPCI has emerged as a systematically important payment system entity in India.[79] In the year 2018-2019, the RBI announced that it would encourage more players to participate in and promote pan-India payment platforms with a view to minimize the concentration risk in retail payment systems and promote competition and innovation, from a financial stability perspective.[80]

In light of the above, the RBI released the Framework after deliberating on the comments received on the 'draft framework for authorization of pan-India umbrella entity for retail payment' [81] (the "**Draft Framework**") floated by the RBI on February 10, 2020. IndusLaw had also submitted its recommendations to the RBI in response to the press release inviting comments on the Draft Framework.[82]

KEY ASPECTS OF THE FRAMEWORK

Capital Requirement and Shareholding

The Umbrella Entity is required to be in the form of a company registered under the Act and maybe 'for-profit' or 'not-for-profit.' The minimum paid-up capital threshold for the Umbrella Entity has been set at INR 500,00,00,000(Indian Rupees Five Hundred Crore), which is subject to a minimum contribution of at least 10% (ten percent), i.e., INR 50,00,00,000 (Indian Rupees Fifty Crore) at the time of making an application. The balance capital needs to be brought in, prior to commencement of operations. Further,

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78 https://www.rbi.org.in/scripts/BS_PressReleaseDisplay.aspx?prid=50232

79 Financial Stability Report, Issue no. 20, issued by the RBI in December, 2019

80 Statement on Developmental and Regulatory Policies [https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=44125], Second bi-monthly Monetary Policy Statement 2018-19 [https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=44125], Financial Stability Report, Issue no. 20 [https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/0FSRDECEMBER20198C840246658946159CB3B94E8516F2EC.PDF]

81 https://www.rbi.org.in/scripts/BS_PressReleaseDisplay.aspx?prid=49373

82 https://induslaw.com/app/webroot/publications/pdf/alerts-2020/Infolex-Article-Comments-on-Draft-Framework-NUE-March-2020.pdf

a minimum net worth of INR 300,00,00,000 (Indian Rupees Three Hundred Crore) is also required to be maintained at all times.

Promoter's Shareholding:

All entities holding up to 25% (twenty-five percent) of the paid-up capital of the Umbrella Entity will be construed to be promoters. No single promoter of Umbrella Entity is permitted to invest more than 40% (forty percent) in the paid-up capital of the Umbrella Entity. The promoter/promoter group may dilute its shareholding to a minimum of 25% (twenty-five percent) after 5 (five) years of the commencement of the business of the Umbrella Entity.

Foreign Shareholding:

If the applicant of the Umbrella Entity has any foreign direct investment/foreign portfolio investment, then it is required to fulfill all the capital requirements, as mentioned in the Foreign Exchange Management Act, 1999.

Eligible Promoters

All promoters/promoter groups of the Umbrella Entity should be 'owned and controlled by resident Indian citizens.'

Further, all such promoters/promoter groups should have experience of at least 3 (three) years in the payment ecosystem as Payment System Operator (PSO) / Payment Service Provider (PSP) / Technology Service Provider (TSP). Additionally, the promoters/promoter groups and directors of the promoter company/group company are required to conform to the 'fit and proper' criteria of the RBI. Further, the Umbrella Entity is required to conform to the norms of corporate governance along with 'fit and proper' criteria for directors to be appointed on its board. The RBI will have the right to approve and appoint directors on the board of the Umbrella Entity.

Scope of Activities

The scope of activities of the Umbrella Entity *inter alia* include the following: (a) Set-up, manage and operate new payment system(s) in the retail space and take care of developmental objectives like enhancement of awareness about the payment systems; (b) Operate clearing and settlement systems for participating banks and non-bank, identify relevant risks and preserve the integrity of the systems and monitor retail payment system developments and related issues in India and internationally to avoid shocks, frauds, and contagions that may adversely affect the systems and/or economy in general; (c) Ensure that principles of fairness, equity and competitive neutrality are applied in determining participation in the system and frame necessary rules and the related processes to ensure that the system is safe and sound; and (d) Carry on any other business as suitable to further strengthen the retail payments ecosystems in the country.

In addition to the above, the Framework mentions additional scope of activities, which were not previously covered in the Draft Framework, which *inter alia* include the following: (a) Umbrella Entities are expected to offer innovative payment systems to include hitherto excluded cross-sections of the society and which enhance access, customer convenience and safety and the same to be distinct yet interoperable; (b) The Umbrella Entities are expected to interact and be interoperable, to the extent possible, with the systems

operated by the NPCI; and (c) the Umbrella Entities may be permitted to participate in the RBI's payment and settlement systems, including having a current account with the RBI, if required.

Business Plan

The application for Umbrella Entity is required to contain a detailed business plan. Such business plan should *inter alia* include the following: (a) payment system proposed to be set-up and/or operated; (b) technology, security features, market analysis/research, benefit, if any, of such payment systems; (c) operational structure of the payment systems; (d) time-period for setting up the payment systems; (e) proposed scale of operations; (f) proposed organizational strategy in terms of fulfilling its responsibility as an Umbrella Entity; and (g) documents to duly establish its experience in the payments ecosystem. In addition to this, the Framework mentions an additional requirement, which was not previously covered in the Draft Framework, that the Umbrella Entity shall have to commence its business/operations within a period of 6 (six) months, extendable to a maximum of 1 (one) year from the date of in-principal approval.

INDUSLAW VIEW

The Framework is a welcome move by the RBI towards setting up an alternative to the NPCI in response to the emerging issues of concentration risk in retail payment systems. By encouraging more players to participate in pan-India payment platforms, the Framework is expected to stimulate innovation and competition in the sector, which in turn is likely to have a positive impact on achieving economic efficiency and financial stability. This move would help in enhancing the reach of digital retail payments to a larger number of payments and thereby reducing dependency on cash.

However, while the Framework has been crafted after deliberating on the public comments received on the Draft Framework, some concerns of the industry have not yet been addressed by the RBI, which *inter alia* include the following:

(a) the scope of activities mentioned in the Framework are broad and generic and the functions that Umbrella Entities are expected to perform are not clearly articulated in the Framework. Further, considering that Umbrella Entities are permitted to engage in any other business activities to strengthen the retail payment ecosystem, it is not clear how the principles of fairness, equity and competitive neutrality will be applied in order to avoid possible conflict of interest *vis. a vis.* payment system operated by the Umbrella Entity/group entities of the Umbrella Entity. In this context, it is worthwhile to note that the State Bank of India, is planning to leverage its scale, massive customer base and existing capabilities to offer new digital payment services and is simultaneously examining the possibility of

applying for a license under the Framework as well[83];

(b) the qualifying criteria for directors, promoters and promoter groups being inherently subjective and open to interpretative ambiguity;

(c) the requirement under the Framework for the promoter to be owned and controlled by resident Indian citizens being in conflict with the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 which allows for 100% (one hundred percent) foreign direct investment under the automatic route for '*Other Financial Services*' regulated by financial sector regulators; and

(d) Interestingly the minimum threshold of INR 500,00,00,000 (Indian Rupees Five Hundred crores) references nominal paid-up capital and should be clarified to include share premium as well, as otherwise this may result in excluding upcoming and promising players in the market that are conducive to innovation and development in the retail payments system space.

4.2 TAMING THE DRAGON: CAUTIOUS MOVES BY INDIA IN THE GAME OF CHINESE CHECKERS

INTRODUCTION

While India-China relations have seen their fair share of ups and downs, owing largely to their approximately 4000 km long shared border, the past few weeks have witnessed heightened tensions, including the border skirmish between the countries at Galwan Valley, Ladakh, on June 15, 2020. The engagement at Galwan Valley is perhaps the most violent encounter between the Indian and Chinese armies in decades. This has occurred, even while China faces severe international criticism on its handling of the spread of COVID-19.

In this geopolitical context, the Ministry of Electronics and Information Technology (the "**MEITY**"), on June 29, 2020, released a press note which blocked 59 applications, citing reasons such as sovereignty and integrity of India, defence of India, security of state and public order (the "**Press Release**").[84] While the Press Release does not spell it out, all 59 applications are owned or controlled by Chinese entities. The Press Release follows Press Note No. 3 of 2020 dated April 17, 2020,[85] issued by the Ministry of Commerce & Industry (the "**Press Note**"), to amend the FDI Policy, pursuant to which investments by companies or persons of "a country sharing land borders with India" were restricted and made subject to prior approval from the Indian government (the "**Government**"). The amendment is aimed at curbing opportunistic takeovers/ acquisitions during the COVID-19 pandemic, and presumably was issued with investments from China in mind.

Most recently, the Ministry of Finance, through an office memorandum dated

[83] https://www.moneycontrol.com/news/business/sbi-plans-to-enter-digital-payments-space-examining-rbis-nue-framework-report-5763411.html

[84] https://pib.gov.in/PressReleseDetailm.aspx?PRID=1635206

[85] https://dipp.gov.in/sites/default/files/pn3_2020.pdf

July 23, 2020, issued an amendment to the General Financial Rules, 2017 (the "**GFR**"),[86] on the grounds of defence and national security of India, requiring that bidders from "countries which share a land border with India" will have to register with the competent authority under the GFR, to be eligible to bid for any procurement of goods, services or works in India (the "**GFR Amendment**")[87]. While this is applicable to procurement by ministries and Government departments as well as other public enterprises, the registration requirement does not apply to countries to which the Government has extended lines of credit or in which it is engaged in developing projects. Given the said exclusion, the GFR Amendment also appears to be aimed at China, since bidders from Nepal, Bhutan, Myanmar and Bangladesh are exempt and, as such, the GFR Amendment currently operates only against India's adversarial neighbours – China and Pakistan.[88]

In light of the aforesaid developments, this article aims to analyse the Press Release, India's international treaty obligations, and the need for a well-defined policy to specifically modulate India's economic and trade relations with China.

PRESS RELEASE BANNING 59 APPS

As per the Press Release, the MEITY has blocked access to 59 applications by the powers granted to it under Section 69A of IT Act read with the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009[89] (the "**Blocking Rules**") in view of threats of "emergent nature".

The Press Release states that the blocking order is in view of these applications being engaged in activities prejudicial to the sovereignty and integrity of India, defence of India, security of state and public order, and further, that the MEITY received several complaints of some applications stealing data and transferring the same in an unauthorized manner to servers outside India.

Analysis

(a) Section 69A of the IT Act empowers the Government to issue an order for blocking access to information. The Blocking Rules provide for procedural safeguards against a blocking order under section 69A of the IT Act, including an opportunity to be heard. Further, Rule 9 (*blocking of information in cases of emergency*) of the Blocking Rules empowers a designated officer to examine the necessity of blocking information *in case of emergencies*. In such circumstances of an emergency, *an interim order may be issued* to identified persons/intermediaries to block public access to information without providing a prior hearing. Within 48 hours

[86] https://doe.gov.in/sites/default/files/GFR2017_0.pdf

[87] https://doe.gov.in/sites/default/files/OM%20dated%2023.07.2020.pdf

[88] https://doe.gov.in/sites/default/files/Exclusion%20from%20restrictions%20under%20Rule%20144%20xi%20of%20the%20General%20Financial%20Rules%202017.pdf

[89] https://meity.gov.in/writereaddata/files/Information%20Technology%20%28%20Procedure%20and%20safeguards%20for%20blocking%20for%20access%20of%20information%20by%20public%29%20Rules%2C%202009.pdf

of being issued, the interim order is required to be presented to the committee formed under the Blocking Rules for passing of a final order.

(b) The Press Release ordering the ban of these 59 apps is not only absent of specific reasoning, but also includes vague and generic statements calling for the blocking of applications that harm India's sovereignty and affect its citizens' privacy; and fails to identify specific issues or grounds in respect of the applications listed therein. Further, the Press Release also clubs all the 59 applications together, disregarding the fact that each of these applications, ranging from social media platforms to an image scanner, have different functionalities and may be collecting and storing data in different ways. Considering the above, the fact that no prior notice was provided to the owners of these applications and no hearing was undertaken as required under the Blocking Rules, it appears that the Press Release is in the nature of an *interim order* at present, and the final reasoned order is awaited from the MEITY.

(c) At this juncture, it is also relevant to note that in *Shreya Singhal v. Union of India*,[90] the Supreme Court of India, while upholding the constitutional validity of Section 69A of the IT Act, also noted that reasons have to be recorded in writing in a blocking order so that they may be assailed in a writ petition.

(d) In the absence of any detailed reasons for blocking each of the 59 applications in the Press Release, the legal tenability of such an order certainly seems questionable, and it does appear that the Press Release is primarily driven by the present geopolitical circumstances between India and China. Keeping aside the argument of whether this action of the Government is justified in the wake of such circumstances, and strictly keeping the prevailing legal framework in view, the Press Release sets a dangerous precedent by creating an easy route for blocking access to websites and applications without appropriate reasoning and grounds.

Waterfall effects of the Press Release

(a) **Notices by MEITY and DoT**

The Press Release has been given effect via notices by the MEITY to Google and Apple to remove the applications from their respective application stores. The Department of Telecommunications (the "**DoT**") also ordered telecom operators and Internet Service Providers (ISPs) to stop traffic of data on these applications and to block IP addresses and access to these applications.

[90] Shreya Singhal v. Union of India, AIR 2015 SC 1523.

(b) **Platforms with user data and e-wallets**

(i) As a result of blocking access to these applications, existing users are unable to access content already uploaded by them. It is unclear whether Indian user accounts will continue to exist on these applications and if users will be able to remove content already uploaded by them.

(ii) Applications that collect personal information and/or sensitive personal data will be required to destroy such information[91], since the collection and processing of such data no longer serves a lawful purpose.

(iii) In case of platforms that allowed users to maintain or sync with e-wallets, or those that offered and credited monetary rewards or remuneration to users, it is also unclear as to what happens to the existing amounts in such e-wallets of users.

(c) **Offline apps**

Applications which run offline and are already downloaded will also continue to function on the user devices and, as such, the blocking order will not be practically effective against such applications. However, these applications will no longer receive any developer support or further updates.

(d) **E-commerce platforms**

Since only access to the applications is blocked through the Press Release, it is unclear if e-commerce platforms such as Shein, Romwe and Clubfactory will be allowed to fulfil orders already received by them prior to the Press Release. These platforms may have to set up refund mechanisms for orders that were pending on the date of the Press Release. As per some media reports, Clubfactory has already delayed payments to sellers on its platform. This will further affect these sellers' ability to provide refunds to buyers on the platform.

PREVIOUS CONTROVERSIES

Several Chinese-owned applications, including those named in the Press Release, as well as Chinese technology companies, have previously also found themselves at the epicentre of controversy both in India and abroad. We summarise some of these past issues below:

India

[91] Rule 5, Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011.

