Legal Milestones
Financial Year 2020-2021
and a Look Ahead

LEGAL MILESTONES FINANCIAL YEAR 2020-2021 AND A LOOK AHEAD

The financial year 2020-2021 commenced with the onset of the Covid-19 pandemic and consequent nationwide lockdowns. To combat the impact of the pandemic on people and businesses, several measures were introduced on the regulatory and judicial front, with digitisation at the forefront of many developments.

The Indian government introduced a slew of regulatory and legislative measures across sectors in the financial year 2020-2021 to cushion the economic impact of the pandemic while balancing the need for precautionary measures to curtail the spread of the virus. The Insolvency and Bankruptcy Code was amended to protect corporate entities defaulting on payment obligations during the Covid-19 pandemic from being dragged into insolvency process. The new Labour Codes were notified, overhauling existing labour laws. Some significant amendments to the foreign direct investment policy were introduced, specifically changes in relation to investments from countries with which India shares land border, restrictions in digital news media sector, liberalisation in the defence and insurance sector.

On the financial services front, the Reserve Bank of India issued circulars permitting banks, NBFCs and other lending institutions to grant a loan moratorium for payments on term loans. The period of moratorium was initially three months and, thereafter, extended by a period of another three months i.e., from 1 March 2020 to 31 August 2020.

Some of the big-ticket changes in the digital space included enactment of Consumer Protection (E-Commerce) Rules, 2020 and release of draft report on regulating non-personal data. On the other hand, the telecommunication sector saw one of the biggest changes with relaxations to the regulatory framework for Other Service Providers.

Notably, this year also marked some key developments on the tax front with the overhaul of the dividend distribution tax and expansion in the scope of the equalisation levy provisions.

On its part, the judiciary also took note of the hardship of litigants and announced an extension on limitation period for filings in all Courts and Tribunals at the start of the nationwide lockdown. There was also a significant transition to a digital mode of operation, with the courts embracing virtual hearings.

For a round-up of some of the key legal developments in the financial year 2020-2021 across practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates.

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Update

Corporate: Legal Milestones Financial Year 2020-21 And A Look Ahead

The year 2020 saw many procedural changes in response to COVID-19 pandemic and some key developments under the Foreign Direct Investment (FDI) Policy, Companies Act, 2013 and Foreign Contribution (Regulation) Act, 2010. This update summarizes some of these developments along with our expectations for the year ahead.

THE YEAR THAT WAS

2020 was a year that witnessed global disruptions, economic downturn and volatility owing to the ongoing COVID-19 pandemic. In the wake of the pandemic, the Government of India undertook several regulatory and legal reforms with the aim of curtailing the economic slump and bolstering foreign investment, while simultaneously suppressing opportunistic takeovers/acquisitions of Indian companies.

The tone of the reforms initiated over the course of the year has been underscored by the concept of 'Atmanirbhar Bharat' (*self-reliant India*).

MAJOR DEVELOPMENTS IN THE FINANCIAL YEAR 2020-2021

1. Foreign Direct Investment Regime

(a) Press Note 3

The Department for Promotion of Industry and Internal Trade (**DPIIT**) issued Press Note 3 of 2020 on 18 April 2020 (**Press Note 3 of 2020**), imposing stricter norms on foreign investments in Indian companies from an investor based out of China and other bordering countries (i.e., Afghanistan, Bangladesh, Bhutan, Myanmar, Nepal, and Pakistan) (**Restricted Country**). Investments from Hong Kong and Taiwan are also covered by Press Note 3 of 2020.

Pursuant to this amendment, prior government approval will now be required for any foreign investment in or acquisition / transfer of an Indian company (directly or indirectly), where the acquirer or beneficial owner of such investment is based out of a Restricted Country. This is regardless of whether or not such investment falls in a sector under the ambit of approval route (i.e. requires prior government approval for FDI) or not under the FDI policy. Further, transfer of ownership of any existing or future FDI into an Indian entity (directly or indirectly), resulting in beneficial ownership by an entity, or a person who is situated in or is a citizen, of a Restricted Country now requires prior government approval.

Please [click here](#) for a more detailed analysis.

(b) Other FDI Related Changes

(i) *Increase in FDI limit in the insurance sector:* The Insurance (Amendment) Act 2021 which received Presidential assent on 26 March 2021, amends the Insurance Act, 1938 to increase the FDI limit under the automatic route (i.e., without prior government approval) for the insurance sector from 49% to 74%. This amendment has been made effective from 1 April 2021.

(ii) *Further liberalization of FDI norms in the Indian defence sector:* The FDI limit under automatic route for the defence industry was increased from 49% to 74%. FDI beyond 74% is permitted under the approval route, provided that such investment is likely to result in access to modern technology. Further, infusion of fresh foreign investment (up to 49%) in a company not seeking an industrial license will now require government approval in the event such investment results in (a) change in the ownership pattern of the company; or (b) transfer of stake of an existing investor to a new foreign investor.