(a) **TikTok**

The Madras High Court, last year, passed an order prohibiting downloads of the TikTok application due to the distribution of pornographic content, exposure of children to disturbing content and their susceptibility to paedophiles, degrading culture, social stigma and medical health issues. However, this order was revoked upon TikTok complying with the requisite guidelines to make the platform safe for children.

(b) **Shein and Clubfactory**

Applications like Shein and Clubfactory have also been under scrutiny for undervaluing their goods and flouting payment of custom and import duties by importing goods valued less than INR 5,000 (Indian Rupees Five Thousand) (approximately USD 66) as "gifts". In order to crack down on such websites (Shein, Clubfactory and AliExpress), the Director General of Foreign Trade amended the Foreign Trade Policy to prohibit the import of goods from e-commerce platforms as "gifts" without clearance of all duties.[92]

(c) **ES File Explorer**

ES File Explorer was blocked by the Google Play Store in the past due to several fake versions of the applications being circulated, and the application abusing file permissions and generating fake impressions.

Other jurisdictions

(a) **TikTok**

In the United States (the "**US**"), TikTok was fined with USD 5.7 million for violating the Children's Online Privacy Protection Act.[93] Further, the Department of Homeland Security, the Navy, the Army, the Marine Corps, the Coast Guard and the Transportation Security Administration in the US have blocked the use of TikTok, citing counterintelligence risks. TikTok has faced scrutiny from the European Union for its policies on data collection and privacy being in contravention of the General Data Protection Regulation (the "**GDPR**"). Indonesia had also temporarily blocked the use of the application for containing inappropriate, pornographic and blasphemous content.

(b) **Huawei**

US President Donald Trump has, through an executive order, bestowed the federal government with the power to block US companies from buying foreign-made telecommunications equipment from companies which pose a

92 https://dgft.gov.in/sites/default/files/Notification%20No.%2035%20dated%2012.012.2019%20in%20E.pdf

93 https://www.ftc.gov/news-events/press-releases/2019/02/video-social-networking-app-musically-agrees-settle-ftc

national security risk. [94] This executive order is specifically aimed at Chinese companies like Huawei Technologies Co. and ZTE Corp. Even in Germany, Huawei has come under the scanner for transferring personal data to its headquarters in China in violation of the GDPR, and for granting China a legal backdoor to access personal information. The United Kingdom also banned the country's telecom networks from buying new Huawei 5G kits from December 31, 2020, citing potential security risks as a result of supply chain disruption and restriction of access to essential technology from the US required to manufacture such equipment following the US President's executive order.[95]

INDIA'S INTERNATIONAL TREATY OBLIGATIONS

China claims that by blocking Chinese applications, India has violated its World Trade Organisation ("**WTO**") and investment treaty obligations. But are these claims valid? To examine this, we provide a brief overview of India's international treaty obligations below.

WTO obligations

India's imports of technological services and goods are governed by India's obligations under the international trade regime of the WTO. The WTO functions as a global system for regulating the rules of trade between member nations. A majority of the trading nations of the world, including India and China, are members of the WTO.

Foreign investments in India are governed by India's specific foreign investment policies and bilateral investment treaties with other countries, whereas trade between India and various other countries is regulated by India's WTO obligations. Particularly, the WTO covers agreements for each of the three broad areas of trade between member nations of the WTO (which include both India and China):

- Goods - under the General Agreement on Tariffs and Trade (the "**GATT**");
- Services - under the General Agreement on Trade in Services (the "**GATS**"); and
- Intellectual Property - under the Intellectual Property (Trade-Related Aspects of Intellectual Property Rights) Agreement.

The blocked applications range from social media platforms like TikTok and Weibo, gaming applications like Mobile Legends and Clash of Kings, e-commerce platforms like Shein, Romwe and Clubfactory, to other software products such as CamScanner and UC Browser. Depending on the nature of the trade carried out through these applications, they would be categorised as 'services' and/or 'products'. Accordingly, India's obligations in respect of permitting trade between India and China through these applications, will be governed by the GATS and/or the GATT.

[94] https://www.whitehouse.gov/presidential-actions/executive-order-securing-information-communications-technology-services-supply-chain/

[95] https://www.gov.uk/government/news/huawei-to-be-removed-from-uk-5g-networks-by-2027.

(a) **Compliance with the GATT**

Under the GATT, India's substantive obligations include the Most Favoured Nation Treatment ("**MFN**") obligation [96] and the National Treatment obligation. The MFN obligation requires that India's treatment of products of one trading country will be no less favourable than its treatment to 'like' products from another trading country. Further, the National Treatment obligation [97] requires India to treat foreign products no less favourably than it treats 'like' domestic products. India has also committed to not imposing any market access barriers in the form of tariffs on goods being imported into India from any other member nation, including China, except for specific products under the schedule of concessions.

(b) **Compliance with the GATS**

Article I of the GATS defines "trade in service" by distinguishing the modes of supply of service in four prongs. These different modes in which member nations under the GATS undertake trade in services are as follows:

(i) Cross Border Supply - from the territory of a member nation into the territory of any other member nation;

(ii) Consumption Abroad - in the territory of a member nation to the service of any other member nation;

(iii) Commercial Presence - by a service supplier of a member nation, through commercial presence in the territory of any other member nation; and

(iv) Presence of Natural Persons - by a service supplier of a member nation, through presence of natural persons of a member nation in the territory of any other member nation.

Under the GATS, India's general substantive obligations include the MFN obligation [98] in respect of service suppliers throughout all sectors. [99] India's specific obligations include market access, national treatment and additional commitments, which apply only to the extent India has agreed to specific commitments for specific service sectors. Market access is a negotiated commitment for specific sectors under the GATS and creates an obligation for a member nation to not create restrictions on (i) the value of service transactions or assets; (ii) the number of operations or quantity of output; (iii) the number of natural persons supplying a service; (iv) the type of legal entity or joint venture; and (v) the participation of foreign capital.[100]

These sector-wise commitments are provided under the Schedule of Specific Commitments of the GATS (the "**Schedule of Commitment**"). On examining the various sectors listed in

[96] Article I, GATT.
[97] Article III, GATT.
[98] Article II, GATS.
[99] https://unctad.org/en/Docs/edmmisc232add31_en.pdf
[100] Article XVI, GATS.

the Schedule of Commitments under the GATS, we note that the applications listed in the Press Release fall under the following service sectors:

(i) **Communication Services** - Applications such as WeSync, We Meet, WeChat, TikTok and Mi Video Call, being communication applications, can be broadly classified as 'communications services'. In the communications services sector, India has made no commitments for market access and national treatment for any of the modes of supply of services. This means India has the right to place restrictions on the supply of 'communication services', in its discretion.

(ii) **Computer and Related Services** – Search engines such as UC Browser and computing services applications such as DU Cleaner fall under the ambit of computer and related services. In this sector, India's commitments are "unbound" for 'market access' and 'national treatment', where the operations are through the modes of cross-border supply, consumption abroad and presence of natural persons (except for measures affecting the entry and temporary stay of business visitors). This means that India can place restrictions on supply of such services when supplied through cross border supply, consumption abroad or through presence of natural persons. However, when such services are supplied through *commercial presence* in the Indian territory, India's commitment is "none" for national treatment; this means that if any computer and related services are being provided in India by a foreign member nation through commercial presence in India, India is obligated to treat such services of a member nation at par with domestic service providers. This obligation is, perhaps, one of the grounds under which China may claim discriminatory behaviour and violation of WTO obligations by India.

(iii) **Recreational Services** – Gaming applications such as Clash of Kings and Mobile Legends, and news applications such as Newsdog and UC News, fall within the ambit of this sector. This sector is not listed in India's Schedule of Commitment. India is, therefore, free to impose restrictions on market access and national treatment on the supply of services in this sector.

(c) **Security Exceptions**

Being a rule-based regime, the WTO allows members to invoke exceptions only when expressly provided for under the GATT and the GATS. National measures under these agreements have specifically stated conditions for them to be invoked and are subject to adjudication by the WTO.

Both the GATS and the GATT allow India to undertake measures that may be contrary to India's commitments and obligations under the GATS[101] and the

[101] Article XIV bis, GATS.

GATT [102] towards other member nations. These are measures that India *may consider necessary for the protection of its essential security interests during the time of a war or other emergency in international relations*. As per the jurisprudence developed by the WTO, a member nation may take such measures as it deems necessary for the protection of essential security interests such as protection of its territory and its population from external threats, and the maintenance of law and public order internally, during the time of war or emergency in international relations, which emergency must be established objectively.[103]

China's claim that India has violated its WTO obligations may arise from India's commitment to accord national treatment to its service suppliers under the Computer and Related services, as explained above. However, security exceptions under the GATT and the GATS allow India to supersede such commitments for measures taken in times of emergency in international relations. While the current situation between India and China involving engagement between the armies of the two countries may qualify as an emergency in international relations, India has not officially declared it as such. This, along with other reasons of diplomacy, is perhaps why the Government has not officially imposed any sanctions on China or named China in the Press Release, despite all applications covered therein being owned or controlled by Chinese entities.

Compliance under international investment agreements

India signed the Bilateral Investment Treaty Agreement with the Republic of China for Protection and Promotion of Investments (the "**India-China BIT**") on November 21, 2006,[104] which was later terminated by India on October 3, 2018 (the "**Termination Date**").[105] Article 16(2) of the India-China BIT[106] states that in case of unilateral termination, the treaty '*shall continue to be effective for a further period of fifteen years from the date of its termination in respect of investments made or acquired before the date of termination of this Agreement*'. In other words, all Chinese investments made before the Termination Date are protected under international law in the India-China BIT.

Article III (2) of the India-China BIT obligates India to accord "Fair and Equitable Treatment" ("**FET**") to Chinese investments and returns of investors in India. The FET standard protects investors against serious instances of arbitrary, discriminatory, or abusive conduct by host states.[107] Several applications ordered to be blocked under the Press Release, such as TikTok, have related entities in India in which Chinese investments were made prior to the Termination Date. In respect of applications listed in the Press Release where Chinese investments were made before the Termination Date, China may claim that India is in violation of FET standards under the India-China BIT.

[102] Article XXI, GATT.

[103] Panel Report, Russia – Measures Concerning Traffic in Transit, WT/DS512/7, at para. 7.130.

[104] https://www.mea.gov.in/TreatyDetail.htm?398

[105] https://dea.gov.in/bipa?page=5

[106] https://www.mea.gov.in/Portal/LegalTreatiesDoc/CH06B0878.pdf

[107] https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf

However, the India-China BIT also provides that "every state has the right to exercise normal regulatory power in pursuance of public interest measures".[108] The Press Release states that the applications are blocked by the Government on grounds of public order and public interest. Therefore, India may argue that the measures under the Press Release are not in contravention of international law standards of FET.

NEED OF THE HOUR: COMPREHENSIVE POLICY ON CHINA

While the Press Release cites concerns over compilation of data, its mining and profiling by elements hostile to national security and defence of India, it seems to be an incomplete measure and stands good only as an interim measure. Further, though many Chinese applications have been included under the Press Release, there are several other Chinese companies or Chinese-owned businesses that operate in India, against which no measures have been taken. One such entity is 'Hikvision', a CCTV surveillance company with a 35% market share in India and of which 42% is owned by Chinese state enterprises. It is also interesting to note that the US government has prohibited its government agencies from buying video surveillance products from companies like Hikvision, citing Chinese ownership and abuse by China against its Muslim minorities as a primary reason.

In light of this limited move by the Government to restrict access to certain applications, the question remains of whether India really wants to put sanctions against Chinese businesses operating in India. If so, then India needs an explicit sanctions policy with a wider ambit to regulate Chinese infiltration into the Indian economy. The US regularly invokes grounds such as national emergency[109], national security, prevention of cyber-theft of trade secrets[110] and protection of its citizens' private data, to impose economic sanctions against China. Given the historically grim political relations between India and China, especially in the wake of the recent global geo-political sentiments against China, perhaps it is time that India also considered a more transparent and targeted approach towards China and came up with its own national policy towards China, emulating the United States Strategic Approach to the People's Republic of China[111]. Such a policy should *inter alia* consider the following factors:

Data protection and privacy

Considering the Press Release and the other measures taken against the applications that are blocked, by reason of personal data of users being collected and stored in China, restrictions should be imposed to ensure that the storage and processing of all data collected by Chinese app developers or companies are done on servers located in India. Any exchange of this data should be fully monitored and permitted only with the Government's approval.

[108] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, (July 8, 2016), at ¶423.

[109] https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states/

[110] https://www.whitehouse.gov/wp-content/uploads/2020/05/U.S.-Strategic-Approach-to-The-Peoples-Republic-of-China-Report-5.20.20.pdf

[111] https://www.whitehouse.gov/wp-content/uploads/2020/05/U.S.-Strategic-Approach-to-The-Peoples-Republic-of-China-Report-5.20.20.pdf

Critical industries

In respect of industries such as telecommunications, surveillance and energy, which are critical for maintaining security, India may consider adopting a policy allowing the Government to restrict Indian companies from buying products from companies from China and other countries that pose a security threat to India.

Dumping by e-commerce platforms

Chinese e-commerce platforms have been under the scanner in the past for the undervaluation and wrongful declaration of goods to authorities. India needs a specific section for e-commerce in its policy towards China to give domestic players a level playing field against malpractices like predatory pricing and deep discounting of goods being imported from China.

This strategic policy must strike a balance between cost and benefit by factoring inevitable retaliatory measures from China and the impact these could have on Indian companies invested in and trading with China.

INDUSLAW VIEW

In light of the unprecedented economic and cross-border tensions that have arisen between India and China in the recent past, India's Press Release has shifted such tensions into cyberspace by way of sanctions against Chinese applications. The above-mentioned analysis of India's international treaty obligations corroborates that India is well within its rights to impose sanctions under the India-China BIT, the GATT and the GATS against any member country in case of national security risks and/or a national emergency. India is also within its rights to impose barriers on investments from neighbouring countries, including China, as notified by it through the Press Note, since foreign investment into India is a policy decision and governed by India's foreign investment policies and regulations. Similarly, India is also within its rights to bring about restrictions for bidders of procurement arrangements who are from neighbouring countries, as notified by the GFR Amendment - which widens the ambit of sanctions towards China beyond cyberspace and investment. Following the Press Release, some recent news reports also suggest that the Government is preparing a list of additional applications which are largely operating as clones of the previous 59 applications, and are under review to be banned on similar grounds and considerations of privacy and national security.

On a closer look at the aim of the Press Note, the Press Release and the GFR Amendment, it is evident that these measures are aimed at Chinese businesses' entrance into the Indian market, without specifically referring to China. It is true that it may be redundant for India to now indulge in the rhetoric of engagement with China considering the ongoing border crisis. However, it may be time for India to consider a targeted economic sanctions policy with a wider overall ambit, covering not only digital space, but also investments from China, trading in sectors other than Communications Services and Computer and Related Services and all other areas of the Indian economy which involve Chinese participation. At the same time, such a 'coming out' must be weighed against

potential retaliatory measures and long-term consequences to the relationship.

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5. ENERGY, INFRASTRUCTURE AND NATURAL RESOURCE

5.1. HIGHLIGHTS OF THE PROPOSED POWER MARKET REGULATIONS, 2020

INTRODUCTION

The Central Electricity Regulatory Commission ("**CERC**") in exercise of its powers conferred under Section 66 read with Section 178 of the Electricity Act, 2003 ("**Electricity Act**") and under the National Electricity Policy, issued the draft CERC (Power Market) Regulations, 2020 ("**Power Market Regulation**s") through a notification dated 18 July, 2020.

The applicability of the proposed Power Market Regulations extends to Power Exchanges [112], Market Participants [113] other than Power Exchanges, and Over the Counter ("**OTC**") Market[114]. These Power Market Regulations are also applicable to contracts transacted on the Power Exchange, contracts relating to renewable energy certificates, contracts relating to energy saving certificates, contracts in the OTC market, and any other contracts/products, as may be approved by the appropriate commission.

KEY HIGHLIGHTS OF THE PROPOSED POWER MARKET REGULATIONS

The key features of the proposed Power Market Regulations have been discussed below:

Power Exchange

The Power Exchanges are established and operated with the objectives including *inter alia,* to design electricity contracts, facilitate transactions of such contracts and to facilitate extensive, quick and efficient price discovery and dissemination.

Eligibility

An applicant for establishing a Power Exchange is required to fulfil the following criteria at the time of making application for registration of a Power Exchange:

(a) The applicant is required to be a company limited by shares, incorporated or deemed to be incorporated under the provisions of the Act;

(b) The applicant is required to be demutualised - which means that the ownership and management of the applicant should be segregated from the trading rights, in terms of the proposed Power Market Regulations;

[112] "**Power Exchange**" is defined to mean an electronic platform for the purpose of facilitating transactions in delivery based electricity contracts or transactions in any other contracts as permitted by the appropriate commission;
[113] "**Market Participants**" will mean to include: (1) grid connected entities; (2) Power Exchanges; (3) Members of Power Exchanges; (4) Trading Licensees; (5) Market Coupling Operator; (6) OTC Platform; (7) Any other entity as notified by the Commission
[114] "**Over the Counter Market**" is defined to mean a market where OTC Contracts are transacted between the sellers and the buyers directly or through a Trading Licensee.

(c) The main objects of the applicant company should be to establish and operate a Power Exchange;

(d) The applicant should have a net worth of minimum INR 50,00,00,000 (Indian Rupees fifty crores) as per the audited special balance sheet, as on any date falling within 30 (thirty) days immediately preceding the date of filing the application for grant of registration;

(e) The directors of the applicant should satisfy the requirements relating to qualification of directors and should not be disqualified for appointment on the Board [115] of Power Exchange, as stated in the proposed Power Market Regulations; and

(f) The applicant should satisfy the requirements relating to the ownership and governance structure, as specified in the proposed Power Market Regulations.

Ownership Structure of the Power Exchange

The shareholding pattern for equity holders in Power Exchange is required to be as follows:

(a) any shareholder other than a Member [116] or a Client [117], directly or indirectly, either individually or together with persons acting in concert, will not acquire or hold more than 25% (twenty five percent) of shareholding in the Power Exchange.

(b) A Member or a Client, directly or indirectly, either individually or together with persons acting in concert, will not acquire or hold more than 5% (five percent) of shareholding in the Power Exchange.

(c) A Power Exchange can have a maximum of 49% (forty nine percent) of its total shareholding owned by entities, which are Members or Clients, directly or indirectly, either individually or together with persons acting in concert.

The Power Exchanges which have been granted registration by the appropriate commission prior to the date of notification of the proposed Power Market Regulations, will be required to, within a period not exceeding 1 (one) year from the date of notification of proposed Power Market Regulations, ensure compliance with the conditions specified in (i) to (iii) above.

The Power Exchange will be required to disclose to the appropriate commission by 30th April each year, its category-wise shareholding pattern as on 31st March of that year, or when there is a significant change in the shareholding

[115] "**Board**" is defined to mean Board of Directors of the Power Exchange.
[116] "**Member of Power Exchange**" is defined to mean a person who has been admitted as such by a Power Exchange in accordance with the Power Market Regulations and in accordance with byelaws, rules and business rules of the concerned Power Exchange.
[117] "**Client**" is defined to means a person who has executed an agreement with a Member of a Power Exchange for dealing with or clearing through such Member.

or as and when directed by the appropriate commission.

The Power Exchange will be required to maintain and preserve all the relevant documents and records relating to the issue or transfer of its shares for a period of not less than 8 (eight) years and make them available to the appropriate commission as and when directed.

Exit Scheme for Power Exchanges

The Power Exchanges are required to get their exit scheme (to cater for closure of the Power Exchange or revocation of registration of the Power Exchange) approved by the appropriate commission at the time of registration. The exit scheme is required to set out the manner in which: (i) the running contracts on the Power Exchange will be closed or the succession plan for all transacted contracts; and (ii) any claims pertaining to pending arbitration cases, arbitration awards, liabilities or claims of contingent nature and unresolved investors complaints or grievances lying with the Power Exchange would be settled by the Power Exchange.

Risk Management by Power Exchanges

The Power Exchange will be required to develop and implement a prudent risk management framework by adopting best practices, which should be dynamic based on the changing risk profiles of the market. The Power Exchange will also be required constitute a Risk Assessment and Management Committee ("**RAMC**") headed by an independent director, and the RAMC will monitor adherence to the risk management framework.

The RAMC will also review the risk management framework on a six-monthly basis (i.e. in January and July each year). The six-monthly report of the RAMC is required to be submitted to the Board of Directors. The report of the RAMC (along with decision of the Board of Directors on the RAMC report) needs to be submitted to the appropriate commission not later than end of March and end of September each year respectively.

Clearing and Settlement

Power Exchanges will be required to enter into an agreement in writing for clearing and settlement of any transaction of electricity undertaken on the Power Exchange with an entity established in accordance with the provisions of the Payment and Settlement Systems Act, 2007 ("**Payment and Settlement Systems Act**").

However, Power Exchanges which have been granted registration by the appropriate commission prior to the date of notification of the proposed Power Market Regulations will be required to transfer clearing and settlement function to an entity established in accordance with the provisions of the Payment and Settlement Systems Act, within a period of 1 (one) year from the date of notification of the proposed Power Market Regulations or such other period as may be approved by the appropriate commission.

Contracts Transacted on Power Exchanges

Under the proposed Power Market Regulations, the types of contracts transacted on Power Exchanges include: (i) Day Ahead Contracts and Real-time Contracts, (ii) Intraday

Contracts and Contingency Contracts, (iii) Term Ahead Contracts, (iv) Renewable-Energy Certificates, and (v) Energy Savings Certificates. The proposed Power Market Regulation discuss the bidding mechanism and price discovery mechanism under such contracts.

The categories covered under (i) to (iii) above cannot be annulled or curtailed except due to constraints in the transmission corridor or any other technical reasons in accordance with the CERC (Open Access in inter-State Transmission) Regulations, 2008 and the CERC (Indian Electricity Grid Code) Regulations, 2010.

Transaction Fee

The Power Market Regulations propose that no Power Exchange will charge transaction fee exceeding such fee as approved by the appropriate commission. The Power Exchanges, which have been granted registration by the appropriate commission prior to the date of notification of these regulations, will be required to obtain approval of the transaction fee to be charged by the Power Exchange within a period of 3 (three) months of the date of notification of the proposed Power Market Regulations.

OTC Market

As per the proposed Power Market Regulations, OTC Market is a market where OTC Contracts[118] are transacted between the sellers and the buyers directly or through a Trading Licensee. The price and other terms of contract in the OTC Market will be determined either through mutual agreement between the buyer and the seller, through competitive bidding process, or will be determined by the appropriate commission.

The application for scheduling of contracts in the OTC Market will be required to be made in accordance with the provisions of the following regulations:

(a) Requirements under CERC (Open Access in inter-State Transmission) Regulations, 2008 for the following:

  (i) Advance scheduling;
  (ii) First-Come-First-Served;
  (iii) Day-Ahead bilateral transaction; and
  (iv) Bilateral transactions in a contingency.

(b) Requirements under CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 for the following:

  (i) Long-term access; and
  (ii) Medium-term open access.

It is proposed that the settlement of contracts transacted in the OTC Market will be done only by physical delivery of electricity without netting. The OTC Platform[119] will operate after obtaining registration under Power Market

[118] "**Over the Counter Contracts**" is defined to mean the contracts transacted outside the Power Exchanges.

[119] "**Over the Counter Platform**" is defined to mean an electronic platform for exchange of information amongst the buyers and sellers of electricity.

Regulations. The objectives of the OTC Platform will be:

(a) To provide an electronic platform with the information of potential buyers and sellers of electricity;

(b) To maintain a repository of data related to buyers and sellers and provide such historical data to Market Participants; and

(c) To provide such services as advanced data analysis tools to Market Participants.

Participants on OTC Platform

Following entities will be eligible for participation in the OTC Platform:

(a) grid connected entities such as generating companies, distribution licensees, open access consumers or any person acting on their behalf; and

(b) Trading Licensees.

Eligibility Criteria

The eligibility criteria for registration of OTC Platform shall be as follows:

(a) The registering company should be incorporated under the Act; and

(b) The minimum net worth of the applicant company should be INR 50,00,000 (Indian Rupees fifty lakhs) as on any date falling within 30 (thirty) days immediately preceding the date of filing the application for grant of registration.

A Power Exchange or Trading Licensee or any of their associates or grid connected entities are proposed, not to be permitted to set up, operate, or have any shareholding in an OTC Platform. The OTC Platform will not engage in the negotiation, execution, clearance or settlement of the contracts and maintain neutrality without influencing the decision making of the Market Participants in any manner.

Market Coupling

The Power Market Regulations propose the introduction of the process of Market Coupling, under which collected bids from all the Power Exchanges will be matched, after taking into account all bid types, to discover the uniform market clearing price for the Day Ahead Market or Real-time Market or any other market as notified by the appropriate commission, subject to Market Splitting[120].

The objectives of Market Coupling include:

(a) Discovery of uniform market clearing price for the Day Ahead Market[121] or Real-time

[120] "**Market Splitting**" is defined to mean the mechanism adopted by the Power Exchange or Market Coupling Operator, as the case may be, for discovering price of electricity in various bidding areas or zones facing congestion in transmission corridor, whereby these bidding areas or zones are split into independent markets and the flow of electricity between these independent markets is permitted to the extent of available transmission corridor under safe grid operating conditions.

[121] "**Day Ahead Market**" is defined to mean a market where Day Ahead Contracts are transacted on the Power Exchange(s), and "Day Ahead Contract" is defined to mean a contract wherein Collective Transactions occur on day (T) and delivery of electricity is on the next day (T+1).

Market[122] or any other market as notified by the appropriate commission;

(b) Optimal use of transmission infrastructure;

(c) Maximisation of economic surplus, after taking into account all bid types and thereby creating simultaneous buyer-seller surplus.

Designation of Market Coupling Operator

Subject to provisions of the Power Market Regulations, it is proposed that the appropriate commission will designate a Market Coupling Operator, who will be responsible for operation and management of Market Coupling.

Functions of the Market Coupling Operator

(a) The Market Coupling Operator, with the approval of the appropriate commission, will be required to issue a detailed procedure for implementing Market Coupling including management of congestion in transmission corridor, the timelines for operating process, information sharing mechanism with the Power Exchanges and any other relevant matters.

(b) The algorithm for enabling Market Coupling will be developed and managed by the Market Coupling Operator and implemented with the approval of the appropriate commission.

(c) Market Coupling Operator will be required to create and maintain a document on its website providing detailed description of the algorithm used for price discovery. The description should essentially include bid types, details of how the algorithm results in maximization of economic surplus taking into account various bid types and congestion in transmission corridor, which will be updated with every new version of the price discovery algorithm.

(d) The Market Coupling Operator will use the algorithm to match the collected bids from all the Power Exchanges, after taking into account all bid types, to discover the uniform market clearing price, subject to Market Splitting.

(e) The Market Coupling Operator will communicate the results of the auction to the Power Exchanges in a transparent manner. The Power Exchanges will inform the participating bidders about the results of the auction as communicated by the Market Coupling Operator.

Market Oversight

The objectives of market oversight will be:

(a) To detect and prevent market manipulation, insider trading, cartelisation and abuse of

[122] "**Real-time Market**" is defined to mean a market where Real-time Contracts are transacted on the Power Exchange(s), and "Real-time Contract" is defined to means a contract other than Day Ahead Contract or Intraday Contract or Contingency Contract, wherein Collective Transactions occur on day (T) or day (T-1) and delivery of electricity is on day (T) for a specified delivery period.

dominant position by any Market Participant;

(b) To ensure that Market Participants have confidence in the integrity and fairness of power markets; and

(c) To ensure that the prices are discovered in a transparent and competitive manner.

The market oversight will include, but not limited to, the following:

(a) procedure for registration of Market Participants;

(b) mechanism for collecting data from Market Participants;

(c) details of Market Participants or any other entities who shall furnish information;

(d) details of information to be furnished by the entities specified in (iii) above;

(e) periodicity and formats for reporting of information;

(f) measures to prevent any misuse of or unauthorised access to the information furnished by Market Participants;

(g) conducting analytics and market surveillance based on the data furnished by the Market Participants; and

(h) any other information as may be required by the appropriate commission.

The appropriate commission may, on being satisfied, that any of the following circumstances exist, order inquiry or investigation in accordance with the provisions of the Electricity Act:

(a) Non-compliance of the statutory obligations by Market Participants: and

(b) Involvement of Market Participants in any of the activities, including but not limited to the following:

(i) Market manipulation;

(ii) Any form of cartelization;

(iii) Insider trading; and

(iv) Abuse of dominant position by any Market Participant.

Intervention by the appropriate commission

It is proposed that on receipt of any information or report under the provision of the Power Market Regulations, the appropriate commission may, after giving such opportunity to the concerned Market Participant, to make a representation in connection with the report and after considering representation, if made, by order:

(a) require the concerned Market Participant to take such action in respect of any matter arising out of the report as the appropriate commission may deem fit; or

(b) impose penalty in accordance with the provisions of the Electricity Act;

(c) debar the relevant Market Participant from participating in any of the contracts regulated by the Power Market Regulations for a period as may be specified by the appropriate commission;

(d) direct the Power Exchange to cancel membership of a Member; or

(e) suspend or cancel the registration of the Power Exchange.

Other circumstances requiring intervention

It is also proposed that in the event the appropriate commission is satisfied that a situation of abnormal increase or decrease in prices or volume of electricity in the Power Exchange exists or is likely to occur in the market, it may give such directions, as may be considered necessary, through an order.

In particular, the appropriate commission through the order may undertake the following actions:

(a) impose floor and cap on prices of electricity in the Power Exchange;

(b) suspend transaction activities on the Power Exchange for a cooling off period, in case of increased volatility;

(c) suspend transaction of any specific contract on Power Exchange; and

(d) regulate the transaction fee charged by the Power Exchange.

Power to issue interim orders

In a situation, where during an investigation or intervention, the appropriate commission is satisfied that an act in contravention of Power Market Regulations has been committed and/or continues to be committed or that such act is about to be committed, the appropriate commission may, by order, temporarily restrain any person from carrying on such act until the conclusion of such investigation or intervention or until further orders, after giving notice to such person.

Power of inspection

The Power Market Regulations empower the appropriate commission to undertake inspection, conduct inquiries or audit of any Power Exchange, either through its officers or through a third-party agency, in accordance with the provisions of the Electricity Act, at any point in time.

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6. EMPLOYMENT LAW

6.1 GOVERNMENT OF HARYANA AMENDS THE FACTORIES ACT, 1948

INTRODUCTION

The Government of Haryana had proposed to amend the Factories Act, 1948 (the "**Factories Act**") and introduce certain new provisions relating to working hours, allowing women workers to work at night, offences that would be compoundable, etc. vide the Factories (Haryana Amendment) Bill, 2018 (the "**Factories Bill**") dated August 28, 2018.

AMENDMENTS CARRIED OUT IN THE FACTORIES ACT

Please refer to Annexure A

INDUSLAW VIEW

Since the State of Haryana has several manufacturing facilities, small to large, the amendments brought in by the State in the Factories Act would certainly minimise the possibility of litigation or undesired inspection by the labour authorities. Additionally, by increasing the overtime limit, the Government of Haryana is allowing the manufacturing units to make up for the loss of the last several months besides giving an opportunity to contribute to *Make in India* programme of the Government of India.

However, the Factories Bill had been pending for assent from the President of India.

The Government of Haryana notified the Factories (Haryana Amendment) Act, 2018 ("**Amendment Act 2018**"), vide a gazette notification dated July 20, 2020, which amends the Factories Act in its applicability to the State of Haryana. The Amendment Act 2018 had received assent from the President of India on June 16, 2020.

6.2 KEY IMPLICATIONS OF THE INDUSTRIAL DISPUTES AND CERTAIN OTHER LAWS (KARNATAKA AMENDMENT) ORDINANCE, 2020

INTRODUCTION

The governor of Karnataka on July 31, 2020 promulgated the Industrial Disputes and Certain Other Laws (Karnataka Amendment) Ordinance, 2020 (the "**Ordinance**") in order to facilitate and boost ease of doing business in the state of Karnataka. The Ordinance brings forth certain significant employer-friendly reforms to the labour laws of Karnataka.

AMENDMENTS AND IMPLICATIONS

Although the Karnataka state legislative assembly and the Karnataka legislative council are currently not in session, the governor of Karnataka under clause (1) of Article 213 of the Constitution of India, after obtaining necessary instructions from the President of India, promulgated the Ordinance with immediate effect thereby bringing noteworthy changes to the Industrial Disputes Act, 1947 ("**IDA**"), the Factories Act, 1948 ("**Factories Act**") and the Contract Labour (Regulation and Abolition) Act, 1970 ("**CLRA**") in the manner as provided in Annexure B.

INDUSLAW VIEW

The Ordinance's clear objective is to make it easier to do business in Karnataka and to boost productivity. For instance, the changes in the IDA will enable employers to take swift business decisions in scenarios of retrenchment or lay off. The changes in the Factories Act limit the number of workers to be employed at a premise to constitute a "factory", thereby significantly reducing the compliance burden for establishments which will be outside the ambit. Similarly, an increase in overtime limit may help employers regain productivity which was lost due to the pandemic. Further, the changes to CLRA may significantly assist in reduction of procedural obligations for several establishments. Most of these reforms were a

consequence of the long pending demands of industries given that employers will gain a fair amount of flexibility to alter their workforce as per business requirements and in some instances, also ease the procedural obligations. While this Ordinance is certainly being welcomed by employers, there may be strong criticism on the lines that the Ordinance would not help workers as their rights may get diluted.

6.3 LABOUR LAWS AMENDMENTS INITIATIVES BY STATE GOVERNMENTS TO PROVIDE IMPETUS TO ECONOMIC ACTIVITY

INTRODUCTION

With the announcement of 'unlock-2' (phase-2 of opening of lockdown), except for few areas, industries or establishments have gradually started inching towards operations of businesses with the limited workforce or resources to not only sustain the businesses but also to contribute to the economic growth of India.

Since COVID-19 has led to slow down of economic growth in India, besides the federal (central) government, state governments have also commenced introducing various measures by way of amending labour and employment statutes, such as granting exemption in working hours and raising the statutory thresholds, amongst others, to ease the financial burden on employers

LEGAL FRAMEWORK

The subject "labour" falls under the concurrent list of the Constitution of India, thus giving power to both federal and state governments to make laws regulating labour and employment, with the exception of certain matters being reserved for the federal government. State governments generally provide for amendment, exemptions, or additions concerning the subject "labour" either by introducing a subject specific statute relevant for such a state or by amending the federal statutes, within the rights available to states, which requires assent of the Hon'ble President of India.

State governments derive power from Article 213 [123] of the Constitution of

[123] 213. Power of Governor to promulgate Ordinances during recess of Legislature
(1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require: Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if
(a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature; or
(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President; or
(c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President
(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Legislature of the State assented to by the Governor, but every such Ordinance
(a) shall be laid before the legislative Assembly of the State, or where there is a Legislative Council in the State, before both the House, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council; and
(b) may be withdrawn at any time by the Governor Explanation Where the Houses of the Legislature of a State having a Legislative Council are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause
(3) If and so far as an Ordinance under this article makes any provision which would not be valid if enacted in an Act of the legislature of the State assented to by the Governor, it shall be void: Provided that, for the purposes of the provisions of this Constitution relating to the effect of an Act

India which allows amendments by way of ordinances in the statutes (when not exercising the powers given within the statutes). In the last few weeks, state governments, exercising the powers under Article 213, have passed certain ordinances to carry out major amendments in federal laws, which would come into force as soon as the ordinances receive President's Assent. Simultaneously, exercising the rights available within the statutes, various state governments have brought in several changes, which are relevant for the specific period.

ORDINANCES BY VARIOUS STATE GOVERNMENTS
UTTAR PRADESH

The Uttar Pradesh ("**UP**") Government on May 08, 2020 has introduced the Uttar Pradesh Temporary Exemption from Certain Labour Laws Ordinance, 2020, applicable to all factories and establishments engaged in manufacturing process and intends to exempt the said factories and manufacturing establishments from the operation of certain labour laws for a temporary period of 3 years subject to the conditions, amongst others, mentioned therein:

(a) The name and details of all employed workers shall be entered electronically on attendance register prescribed in Section 62 (register of adult workers) of the Factories Act, 1948, which is to be maintained in a physical register;

(b) No workers shall be paid less than minimum wages as prescribed by the Government of UP;

(c) The workers shall not be allowed or required to work for more than 11 hours per day and the spread over of the work shall not be more than 12 hours per day, which is currently 9 hours in a day and spread over not exceeding 10 ½ hours;

(d) Wages to be paid in the bank account only and as per the time limit prescribed under the Payment of Wages Act, 1936;

(e) The provisions relating to safety and security of workers as provided in the Factories Act, 1948 and Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 will continue to be applicable;

(f) The various laws relating to employment of children and women will continue to be applicable;

(g) For any death or disability due to accident arising out of and in the course of employment, compensation to be paid in accordance with the provisions of Employees' Compensation Act, 1923; and

(h) The provisions of Bonded Labour (System) Abolition Act,

of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List, an Ordinance promulgated under this article in the Concurrent List, an Ordinance promulgated under this article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the president and assented to by him.

1976 will continue to be applicable.

MADHYA PRADESH

The Madhya Pradesh ("**MP**") Government on May 06, 2020 also has introduced the Madhya Pradesh Labour Laws (Amendment) Ordinance, 2020, which aims at amending two state laws, the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961 and the Madhya Pradesh Shram Kalyan Nidhi Adhiniyam, 1982.

The Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961 is applicable to all the undertakings[124] having 50 employees[125]. The MP Government by way of an amendment intends to increase the applicability threshold to 100 or more employees.

The Madhya Pradesh Shram Kalyan Nidhi Adhiniyam, 1982 provides for constitution of a labour welfare fund that will finance the activities related to welfare of labour. Under the said Act, an employer is required to deposit contribution on behalf of both employer and employee[126] at the rate of INR 1 (employee's contribution) and INR 3 (employer's contribution) every 6 months. The proposed ordinance intends to amend the said Act by including a new section to allow the Government of MP to exempt any establishment or class of establishments from the provisions of the said Act through a notification.

GOA

Vide the Contract Labour (Regulation and Abolition) (Goa Amendment) Ordinance, 2020 introduced on June 26, 2020, the State Government of Goa intends to amend the threshold of employees from 20[127] workmen to 50 as prescribed under Section 1 (4)[128] of the

[124] The Madhya Pradesh Industrial Relations Act, 1960 defines 'Undertaking' as a concern in any industry. 'Industry' means:
(a) any business, trade, manufacture or undertaking or calling of employers.
(b) any calling, service, employment, handicraft, or industrial occupation or
avocation of employees, and includes-
(i) agriculture and agriculture operations;
(ii) any branch of an industry or group of industries which the State Government may by notification, declare to be an industry for the purposes of this Act.

[125] The Madhya Pradesh Industrial Relations Act, 1960 defines 'employee' as any person employed in any industry to do any skilled, unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and includes—
(a) a person employed by a contractor to do any work for him in the execution of a contract with an employer within the meaning of sub-clause(e) of clause 14, and
(b) an apprentice other than an apprentice under sub-clause (v) but does not include any person-
(i) who is subject to the Army Act, 1950, or the Air Force Act, 1950 or the Navy Discipline Act 1957; or
(ii) who is employed in the Police Service or as an officer or other employee of prison; or
(iii) who is employed mainly in a managerial capacity; or
(iv) who being employed in a supervisory capacity draws wages exceeding one thousand and six hundred rupees per mensum; or
(v) who is a craftsman or an apprentice working under a scheme approved by the State Government on the condition that such craftsman or apprentice shall not be deemed to be an employee under this Act;
Explanation— An employee who has been dismissed, discharged or retrenched from employment or whose employment has been otherwise terminated shall, in respect of matters relating to such dismissal. discharge, retrenchment or termination, be deemed etc., be an employee for the purposes of this Act.

[126] Under Section 2(3), "employee" means any person who is employed for hire on reward to do any skilled, semi-skilled or un-skilled, manual, clerical, supervisory, or technical work in an establishment but does not include any person:—
(a) who is employed mainly in a managerial or administrative capacity; or
(b) who, being employed in a supervisory capacity draws wages exceeding one thousand and six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office, or by reason of the powers vested in him, functions mainly of a managerial nature.

[127] The Goa government had already reduced the threshold from 20 to 10 employees for the applicability of the Contract Labour (Regulation and Abolition) Act, 1970 vide Gazette Notification dated April 30, 2001.

[128] 1 (4) It applies -(a) to every establishment in which twenty or more workmen, art employed or were employed on any day of the preceding twelve months as contract labour;

Contract Labour (Regulation and Abolition) Act, 1970 (the "**CLRA Act**") for applicability of CLRA Act in the State of Goa and, also incorporate a new section with respect to compounding of offences, depending upon number of workmen employed in the establishment and number of times such an offence is committed.

Further, vide the Industrial Disputes (Goa Amendment) Ordinance, 2020 introduced on June 26, 2020, the State Government of Goa wants to amend the Industrial Disputes Act, 1947 (the "**ID Act**"), as in force in the state of Goa. The State Government of Goa intends to lower the limitation period from 3 years to 1 year under Section 2 A (3)[129] of the ID Act.

Further, a new sub-section (4) in Section 2A is proposed to be inserted which makes it mandatory for raising the dispute before conciliation officer within 1 year from the date of discharge, dismissal, retrenchment or termination in order to qualify as an "industrial dispute" under the ID Act.

The Government of Goa intends to amend the threshold regarding applicability from 100 to 300 workmen, as provided in Section 25K[130] (Chapter V-B) of the ID Act (special provisions relating to lay-off, retrenchment and closure in certain establishments). In case of retrenchment (under Section 25F[131] and Section 25N of the ID Act) or closure of an undertaking (under Section 25O of the ID Act), compensation to be paid to workmen is sought to be enhanced from 15 days' average pay to 45 days' average pay, for every completed year of service part in excess of 6 months.

Further a new Section 31 A relating to compounding of offences is proposed to be incorporated for any offence punishable under Sections 25Q, 25R, 25U, 26, 27, 28, 29, 30A and subsections (1) and (2) of Section 31.

ASSAM

The Factories (Assam Amendment) Ordinance, 2020 introduced on June 30, 2020 aims at amending the threshold of employees in the definition of factory[132],

(b) to every contractor who employs or who employed on any day of the preceding twelve months twenty or more workmen.
Provided that the appropriate Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment or contractor employing such number of workmen less than twenty as may be specified in the notification.

[129] (3) The application referred to in sub-section (2) shall be made to the Labour Court or Tribunal before the expiry of three years from the date of discharge, dismissal, retrenchment or otherwise termination of service as specified in sub-section (1).

[130] 25K. Application of Chapter V-B.- (1) The provisions of this Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than 2[one hundred] workmen were employed on an average per working day for the preceding twelve months.
(2) If a question arises whether an industrial establishment is of a seasonal character or whether work is performed therein only intermittently, the decision of the appropriate Government thereon shall be final.

[131] 25F. Conditions precedent to retrenchment of workmen
No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,
(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof more than six months; and
(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.

[132] (m) "factory" means any premises including the precincts thereof-

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in

as defined in the Factories Act, 1948, from 10 workers (where manufacturing process is with the aid of power) to 20 and from 20 workers (where manufacturing process is without the aid of power) to 40.

BIHAR

The Factories (Bihar Amendment) Ordinance, 2020 introduced on July 02, 2020, aims at amending the threshold of employees in the definition of factory, as defined in the Factories Act, 1948, from 10 workers (where manufacturing process is with the aid of power) to 20 and from 20 workers (where manufacturing process is without the aid of power) to 40.

Vide the Industrial Disputes (Bihar Amendment) Ordinance, 2020 promulgated on July 02, 2020, the state government intends to amend the threshold regarding applicability from 100 to 300 workmen, as provided in Section 25K (Chapter-V-B) of the ID Act (special provisions relating to lay-off, retrenchment and closure in certain establishments).

The Contract Labour (Regulation and Abolition) (Bihar Amendment) Ordinance, 2020 promulgated on July 02, 2020 proposes to amend the threshold regarding applicability of statute from 20 to 50 workmen, as prescribed under Section 1 (4) of the CLRA Act.

GUJARAT

The Factories (Gujarat Amendment) Ordinance, 2020 introduced on July 02, 2020 aims at amending the threshold of employees in the definition of factory, as defined in the Factories Act, 1948, from 10 workers (where manufacturing process is with the aid of power) to 20 and from 20 workers (where manufacturing process is without the aid of power) to 40.

Further, the State Government of Gujarat also intends to incorporate a new section with respect to compounding of offences, which may be specified by the State Government of Gujarat by way of notification.

The Industrial Disputes (Gujarat Amendment) Ordinance, 2020 introduced on July 03, 2020 aims to amend the threshold regarding applicability from 100 to 300 workmen, as provided in Section 25K (Chapter-V-B) of the ID Act (special provisions relating to lay-off, retrenchment and closure in certain establishments).

Under Section 25N of the ID Act, the option to pay the workman wages in lieu of 3 months' notice is sought to be done away with. Further, in case of a retrenchment (under Section 25N of the ID Act) or closure of an undertaking (under Section 25O of the ID Act), an amount equivalent to the workman's

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any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, a railway running shed or a hotel, restaurant or eating place.

Explanation. I--For computing the number of workers for the purposes of this clause all the workers in different groups and relays in a day shall be taken into account;
Explanation. II.--For the purposes of this clause, the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof;

last three months' average pay has been added in the last of each section.

The Contract Labour (Regulation and Abolition) Gujarat Amendment Ordinance, 2020 introduced on July 20, 2020 aims at amending the threshold regarding applicability of statute from 20 workers to 50, as prescribed under Section 1 (4) of the CLRA Act.

HIMACHAL PRADESH

The Contract Labour (Regulation and Abolition) Himachal Pradesh Amendment Ordinance, 2020 introduced on July 09, 2020 aims at amending the threshold regarding applicability of statute from 20 workers to 30, as prescribed under Section 1 (4) of the CLRA Act.

The Industrial Disputes (Himachal Pradesh Amendment) Ordinance, 2020 promulgated on July 09, 2020 aims to amend the threshold regarding applicability from 100 to 200 workmen, as provided in Section 25K (Chapter-V-B) of the ID Act (special provisions relating to lay-off, retrenchment and closure in certain establishments). Further, in case of retrenchment (under Section 25F of the ID Act), the compensation is sought to be increased from 15 days' average pay to 60 days' average pay for every completed year of continuous service or part thereof more than 6 months. Further, the provisions governing prohibition of strikes and lock-outs under Section 22[133] is sought to be made applicable to public utility and non-public utility services.

The Factories (Himachal Pradesh Amendment) Ordinance, 2020 promulgated on July 09, 2020 aims at amending the threshold of employees in the definition of factory, as defined in the Factories Act, 1948, from 10 workers (where manufacturing process is with the aid of power) to 20 and from 20 workers (where manufacturing process is without the aid of power) to 40.

Further, the State Government of Himachal Pradesh also intends to incorporate a new section with respect to compounding of offences which are punishable with fine only and committed for the first time.

AMENDMENTS INTRODUCED BY STATES EXERCISING POWERS PROVIDED WITHIN THE

[133] 22. Prohibition of strikes and lock-outs
(1) No person employed in a public utility service shall go on strike in breach of contract,
(a) without giving to the employer notice of strike, as herein-after provided, within six weeks before striking; or
(b) within fourteen days of giving such notice; or
(c) before the expiry of the date of strike specified in any such notice as aforesaid; or
(d) during the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings.
(2) No employer carrying on any public utility service shall lock-out any of his workmen,
(a) without giving them notice of lock-out as hereinafter provided, within six weeks before locking out; or
(b) within fourteen days of giving such notice; or
(c) before the expiry of the date of lock-out specified in any such notice as aforesaid; or
(d) during the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings.
(3) The notice of lock-out or strike under this section shall not be necessary where there is already in existence a strike or, as the case may be, lock-out in the public utility service, but the employer shall send intimation of such lock-out or strike on the day on which it is declared, to such authority as may be specified by the appropriate Government either generally or for a particular area or for a particular class of public utility services.
(4) The notice of strike referred to in sub-section (1) shall be given by such number of persons to such person or persons and in such manner as may be prescribed.
(5) The notice of lock-out referred to in sub-section (2) shall be given in such manner as may be prescribed.
(6) If on any day an employer receives from any persons employed by him any such notices as are referred to in sub-section (1) or gives to any persons employed by him any such notices as are referred to in sub-section (2), he shall within five days thereof report to the appropriate Government or to such authority as that Government may prescribe the number of such notices received or given on that day.

STATUTES AND CURRENTLY EFFECTIVE

THE FACTORIES ACT, 1948

Section 5[134] of the Factories Act, 1948 allows state governments to exempt any factory or description of factories from all or any of the provisions of the said Act in the case of public emergencies for a period of 3 months.

Section 65 (2)[135] of the said act allows to exempt, on such conditions, any or all of the adult workers, in any factory or group or class or description of factories from any or all of the provisions of Sections 51, 52, 54 and 56 on the ground that the exemption is required to enable the factory or factories to deal with an exceptional work pressure. The exemptions granted under Section 65(2) are subject to the conditions laid down in Section 65(3)[136] of the said Act.

Exercising the said power(s) various state governments have carried out temporary amendments to weekly hours (Section 51), daily hours (Section 54), interval for rest (Section 55), spread-over (Section 56) and extra wages for overtime (Section 59), in respect of adult workers subject to certain conditions for providing impetus to the industrial and economic activities in such states. A glance of changes carried out by various states is provided in Annexure C.

The maximum spread-over allowed under the notifications has been increased to 13 hours from 10 ½ hours in a day.

The Factories Act, 1948 (under Section 59) prescribes that an adult worker who has worked for more than 9 hours in a day or 48 hours in a week shall be entitled to wages at the rate of twice the ordinary rate of wages as overtime wages. However, the Government of Gujarat, exercising the power under Section 5, have notified that the overtime wages will be paid at a proportionate rate, that is, at the same rate as the ordinary wage rate and not at twice the ordinary rate of wages.

The Government of Tripura, further exercising its power under Section 5 of the Factories Act, 1948 has also increased the threshold of employees in the definition of factory, from 10 workers (where manufacturing process is with the aid of power) to 20 and from 20 workers (where manufacturing process is without the aid of power) to 40, which will be in effect for 3 months starting from May 26, 2020.

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134 5. Power to exempt during public emergency. In any case of public emergency the State Government may, by notification in the Official Gazette, exempt any factory or class or description of factories from all or any of the provisions of this Act, [except section 67] for such period and subject to such conditions as it may think fit: Provided that no such notification shall be made for a period exceeding three months at a time. Explanation--For the purposes of this section "public emergency" means a grave emergency whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression of internal disturbance.

135 65 (2) The State Government or, subject to the control of the State Government, the Chief Inspector, may by written order exempt, on such conditions as it or he may deem expedient, any or all of the adult workers, in any factory or group or class or description of factories from any or all of the provisions of sections 51, 52, 54 and 56 on the ground that the exemption is required to enable the factory or factories to deal with an exceptional press of work.

136 65 (3) Any exemption granted under sub-section (2) shall be subject to the following conditions, namely-
(i) the total number of hours of work in any day shall not exceed twelve;
(ii) the spread over, inclusive of intervals for rest, shall not exceed thirteen hours in any one day;
(iii) the total number of hours of work in any week, including overtime, shall not exceed sixty;
(iv) no worker shall be allowed to work overtime, for more than seven days at a stretch and the total number of hours of overtime work in any quarter shall not exceed seventy-five.
Explanation: In this sub-section "quarter" has the same meaning as in sub-section (4) of section 64.

The Government of Madhya Pradesh in exercise of the powers conferred by Sections 8(1) and 112[137] of the Factories Act, 1948 has notified to recognize the '*third-party certification*', which was earlier done by the government appointed inspector, for non-hazardous factories employing up to 50 workers. Such factories can now submit certification report carried out by a third party (authorised by the Labour Commissioner, Madhya Pradesh) regarding compliances under the said Act (to the Inspector having jurisdiction) before January 31 of every year. After submission of such certification report by a non-hazardous factory, it shall be exempt from routine inspection process, (subject to that inspection of such factories in case of serious/fatal accident or complaint information received thereto shall only be carried out with the prior permission of Labour Commissioner, Madhya Pradesh). The non -hazardous factories which fail to submit their compliance certification report before the prescribed deadline of January 31 of every year shall not be entitled for such exemption.

Further, the Government of Madhya Pradesh, in exercise of the powers conferred by Section 5 of the Factories Act, 1948, has exempt all factories registered under the said Act, for a period of 3 months, from all the provisions of the Factories Act, 1948 and Madhya Pradesh Factories Rules, 1962 except Section 6 (approval, licensing and registration of factories), Section 7 (notice of opening by occupier), Section 8 (inspectors) and Sections 21 to 41-H under Chapters-IV and IVA about safety and provisions relating to hazardous processes, Section 59 (overtime wages), Section 65 (power to make exempting orders), Section 67 (prohibition of employment of young children), Section 79 (annual leave with wages), Section 88 (notice of certain accidents), Section 112 (power to make general rules) and Rules made thereunder from the date of publication of the notification dated May 05, 2020.

Therefore, because of the exemptions, factories are not required to comply with provisions such as cleanliness, disposal of wastes and effluents, washrooms, crèches, drinking water, lighting, and ventilation, disposal of wastes, dangerous operations, canteens, shelter rooms, first aid appliances, facilities for sitting, working hours, amongst others, which are more in the nature of compliances.

The Madhya Pradesh Factories Rules, 1962 has been amended by the government by giving powers to Labour Commissioner to authorise any person or agency to carry out medical examination which was earlier done by an Inspector (Labour) who was a duly qualified medical practitioner. This is an effort to put an end to rigid system of 'inspector raj', that is, a rigid system of inspection and licensing done by government officials.

These exemptions for a period of 3 months are an attempt on behalf of the governments to boost the economic activities and seek more investments in the state. However, keeping in view the amount of time required to set up a factory and start operations and, other

[137] Section 8 Inspectors- (1) The State Government may, by notification in the Official Gazette, appoint such persons as possess the prescribed qualification to be Inspectors for the purposes of this Act and may assign to them such local limits as it may think fit.

Section 112 Power to Make General Rules.

factors such as infrastructure, electricity, transport, raw materials, amongst others, the benefit of these exemptions may not serve the purpose of the government.

THE INDUSTRIAL EMPLOYMENT STANDING ORDERS ACT, 1946 AND RULES THEREUNDER

The Industrial Employment (Standing Orders) Central Rules, 1946 were amended in the year 2018 to include "fixed term employment" in all sectors.

Several states such as Bihar, Goa, Karnataka and union territory such as Lakshadweep have introduced amendments and included reference to "fixed term employment" in the state specific Industrial Employment (Standing Orders) Rules, 1946.

Introduction of such amendments 2 years later, especially during the pandemic, shows the intention of the governments to all businesses to hire workforce for a fixed duration and avoid the applicability of ID Act and compliances relating to cessation of employment of such workforce.

Workers employed on fixed term employment will be entitled to same hours of work, wages, perks and benefits as that of a permanent workman along with all statutory benefits proportionate to the period of services rendered by a fixed term worker. This would be applicable even if the period of employment does not extend to the qualifying period of employment required in the statute. However, employers are not allowed to convert the posts of the permanent workmen to fixed term.

THE CONTRACT LABOUR REGULATION AND ABOLITION ACT, 1970 AND RULES THEREUNDER

The CLRA Act is applicable to every establishment in which 20 or more workmen, are employed or were employed on any day of the preceding twelve months as contract labour and to every contractor who employs or who employed on any day of the preceding 12 months 20 or more workmen. Many state governments, while exercising the powers provided within the CLRA Act, have increased the threshold of workmen (as given in the federal statute) for applicability of the said Act in the state.

In exercise of powers conferred by Section 31 [138] of the CLRA Act, the Government of Tripura has increased the threshold of existing 20 workers to 50 workers for applicability of the said Act to any establishment or class of establishments or any class of contractors. The said amendment will be effective till 1000 days or further orders, whichever is earlier.

The Government of Puducherry has amended the Puducherry Contract Labour (Regulation and Abolition) Rules, 1973 by making provision of online application and deposit of fees instead of physical filing and deposit of fees as was required earlier. Further, the records pertaining to register of contractors and persons employed are also to be maintained electronically and,

[138] 31. Power to exempt in special cases- The appropriate Government may, in the case of an emergency, direct, by notification in the Official Gazette, that subject to such conditions and restrictions if any, and for such period. or periods as may be specified in the notification, all or any of the provisions of this Act or the rules made thereunder shall not apply to any establishment or class of establishments or any class of contractors.

half-yearly return and annual return shall be submitted through the online portal of labour department. The amendment also inserts a new rule which requires that books, register, records shall be maintained electronically at the discretion of employer subject to the condition that the employer shall furnish all such books, register, records in the electronic form to the Inspector on demand.

The Madhya Pradesh Government exercising its powers under Section 35(1) [139] has amended the Contract Labour (Regulation and Abolition) Madhya Pradesh Rules, 1973. The amendment has replaced manual filing of application to obtain licence under the said Act by a contractor with online filing of the said application. Further, with this amendment, fees for one calendar year would be charged for grant or renewal of licence which earlier used to be paid depending upon the number of workmen employed by a contractor in a day.

Further, the licence granted to the contractor under the said Act shall be valid for the period of the contract for which the application is made or renewed instead of earlier validity till December 31 following the date of its grant or renewal, thus requiring no renewal each year during the period of contract. This has eased the compliance process for both employer and contractor.

THE INDUSTRIAL DISPUTES ACT, 1947

In exercise of the powers conferred by Section 36-B [140] of the ID Act, the Government of Madhya Pradesh has exempted new factories, which would start production for the first time, from the provisions of the said Act, except the provisions of Chapter VA (provisions with respect to lay-off, retrenchment, compensation to be paid in case of transfer of undertaking, closure of industrial undertaking), Section 25N (conditions precedent to retrenchment of workmen), 25O (procedure for closing down an undertaking), 25-P (special provision as to restarting undertakings closed down), 25Q (penalty for lay-off and retrenchment without previous permission) and 25R (penalty for closure) of Chapter VB.

The said exemption is valid for 1000 days with effect from May 05, 2020 subject to the condition that adequate provisions are made by such industries for the investigation and settlement of industrial disputes of the workmen employed by them.

This is a clear indication of the government to draw new investment to support the depleting economy of the state and do away with rigidities that may hamstrung businesses and deter fresh investments.

However, doing away with the rights of workmen in respect of collective bargaining and dispute resolution system, may not provide a cordial and

[139] 35. Power to make rules- (1) The appropriate Government may, subject to the condition of previous publication, make rules for carrying out the purposes of this Act.

[140] 36 B. Power to exempt.- Where the appropriate Government is satisfied in relation to any industrial establishment or undertaking or any class of industrial establishments or undertakings carried on by a department of that Government that adequate provisions exist for the investigation and settlement of industrial disputes in respect of workmen employed in such establishment or undertaking or class of establishments or undertakings, it may, by notification in the Official Gazette, exempt, conditionally or unconditionally such establishment or undertaking or class of establishments or undertakings from all or any of the provisions of this Act.

congenial working environment. Furthermore, the onus being on the employer to make adequate provisions for investigation and settling of industrial disputes of the workmen employed by them, the exemption seems a mere formality since it is not clear how the compliance of the same would be meted out and simultaneously monitored by the government.

Furthermore, under Section 36B the power to exempt is limited only to industries or undertakings carried on by any department of the government. Therefore, the state government may not have the power to exempt an undertaking, establishment or classes of establishments or undertakings, carried on by private enterprises, thus making the exemption non-useful. This exercise of power under Section 36B may be amenable to challenge before the courts.

THE MADHYA PRADESH SHOPS AND ESTABLISHMENTS ACT, 1958

In exercise of the powers conferred by Section 9 [141] of the Madhya Pradesh Shops and Establishments Act, 1958, the Government of Madhya Pradesh provided that no shop or commercial establishment shall on any day be opened earlier than 6 AM and be kept opened later than 12 AM (although the notification erroneously mentions 12 PM).

Vide the said amendment the state government has extended the opening and closing time of the establishments/shops to enable the establishments/shops to have staggered shifts, extra working hours and opportunity to do more business and thus contributing to the economy of the state.

INDUSLAW VIEW

The whole intention and idea of the state governments in bringing the amendments or the proposed amendments is to encourage economic activities and employment opportunities due to adverse impact on businesses due to pandemic "**COVID-19**". The state governments are attempting to give more powers to business owners in respect of hire and fire, increase production by allowing longer working hours, minimum procedural compliance and lesser intervention by regulators, amongst other, thus to encourage businesses to recoup for the lost time and opportunities besides ensuring availability of employment opportunities in the market.

COVID-19 has certainly woken up state governments to think about accelerating the economic growth but the same can only be possible by bringing about substantial and permanent changes in the pending codes and introducing more refined laws which would not only address the current issues but would also be relevant for at least next ten years and work in parallel with the industrial policies of the federal or state governments to augment economic growth of India.

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7. LITIGATION & DISPUTE

[141] 9. Opening and closing hours.

RESOLUTION

7.1. RETROSPECTIVE APPLICATION OF SECTION 29 A (1): DELHI HIGH COURT SETTLES THE ISSUE

INTRODUCTION

Section 29 A was introduced in 2015[142] by way of Arbitration and Conciliation Act (Amendment) Act, 2015 (**'Amendment Act 2015')** which set out a timeline for the completion of arbitration proceedings commenced under the Arbitration & Conciliation Act, 1996 (**'Arbitration Act'**). The said provision provided for the mandate of making of an award by an arbitral tribunal (**'Tribunal'**) within a period of 12 months from the date of the Tribunal entering the reference, which could be extended for a further period of 6 months by consent of the parties[143]. The Amendment Act 2015 also provided for further extension of the mandate of the Tribunal by the competent Court if the award could not be made within the extended period i.e. 12 months plus 6 months (18 months)[144]. This provision, as introduced in 2015, was applicable for domestic as well as international commercial arbitrations. It is pertinent that the provision setting out a time limit for the Tribunal to pass awards was not a recommendation made in the 246th Report of the Commission on **'Amendment to the Arbitration and Conciliation Act, 1996'[145].**

The Arbitration Act, once again, underwent a rampant change in 2019 by way of Arbitration and Conciliation (Amendment) Act 2019 [146] (**'Amendment Act 2019'**). The Amendment Act 2019 was based on the recommendations made in the **Report of the High-Level Committee to Review the Institutionalization of Arbitration Mechanism in India** [147] . Considering the *one – size fit* approach adopted by the legislature while introducing Section 29 A in the Arbitration Act in 2015, the recommendation[148] was made to amend the provision suitably. Based on the recommendation, Section 29 A was amended by way of Amendment Act 2019[149]. Post the amendment in 2019, the mandate of making of an award by the Tribunal is now, to be computed from the date of completion of the pleadings, as contemplated under Section 23 (4)[150] of the Arbitration Act (as amended in 2019). The Amendment Act 2019 also restricted the applicability of the amended provision to *'matters other than international commercial arbitration'* i.e. only to domestic arbitrations, seated in India and excluded the international commercial arbitrations [151] , seated in India.

The amended provision of Section 29 A was enforced with effect from 30 August 2019 (i.e. **the 'Effective Date'**) by the Notification dated 30 August

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[142] Notified on 1 January 2016, with effect from 23 October 2015
[143] Section 29 – A (3) as inserted by Amendment Act 2015
[144] Section 29 – A (4) and (5) as inserted by Amendment Act 2015
[145] http://lawcommissionofindia.nic.in/reports/Report246.pdf
[146] http://egazette.nic.in/WriteReadData/2019/210414.pdf
[147] http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf
[148] Para 4 at Page 63 of the Report
[149] Section 6 of the Arbitration Act 2019
[150] With effect from 30 August 2019
[151] Section 2 (1) (f) of the Arbitration & Conciliation Act 1996

2019[152] (**'said Notification'**). However, as is the case with most new enactments, there was ambiguity with regard to the applicability of the amended provision i.e., whether the same would be retrospective or prospective in nature.

DECISIONS PASSED BY THE DELHI HIGH COURT

Following the conundrum which the litigation in India has witnessed, more so *qua* the applicability of the amendments made in the Arbitration Act, there was ambiguity regarding application of the amended provision of Section 29 A (1) of the Arbitration Act as well.

The Hon'ble High Court of Delhi (**'High Court'**), in the matter of ***Shapoorji Pallonji and Co. Pvt. Ltd v Jindal India Thermal Power Limited*** [153] had the occasion to test the applicability of the said provision. The High Court, by its Order dated 23 January 2020, held that the amendments introduced to Section 29 A (1) and Section 23 (4) of the Arbitration Act will be applicable retrospectively. The High Court based its decision on the *rationale* that the amendments were procedural in nature and hence, the amended provision would apply to all the arbitration proceedings pending as on the Effective Date. The decision in the said case was strictly based on the said Notification, without much deliberation on any other aspect.

However, the High Court, while dealing with another case of ***MBL Infrastructures Ltd. v. Rites Ltd.***[154] held that, the applicability of the amended provision of Section 29 A (1) would be prospective in nature, since the said Notification did not contain anything which suggests otherwise. It is noteworthy that the decision in the *MBL Infrastructures* case did not consider the decision passed in the case of *Shapoorji Pallonji* case.

These two decisions created a stir, both the decisions having been passed by a Single Judge.

SETTLEMENT OF THE ISSUE

After a lapse of almost 7 months, the High Court was once again, faced with an opportunity to examine the nature of applicability of the amended provision of Section 29 A (1) of the Arbitration Act.

In the case of ***ONGC Petro Additions Limited v. Ferns Construction Co. Inc.***[155], *prima facie,* the issue before the High Court was, if international commercial arbitration proceedings, seated in India be bound by the mandate of the timeline stipulated in Section 29 A (1) of the Act (as amended in 2015). In this case, the High Court had the occasion to examine whether amended provision of Section 29 A (1) would be prospective or retrospective in nature. Such determination was necessitated since Section 29 A (1) (as amended in 2019) excludes international commercial arbitrations from its purview.

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[152] http://legalaffairs.gov.in/sites/default/files/notificaiton%20arbit.pdf

[153] O.M.P.(MISC.) (COMM.) 512/2019, decided on 23 January 2020

[154] O.M.P.(MISC)(COMM) 56/2020, decided on 10 February 2020

[155] OMP(MISC) (COMM) 256/2019, decided on 21 July 2020

The Hon'ble High Court considered the Orders passed in the cases of *Shapoorji Pallonji* and *MBL Infrastructures,* while arriving at the conclusion in the case in hand.

The High Court rightly proceeded to decide the case in hand, by firstly holding that the decision in the case of *MBL Infrastructures* was *per incuriam,* having been passed without considering or dealing with the Order passed in *Shapoorji Pallonji* case, being prior in time. In doing so, the Court placed reliance on the judgment passed in the case of ***National Insurance Co. Ltd. v. Pranay Sethi***[156]. The High Court reaffirmed its decision passed in the case of *Shapoorji Pallonji,* on the ground that the amended provision of Section 29 A (1) is procedural in nature.

The High Court also examined Section 26 of the Amendment Act 2015 and the judgment in the case of ***BCCI v. Kochi Cricket (P) Ltd.***[157]. In the *BCCI* case, the Hon'ble Supreme Court ('**Apex Court**'), while taking a view that despite the then newly introduced provision of Section 29 A being procedural in nature, it would apply prospectively to the arbitration proceedings commenced on or after 23 October 2015. This view was taken by the Apex Court, due to the presence of Section 26 of the Amendment Act 2015. Section 26 explicitly stipulates prospective application of the amendments introduced in 2015 to arbitration proceedings commenced on or after 23 October 2015. Such qualification has not been incorporated in the Amendment Act 2019. Therefore, the abovementioned analysis stipulates that nothing contained in the Amendment Act 2019 bars the retrospective application of Section 29 A (1) of the Arbitration Act (as amended in 2019). Not to mention that the deletion of Section 26 of the Amendment Act 2015 vide Amendment Act 2019[158], was set aside by the Apex Court in the case of ***Hindustan Construction Company Limited and Ors. v. Union of India (UOI) and Ors.***[159]**.**

A combined effect of the analysis mentioned above clearly contemplates that the amendment in Section 29 A (1) of the Arbitration Act, being procedural in nature, would apply retrospectively to all the domestic arbitration proceedings:

a. seated in India
b. pending as on the Effective Date
c. commenced on or after 23 October 2015

In furtherance to the above findings, the High Court also held that the international commercial arbitration proceedings would not be bound by the mandatory timeline stipulated in Section 29 A (1) and hence, would fall outside the purview of Section 29 A (1) of the Arbitration Act.

INDUSLAW VIEW

The abovementioned decision is much of a greeting respite to the parties facing the conundrum of the applicability of the amended provisions. Needless to mention that the decision is in conformity with the jurisprudence and judicial precedents laid down from time

[156] (2017) 16 SCC 680
[157] (2018) 6 SCC 287
[158] Section 87 introduced by Section 13 of the Amendment Act 2019
[159] AIR 2020 SC 122

to time that procedural law is retrospective in nature, unless there exists an intention contrary to the same in the legislation.

Further, the amendment and the decision of the High Court in the *ONGC Case* is in aid of minimization of the judicial intervention i.e. the driving force behind the Arbitration Act, including the amendments brought into force. Not only has the decision put to rest a very significant question *qua* the applicability of amended provision of Section 29 A (1) but has also done away with ambiguity of amended provisions in the Arbitration Act to a great extent. However, such certainty would be arrived at only with the test of time, when the Courts are faced with peculiar situation, which is not a rarity in the current scenario.

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8. GOVERNMENT AND REGULATORY

8.1. NEW EDUCATION POLICY 2020 – A PARADIGM SHIFT

INTRODUCTION

On July 29, 2020 the Union Cabinet approved the National Education Policy 2020 ("**NEP**") that replaces the 34 years old National Policy of Education, 1986 to transform the school and higher educational systems in India. [160] The NEP is based on the report submitted by the 'Committee for the Draft National Education Policy' under the chairmanship of the eminent scientist Dr. K. Kasturirangan.

Being part of the central government's election manifesto in 2014, the consultation process for educational reforms was initiated as early as January 2015. The formulation of the NEP witnessed unprecedented collaborative, multi-stakeholder, and multi-pronged (online, grassroot and national level thematic) deliberations that involved over 2 lakh suggestions.[161]

The NEP recognizes that the pedagogy adopted in the Indian education system must evolve to make education more experiential, holistic, integrated, inquiry-driven, discovery-oriented, learner-centred, discussion-based, flexible, and at the same time, enjoyable in order to bring out unique capabilities of each student. As opposed to the previous policy which focused largely on issues of access and equity, the NEP is built on the principles of accessibility, accountability, quality, affordability, and equity, among others, and is also aligned to the 2030 Agenda for Sustainable Development adopted by India along with all United Nations Member States in 2015.

The objective of the NEP is to transform the country into a flourishing knowledge society as well as a global knowledge superpower by transforming the school and higher educational systems into a system that includes humanitarian and constitutional values, creativity and critical thinking, use of technology, and philanthropic private and community

[160] https://pib.gov.in/PressReleseDetailm.aspx?PRID=1642061.

[161] https://pib.gov.in/AllReleasem.aspx.

participation, while still recognizing education as a public service.

KEY CHANGES

The NEP suggests various changes, starting with the re-designation of the Ministry of Human Resource Development ("**MHRD**") as the Ministry of Education ("**MoE**"). We discuss below the various objectives of the NEP:

PRE-PRIMARY TO SECONDARY EDUCATION

New Academic Structure

The existing mainstream academic structure of 10+2 consisting of the age groups of 6-16 and 16-18 years will now be revamped to a 5+3+3+4 model, that is, (i) 5 years of "Foundational Stage", ranging from 3 years pre-primary education to classes 1 - 2; (ii) 3 years of "Preparatory Stage", ranging from classes 3-5; (iii) 3 years of "Middle Stage", ranging from classes 6- 8; and (iv) 4 years of "Secondary Stage", ranging from classes 9 – 12.

The Foundational Stage will involve flexible, multilevel, play-based, activity-based, and discovery-based learning, continuously incorporating the latest research and the various time-tested Indian traditions for cognitive and emotional stimulation of children. The Preparatory Stage will involve all activities of the Foundational Stage, but also gradually beginning to incorporate textbooks and aspects of more formal classroom learning. The Middle Stage will comprise of building on more formal pedagogical and curricular style of the Foundational Stage, but will see the introduction of subject teachers for learning and discussion of the more abstract concepts in each subject that students will be ready for at this stage across sciences, mathematics, arts, social sciences, and humanities. The Secondary Stage will comprise of multidisciplinary study, and will build on the subject-oriented pedagogical and curricular style of the Middle Stage, but with greater depth, greater critical thinking, greater attention to life aspirations, and greater flexibility and student choice.

With the objectives of overall learning, development, and well-being of children, 'early childhood care and education' is also included in the new academic structure, wherein the policy aims to achieve universal provisioning of quality early childhood development, care, and education by the year 2030. The planning and implementation of early childhood education is proposed to be carried out jointly by the MHRD, the Ministry of Women and Child Development ("**MWCD**"), Ministry of Health and Family Welfare ("**MHFW**"), and Ministry of Tribal Affairs. A special joint task force will be constituted for continuous guidance of the integration.

Foundational Literacy and Numeracy

The NEP intends to achieve universal foundational literacy and numeracy, that is, ability to read and comprehend basic text and the ability to carry out basic addition and subtraction with Indian numerals at the foundational level in primary school and beyond, by 2025.

Considering that education is a subject matter under the concurrent list of the Constitution of India, individual states and union territories have been tasked with the implementation of this objective, along with closely tracking

and monitoring the progress of the same. It is also proposed that (i) teacher education, and the early grade school curriculum be redesigned to this end, and (ii) with a focus on nutrition, an energising breakfast in addition to midday meals be provided. The need for introduction of well-trained social workers and counsellors to continuously work with students and their parents has been stressed, for the wellbeing of children.

Curtailing Dropout Rates and Ensuring Universal Access to Education at All Levels

With data indicating high dropouts from class 6 onwards, the NEP intends to reduce the rate of dropout and introduce changes to bring back the children who have dropped out to complete their education. aiming to achieve 100% gross enrolment ratio in preschool through secondary school by 2035 with concerted national effort by both the central and state governments.

The NEP envisages two primary initiatives in this regard, being (i) building and fortifying the infrastructural facilities which are effective, sufficient, and accessible to the students and (ii) achieving universal participation in school by carefully tracking students and their learning levels, to ensure that the children are enrolled in and attending school, and in case they have fallen behind or dropped out, to have opportunities to catch up and re-enter school.

Holistic and Integrated Learning

As discussed above, the NEP focuses on the development of holistic and well-rounded individuals by way incorporation of the following:

(a) reduction of the curriculum content to enhance essential learning and critical thinking, thus enabling children to think critically and focus on inquiry, discovery, discussion, and analysis-based learning;

(b) experiential learning, by integration of art (including poetry, dramatics, and drawing) and sports, among others, following a cross-curricular pedagogical approach;

(c) empowering students through flexibility in course choices, where there will not be a strict separation among 'curricular', 'extra-curricular', or 'co-curricular', among 'arts', 'humanities', and 'sciences', or between 'vocational' or 'academic' streams;

(d) mandating multilingualism with a focus on Indian languages and literature, along with standardization of the Indian sign language;

(e) inclusion of fun courses and internships which focus on vocational crafts such as carpentry, electric work, metal work, and gardening, among others;

(f) integration of Indian knowledges systems in such as tribal knowledge, yoga, philosophy, architecture, and among others, in the curriculum; and

(g) teaching students to understand ethics,

constitutional values and the importance of 'doing what's right'.

Vocational education for children is envisaged to start in schools from the 6th grade onwards and will include internships as well.

National Curriculum Framework

The NEP provides for a national curriculum framework to be formulated by the National Council of Education Research and Training ("**NCERT**") incorporating of the following:

(a) revision of national textbooks to have reduced content with more flexibility, to be available at the lowest possible cost and in all regional languages;

(b) assessment of students at all level to be based on competency and which tests higher-order skills, such as analysis, critical thinking, and conceptual clarity, instead of assessment techniques based on rote learning;

(c) revision of the traditional report cards of students to be a 'holistic 360-degree', multidimensional report that reflects in great detail the progress as well as the uniqueness of each learner in the cognitive, affective, socio-emotional, and psychomotor domains;

(d) the students will be required take school examinations in grades 3, 5, and 8 to be conducted by the appropriate authority;

(e) revamping the board, entrance examinations and common tests on specialised subjects (including the Common Admission Test ('CAT'), among others), to eliminate the requirement of coaching classes, with possibility to allow the students take the board exam twice and best-of-two-attempts assessments which will primarily test core capacities and competencies; and

(f) support for gifted students or students with special talents with topic-centred and project-based clubs and circles.

Efficient Resourcing and Effective Governance through School Complexes

A grouping structure called school complex consisting of one secondary school together with all other schools offering lower grades in its neighbourhood in a radius of five to ten miles is envisaged by the NEP, on similar lines to the suggestion which was first made by the Education Commission (1964–66).

The aim of the school complex or cluster will be to enhance resource efficiency and effective functioning by (i) integrating education across all school levels; (ii) sharing key material resources, such as teachers, libraries, science laboratories and equipment, among others; (iii) developing a critical mass of teachers, students, supporting staff (along with adequate number of counsellors and teachers for all subjects including art and sports), as well as equipment and infrastructure; and (iv) developing a culture of working to a

plan, both short-term (1 year) and long-term (3-5 years).

Standard-setting and Accreditation for School Education

The NEP aims to provide an effective quality self-regulation or accreditation system for all stages of education and all new schools will need to ensure minimum prescribed norms, in terms of governance, infrastructure, safety, teachers, and other learning resources, which will have to be displayed through a transparent self-disclosure mechanism.

The NEP also envisages to replace the existing system of standard-setting and accreditation as provided in Annexure D.

HIGHER EDUCATION

The NEP envisions a complete overhaul of the higher education system to deliver high-quality education, with equity and inclusion to all young people who aspire to it. The NEP envisages broad based, multi-disciplinary, holistic undergraduate education with flexible curricula, creative combinations of subjects, integration of vocational education and multiple entry and exit points, with appropriate certification. It boldly envisages establishing at least one higher education institute (the "**HEI**") in or near every district across India, that offers medium of instruction or programmes in local or Indian languages.

The NEP also stresses on the need of optimal learning environment and continuous support for students and envisages autonomy to the faculty and HEIs in terms of matters of curriculum, pedagogy, assessment, choice based credit systems along with an academic bank of credit maintained online (to record the different credits earned from various HEIs), support centres to be set up by universities especially for students from socio-economically disadvantaged backgrounds and revamping online distance learning programs. Further, the NEP's vision includes governing HEIs by highly-qualified independent boards having academic and administrative autonomy, and regulating "light but tight" by a single regulator for all of higher education, including professional education.

While the principles discussed above for pre-primary to secondary education also apply to higher education in India, we discuss the policy objectives specifically intended for higher education below.

Institutional Restructuring and Consolidation

One of the main objectives of the NEP is to end the disintegration of higher education by establishing one unified higher education system, including professional and vocational education, and transforming HEIs into large multidisciplinary knowledge hubs with best practices to build well round individuals.

The NEP contemplates 3 types of universities or colleges being (i) research-intensive universities ('RUs') that place equal emphasis on teaching and research; (ii) teaching-intensive universities ('TUs') that place greater emphasis on teaching but still conduct significant research and; (iii) the autonomous degree-granting colleges ('ACs') that are multidisciplinary institutions of higher learning that grants undergraduate degrees and is

primarily focused on undergraduate teaching.

The NEP also aims to have one large multidisciplinary HEI in or near every district and increase the gross enrolment ratio to 50% by 2030. Further all HEIs are to include credit-based courses and projects in the areas of community engagement and service, environmental education, and value-based education.

Value-based education will include the development of humanistic, ethical, Constitutional, and universal human values of truth, righteous conduct, peace, love, nonviolence, scientific temper, citizenship values, and also life-skills. It is also aimed that students at all HEIs be provided with opportunities for internships with local industry, businesses, artists, craftspersons, among others, as well as research internships with faculty and researchers at their own or other HEIs or research institutions.
According to the NEP, the Master of Philosophy ('M.Phil.') programme shall be discontinued and HEIs will also have the flexibility to offer different designs of Master's programmes such as:

(a) for those who have completed the 3-year Bachelor's programme, a 2-year programme with the second year devoted entirely to research;

(b) for students completing a 4-year Bachelor's programme with research, 1-year master's programme; and

(c) an integrated 5-year bachelor's or master's programme; and

(d) for undertaking a Doctor of Philosophy ('Ph.D.') programme a master's degree or a 4-year bachelor's degree with research would be required.

The NEP also envisions gradually phasing out the system of 'affiliated colleges' over a period of fifteen years through a system of graded autonomy, and mentoring from respective affiliating university.

Internationalisation

The NEP aims to promote India as a global study destination providing premium education at affordable costs, where an 'International Students Office' at each HEI hosting foreign students will be set up to coordinate all matters relating to the foreign students and also provisions to encourage high performing Indian universities to set up campuses in other countries.

Similarly, select universities, including from among the top 100 universities in the world, will be permitted to operate in India and in this regard a legislative framework facilitating such entry will be put in place, and such universities will be given special dispensation regarding regulatory, governance, and content norms on par with other autonomous institutions of India.

Equity

The NEP ensures incorporation of equitable principles in education system, where certain steps are to be taken by governments and HEIs, among others, such as:

(a) Earmark suitable government funds for the education of Socio-Economically

Disadvantaged Groups ("**SEDGs**");

(b) enhance gender balance in admissions to HEIs;

(c) enhance access by building more high-quality HEIs in aspirational districts and special education zones containing larger numbers of SEDGs; and

(d) develop and support high-quality HEIs that teach in local/Indian languages or bilingually; and

(e) provide more financial assistance and scholarships to SEDGs in both public and private HEIs;

The National Research Foundation (the "NRF")

This NEP, in order to provide a comprehensive approach to transforming the quality and quantity of research with a key emphasis on the scientific method and critical thinking, establish an NRF.

The NRF will provide a reliable base of merit-based but equitable peer-reviewed research funding, to develop a culture of research in the country through suitable incentives for and recognition of outstanding research. It will also undertake major initiatives to seed and grow research at state universities and other public institutions where research capability is currently limited and act as a liaison between researchers, government and industry, to achieve information symmetry.

Vocational Training

India's vocational education is not at par with the best practices around. While 52%, 75% and 96% of the workers in USA, Germany and South Korea respectively are workers with vocational training, whereas the percentage in India is less than 5% of the workforce.

The NEP seeks to address this issue by requiring all education institutions to integrate vocational education programmes into mainstream education in a phased manner, beginning with vocational exposure at early ages, where the aim is that 50% of learners through the school and higher education system have exposure to vocational education by 2025.

The NEP also provides the National Skills Qualifications Framework to be detailed for each discipline, vocation or profession, and the Indian standards be aligned with the International Standard Classification of Occupations as maintained by the International Labour Organisation.

Transforming the Regulatory System of Higher Education

The NEC envisages the regulatory system of higher education to have distinct functions of regulation, accreditation, funding, and academic standard setting that will be managed by distinct, independent, and empowered organisations and structures, as provided in Annexure E. The aim is to create checks-and balances in the system, minimise conflicts of interest, and eliminate concentrations of power.

OTHER SIGNIFICANT ASPECTS

Teachers

The NEP aims to improve the quality of teacher education and the competency of teachers at all levels of education (from Foundational to Higher Education) with steps such as:

(a) vacancies to be filled in time-bound manner;

(b) pupil-teacher ratio to be maintained at 30:1 for all schools and pupil-teacher ratio for areas having large numbers of socio-economically disadvantaged students to be aimed at 25:1,

(c) providing teachers with constant opportunities for self-improvement and to learn the latest innovations and advances in their profession, such as through participation in at least 50 hours continuous professional opportunities every year basis the need and choices;

(d) providing teachers with opportunities to choose the pedagogy best suited to the students;

(e) a common guiding set of National Professional Standards for Teachers ('NPST') to be developed by 2022, reviewed and revised nationally in 2030, and thereafter every ten years;

(f) teachers doing outstanding work will be recognised, incentivised, provided scholarships, and the career management and progression of teachers (including promotion and salary structure, and the selection of school and school complex leadership positions) to be based on performance and merit, through clear standards for evaluation of the same;

(g) substandard and dysfunctional teacher education institutions to be shut down, and all multidisciplinary colleges and public universities are encouraged to establish, develop, and house outstanding education departments which, aside from carrying out cutting-edge research in various aspects of education, will also run B.Ed. programmes;

(h) teacher education can be introduced in multi-disciplinary colleges and minimum degree qualification for teachers to be at least 4-year integrated B.Ed. degree. Additionally, a 2-year B.Ed. programme for teachers already having a bachelor's degree in other specialized subjects and 1-year B.Ed. programme for teachers having 4 years bachelor degree or masters in a subject is also envisaged.

Regulating commercialization of education

The NEP aims to provide multiple mechanisms with checks and balances to combat and stop the commercialization of higher education while encouraging private philanthropic efforts. All education institutions are to be audited as per standards of audit for a not for profit

company incorporated under section 8 of the Act. Further, the Institute of Chartered Accountants of India may also provide rules for education institutions, including ensuring that related party transactions, services, or charges by any other names are not used to profit from the institution by the promoters or sponsors or management while leaving the institution nominally 'not-for-profit'.

Surpluses if any are to be reinvested in the institution. There will be transparent public disclosure of all these financial matters with recourse to grievance-handling mechanisms to the general public. Further, the NEP also envisages common national guidelines for all legislative acts that will form private HEIs, which would provide for common minimal guidelines will enable all such Acts to establish private HEIs, enabling a common regulatory regime for private and public HEIs.

That said, the NEP also intends that the expenditure on education reaches 6% of GDP at the earliest, and 20% of all public expenditure over a 10-year period. It is pertinent to note that this hasn't happened since it was first proposed in 1968. The light but tight approach to ensure government expenditure increases and education is still available as a public good (non-commercial) has also been emphasized.

Technology Use and Integration

Generally, the NEP considers the technological advancements and acknowledges the need to utilize the same to further transform the education sector. In this regard, an autonomous body, the National Educational Technology Forum ("**NETF**"), will be created to provide a platform for the free exchange of ideas on the use of technology to enhance learning, assessment, planning, administration, and so on, both for school and higher education.

In relation to higher education the NEP enables institutions (that have been specifically accredited for the purpose) to have the option to run Open Distance Learning ("**ODL**") and online programmes, in order to enhance their offerings, improve access, and increase gross enrolment ratio. For quick adoption, HEIs may blend these online courses with traditional teaching in undergraduate and vocational programmes.

The NEP provides to establish a national repository of high-quality resources on foundational literacy and numeracy to be made available on the national teacher's portal, that is, the Digital Infrastructure for Knowledge Sharing ('DIKSHA'). Public and school libraries will be significantly expanded to build a culture of reading across the country. Digital libraries will also be established. A rich variety of educational software will be developed and made available for students and teachers at all levels in all major Indian languages. The platform may also be utilised for e-content related to teacher's professional development, among others. Technology-based education platforms, such as DIKSHA will be better integrated across school and higher education, and will include ratings/reviews by users, so that users are able to choose their content wisely and so that content developers may continuously improve content.

The NEP recognises importance of Artificial Intelligence ("**AI**") technology suggests that the education system must respond quickly to such developments. Further, the NITI Aayog's discussion paper, "National Strategy for Artificial Intelligence: #AIForAll", is also endorsed by the NEP, that may be kept in mind to propose technology-specific policy changes. HEIs are expected to play an active role not only in conducting research on disruptive technologies but also in creating initial versions of instructional materials and courses (including online courses) in cutting-edge domains and assessing their impact on specific areas such as professional education.

Other Developments

A new National Assessment Centre, 'PARAKH' (Performance Assessment, Review, and Analysis of Knowledge for Holistic Development), will be set up as a standard-setting body. Further, all school children would also be required to undergo regular health check-ups by schools and for this health cards will be issued to the children.

The NEP additionally provisions for the Government of India to constitute a 'Gender-Inclusion Fund' to build the nation's capacity and provide a quality and equitable education for all girls as well as transgender students eliminating any remaining disparity in access to education (including vocational education) for children from any gender or other socio-economically disadvantaged group.

The NEP also endorses the recommendations of the Rights of Persons with Disabilities Act, 2016 ("**RPWD**") and provisions for addressing the rehabilitation and educational needs of learners with disabilities.

INDUSLAW VIEW

The NEP paves way for transformational reforms in the education systems across the country with an aim to achieve 100% youth and adult literacy. The NEP seems to be a step in the right direction with its emphasis on constitutional values, ethics, mental health and overall well-being, integrating technological advancements, and equity. The fact that the NEP acknowledges the need for (together with provisioning for) holistic development of children and moving away from the culture of rote learning, with special focus on internships, and vocational training since an early age, is highly commendable.

The NEP contemplates that completely commercializing education may pose a threat to the 'right to education' being a right exercisable for all sections of the society. However, till the government exchequer can sufficiently increase the public expenditure in this sector, the light but tight approach, may need to be structured in a manner that it strikes a balance between (i) overregulating the sector in attempt to make education accessible to all sections of society on one hand, and (ii) allowing private funding (including private philanthropic efforts) for enhancing access, and education to be activity solely for profit on the other hand. It remains to be seen how the scholarships, as envisaged in NEP are capable of being funded in a realm of 'fee control'.

The recommendation to establish at least one HEI in every district in the

country or the dream to become a global destination for quality education, seems almost impossible considering (i) the huge amount of infrastructural support and resources required, and (ii) how underfunded the education sector currently is.

It is worthy to note that the NEP considers implementing technological solutions for building adequate infrastructure, providing specialized distance learning courses, and general capacity building exercises. However, from the perspective of a comprehensive framework, the NEP seems to have missed giving due weightage on how online education will shape the future by creating access to all, and does not delve into the aspect of day to day online education (which has been banned by various state governments recently), which in light of the pandemic, is the need of the hour.

Any policy is only as good as its implementation. Since education is a subject matter under the concurrent list under the Constitution of India, careful planning, joint monitoring, and concerted efforts to implement the NEP will be required from both the central and the state governments. To ensure that the NEP does not end up as an elaborate informative essay on the need and benefits of overhauling the Indian education system, it is imperative that effective measures be undertaken for implementation of the NEP. This will require initiatives and actions by all stakeholders such as parents, teachers, trainers, counsellors, social workers, education technology innovators, and state and central governments, in a synchronised and systematic manner, along with awareness, sensitization and acceptance from the grassroot level to the top.

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ANNEXURE A

(Refer to Paragraph 6.1)

Particulars	The Factories Act	Amendment Act 2018	Effect of Amendments
Section 2 (m) Definition of Factory	(m) "Factory" means any premises including the precincts thereof- (i) whereon 10 or more workers are working, or were working on any day of the preceding 12 months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or (ii) whereon 20 or more workers are working, or were working on any day of the preceding 12 months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on……	The threshold has been increased in: (i) 10 or more workers have been amended to 20 or more workers. (ii) 20 or more workers have been amended to 40 or more workers.	Accordingly, the factories in the State of Haryana employing workers less than the revised threshold would not be required to obtain registration under the Factories Act.
Section 65 (3) (iv) Power to make exempting orders	(3) Any exemption granted under sub-section (2) shall be subject to the following conditions, namely: (i) the total number of hours of work in any day shall not exceed 12; (ii) the spread over, inclusive of intervals for rest, shall not exceed 13 hours in any 1 day; (iii) the total number of hours of work in any week, including overtime, shall not exceed 60; (iv) no worker shall be allowed to work overtime, for more than 7 days at a stretch and the total number of hours of overtime work in any quarter shall not exceed 75.	Clause (iv) has been amended to the effect that the total hours of overtime work in any quarter has been increased to 115 hours from 75 hours.	On April 29, 2020, the Government of Haryana under Section 65 (2) of the Factories Act, had exempt any or all of the adult workers in any factory or group or class or description of factories from any or all of the provisions of sections 51 (Weekly hours), 54 (Daily Hours) and 56 (Spread-over). Such a notification was valid until June 30, 2020. The Amendment Act, 2018 has allowed increase in the overtime hours which will help the factories to deploy workforce for longer hours per week to undertake manufacturing.

Particulars	The Factories Act	Amendment Act 2018	Effect of Amendments
	Explanation -In this sub-section "quarter" has the same meaning as in sub-section (4) of section 64.		
Section 66 (1) (b) proviso	66. Further restrictions on employment of women. (1) The provisions of this Chapter shall, in their application to women in factories, be supplemented by the following further restrictions, namely- (a)--------; (b) no woman shall be required or allowed to work in any factory except between the hours of 6 A.M. and 7 P.M; Provided that the State Government may, by notification in the Official Gazette, in respect of any factory or group or class or description of factories, vary the limits laid down in clause (b), but so that no such variation shall authorize the employment of any woman between the hours of 10 P.M. and 5 A.M…….	The proviso to clause (b) has been amended as follows: "Provided that the State Government may, by notification in the Official Gazette, in respect of any factory which provides such adequate safety and security measures or safeguards, as may be prescribed apply for such exemption, allow the women to work in factory between the hours of 7:00 PM to 6:00 AM."	Vide the notification dated August 17, 2017, the Government of Haryana had allowed the women workers in the factories to work in night shifts between 7:00 PM to 6:00 AM, after obtaining the necessary permission subject to various conditions and safeguards to be provided by an employer. Such an exemption under the notification was valid for 1 year. The Amendment Act 2018 has made it a permanent change to the Factories Act.
Section 85 (1) (i) Power to apply the Factories Act to certain premises	(1) The State Government may, by notification in the Official Gazette, declare that all or any of the provisions of the Factories Act shall apply to any place wherein a manufacturing process is carried on with or without the aid of power or is so ordinarily carried on, notwithstanding that-- (i) the number of persons employed therein is less than 10, if working with the aid of power and less than 20 if working without the aid of power, or (ii) the persons working therein are not employed by the owner thereof but are working with the permission of, or under	The threshold mentioned in clause sub clause (i) has been amended to 20 workers if working with the aid of power and 40 workers if working without the aid of power.	With the amendment, the small-scale industries/factories in the State of Haryana, having less number of workers shall be exempted from the purview of the Factories Act.

Particulars	The Factories Act	Amendment Act 2018	Effect of Amendments
	agreement with, such owner: Provided that the manufacturing process is not being carried on by the owner only with the aid of his family.		
Section 105 (1) Cognizance of offences	(1) No Court shall take cognizance of any offence under the Factories Act except on complaint by, or with the previous sanction in writing of, an inspector (as defined and designated under the Factories Act).	The sub-Section (1) has been amended as follows: "(1) No Court shall take cognizance of any offence under the Factories Act except on a complaint by an inspector with the previous sanction in writing of the chief inspector."	By the said amendment, filing of cases directly by an inspector has been done away with. The requirement of previous sanction in writing by a chief inspector has added another layer of protection for employers and only very serious non-compliance being prosecuted under this Section. This would also allow employer (s) to get an opportunity to compound offences, if any, at department level instead of going to the court.
Section 106 B Compounding of offences	NIL	A new section has been introduced after Section 106 A. "(1) The offences specified in the Fourth Schedule, if committed for the first time, may be compounded before the institution of the prosecution by such officer and for such amount, as may be notified by the State Government in the Official Gazette. The amount of fine shall not exceed the fine prescribed under section 92. (2) Where an offence has been compounded under sub-section (1), no further proceedings shall be taken against the occupier in respect of such offence."	This amendment will reduce litigations and provide the relief to the factories and its owner, who have committed the offence for the first time to be compounded at the department level itself.
Fourth Schedule	NIL	A new schedule of list of compoundable offences (Section 106 B) after the third	This amendment will help in ease of doing business by first time

Particulars	The Factories Act	Amendment Act 2018	Effect of Amendments
		schedule has been added for the State of Haryana. The list of compoundable offence *amongst others* is: i. Not providing and maintaining cleanliness, arrangements for drinking water, latrine and urinal accommodation, spittoons, washing facilities, first-aid appliances, shelters, rest rooms and lunch rooms, canteen, etc., as per the provisions. ii. Not providing and maintaining crèches as per the provisions. iii. Not displaying the notice and not maintaining the register for compensatory holiday, register of adult workers, etc. iv. Not maintaining the prescribed registers for recording extra wages for overtime. v. Not complying with the provisions of notice of periods of work for adults, annual leave with wages, wages during leave period, payment in advance in certain cases, display of notices, filing of returns, etc.	offenders by not getting entangled in litigations.

ANNEXURE B

(Refer to Paragraph 6.2)

Name of the statute	Amendment(s)	Implication(s)
IDA	• In sub-section (1) of Section 25K, for the words "one hundred", the words "three hundred" shall be substituted. • In sub-section (1A) of Section 25K, for the words "one hundred", the words, "three hundred" shall be substituted.	Industrial establishments with up to 300 (three hundred) workers can now lay-off and/or retrench its workers or close its operation without prior government permission.
Factories Act	• In item (i) of clause (m) of Section 2, for the words "ten or more", the words "twenty or more" shall be substituted. • In item (ii) of clause (m) of Section 2, for the words "twenty or more", the words "forty or more" shall be substituted. • In clause (iv) of sub-section (3) of Section 65, for the words "seventy-five", the words "one hundred and twenty-five" shall be substituted.	These amendments limit the premise that constitutes a factory by increasing the threshold from 10 (ten) workers (*with power*) and 20 (twenty) workers (*without the aid of power*) to 20 (twenty) and 40 (forty) workers respectively. Furthermore, the Ordinance also increases the overtime limit for workers from 75 (seventy five) hours per quarter to 125 hours (one hundred and twenty five).
CLRA	• In item (a) of sub-section (4) of Section 1, for the words "twenty or more", the words "fifty or more" shall be substituted.	This amendment confines the applicability of CLRA to establishments that have employed at least 50 (fifty) workmen as contract labour. Previously, the law applied to every establishment which employed 20 (twenty) or more workmen as contract labour.

ANNEXURE C
(Refer to Paragraph 6.3)

State/Union Territory	Establishments	Maximum weekly work hours	Maximum daily work hours	Overtime Pay at Double the Rate* (Exceptions discussed in subsequent paras)	Time period
Assam [Under Section 65(2)]	All factories	Not specified	Increased from 9 hours to 12 hours (on a mutual agreement between employer and employees subject to payment of overtime)	Required	3 months (with effect from May 08, 2020)
Chandigarh [Under Section 5]	All factories (No woman worker to work between 7 pm to 6 am)	Increased from 48 hours to 72 hours	Increased from 9 hours to 12 hours	Required	3 months (with effect from June 03, 2020)
Goa [Under Section 65(2)]	All factories	Increased from 48 hours to 60 hours	Increased from 9 hours to 12 hours	Required	3 months (till July 31, 2020)
Gujarat	All factories (No woman worker to work between 7 pm to 6 am)	Increased from 48 hours to 72 hours	Increased from 9 hours to 12 hours	Not required	3 months (till October 19, 2020)
Uttarakhand [Under Section 5]	1. All factories allowed to work by the state government 2. All continuous process industries allowed to work by the state government	Maximum 6 days of work in a week	Two shifts of 11 hours each with 3 hours of overtime work per day. Two shifts of 12 hours each with 4 hours of overtime work per day.	Required	3 months (with effect from April 28, 2020) 3 months (with effect from May 05, 2020)

ANNEXURE D
(Refer to Paragraph 8.1)

DEPARTMENT OF SCHOOL EDUCATION	♦ apex state-level body in school education ♦ responsible for overall monitoring and policymaking for continual improvement of the public education system
DIRECTORATE OF SCHOOL EDUCATION	♦ separate and independent body ♦ to oversee educational operations and service provision for the public schooling system and implement policies regarding educational operations
STATE SCHOOL STANDARDS AUTHORITY (SSSA)	♦ each state or union territory to establish their own SSSA ♦ to establish a minimal set of standards based on basic parameters (namely, safety, security, basic infrastructure, number of teachers across subjects and grades, financial probity, and sound processes of governance), which shall be followed by all schools
STATE COUNCIL OF EDUCATIONAL RESEARCH AND TRAINING (SCERT)	♦ Academic matters, including academic standards and curricula in the State are to be led by SCERT (in close consultation with the NCERT) ♦ Develop a School Quality Assessment and Accreditation Framework (SQAAF) through wide consultations with all stakeholders
BOARD OF CERTIFICATION	♦ Certification of competencies of students at the school-leaving stage

ANNEXURE E
(Refer to Paragraph 8.1)

HECI	♦ Higher Education Commission of India (the "**HECI**")
NHERC	♦ National Higher Education Regulatory Council (the "**NHERC**") ♦ Single point regulator for the entire Higher Education Sector
NAC	♦ National Accreditation Council (the '**NAC**") (a meta-accrediting body) ♦ To supervise and oversee independent ecosystem of accrediting institutions (which primarily take into account the basic norms, public self-disclosure, good governance, and outcomes
HEGC	♦ Higher Educational Grants Council (the "**HEGC**") ♦ To carry out funding and financing of higher education based on transparent criteria
GEC	♦ Central Education Council (the "**GEC**") ♦ To frame expected learning outcomes for higher education programmes

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