Please [click here](#) for a more detailed analysis.

(iii) *FDI in news on digital media*: Pursuant to Press Note 4 of 2019 (**PN 4 of 2019**) and subsequent amendments (on 5 December 2019) to the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019 (**NDI Rules**), the government released guidelines on FDI in the news digital media sector. The amended NDI Rules provide that FDI in a company engaged in the business of *'uploading/ streaming of news & current affairs through digital media*' is permitted to accept foreign investment up to 26%, with government approval. Prior to this, FDI in digital media was unregulated, and the restriction on FDI in news was limited to 26% in print media and 49% in broadcasting content services

However, PN 4 of 2019 and the amendments to the NDI rules gave rise to a few ambiguities on the scope of its restriction. Consequently, on 16 October 2020, the DPIIT issued a clarification regarding the categories of entities that would be subject to the FDI restriction, along with the time period for aligning their existing FDI limits to the 26% limit and obtaining government approval.

Please [click here](#) for a more detailed analysis.

(iv) *Downstream investments made by Non-Resident Indians (**NRIs**):* Pursuant to Press Note 1 of 2021, investments by NRIs on a non-repatriation basis will be treated at par with the investments made by residents i.e., domestic investments. Further, such investments will be exempt for calculation of aggregate foreign indirect investment in an Indian investee entity.

2. FOREIGN CONTRIBUTIONS (REGULATION) AMENDMENT ACT, 2020

The Foreign Contribution (Regulation) Act, 2010 (**FCRA**) which regulates the flow and utilisation of foreign donations and contributions was amended with effect from 29 September 2020 through the Foreign Contribution (Regulation) Amendment Act, 2020 (**FCRA Amendment Act**). Some key changes introduced are:

(a) Absolute prohibition on further transfers of foreign contributions received by eligible recipients under the FCRA to any third party/person**.** Previously, transfer of foreign contribution received by eligible recipients to third parties was permissible subject to receipt of adequate approval from the Central government or such other relevant authority.

(b) Reduction in the percentage of foreign contributions that can be utilised to defray administrative expenses from 50% to 20%.

(c) Enhancement of the period of suspension of registration by the Central government for up to 360 days (instead of 180 days) pending an inquiry for cancellation of the FCRA registration.

(d) Introduction of a provision allowing the government to prevent a person from utilising foreign contribution while an inquiry is pending.

(e) 'Public servants' (*defined under the Indian Penal Code*) have been brought under the ambit of persons who are restricted from receiving foreign contributions.

(f) Receipt of foreign contribution in the first instance through an account designated as an 'FCRA account' opened with a branch of the State Bank of India, New Delhi. No funds other than the foreign contribution should be received or deposited in this account.

While the amendment was enacted with the objective of enhancing transparency and accountability in the receipt and utilisation of foreign contributions, the purpose of some of the amendments is unclear and does not seem aligned with the stated objective.

Please click here for a more detailed analysis.

3. STARTUP-INDIA SEED FUND SCHEME (SISFS)

The SISFS will come into effect on and from 1 April 2021 and will be in force for a period of four years. The objective of the scheme is to provide financial assistance to start-ups recognised by DPIIT for facilitating proof of concept, prototype development, product trials, market entry and commercialisation. The corpus amassed for doling out financial assistance is to the tune of INR 945 crores, which will be disbursed through selected incubators across India.

4. COMPANIES ACT, 2013 - 2020 AMENDMENTS

(a) To improve the ease of doing business in India, various amendments have been made to the existing legal provisions of the Companies Act, 2013 (**Act**) through the Companies (Amendment) Act, 2020 (**Companies Amendment Act**).

Some key changes introduced are:

(i) *De-criminalisation of minor offences -* The Companies Amendment Act decriminalises 46 offences under the Act and provides leniency in relation to minor offences. For instance, imprisonment has been removed as a punishment for contraventions pertaining to buyback of securities, disclosure of interest by directors. Fines/penalties for procedural lapses such as filing of annual return with the registrar, variation of shareholder rights, transfer of securities, alteration, and reduction of share capital amongst others have been reduced.

Further, the MCA through press release dated 3 February 2021 has decided to decriminalise certain compoundable offences under the LLP Act 2008. In this regard, 12 compoundable offences are to be decriminalised and one provision (i.e., Section 73) entailing criminal liability is to be omitted. The de-criminalised offences would be then dealt within an in-house adjudication framework.

(ii) *Remuneration of independent or non-executive directors in case of no/inadequate profits -* In addition to executive directors, now an independent director is also eligible to receive remuneration, even if a company has no profits or inadequate profits in accordance with Schedule V of the Act.

(iii) *Listing on foreign exchanges -* The amendment allows a class of public companies to list certain class of securities on stock exchanges in permissible foreign jurisdictions. It also empowers the Central government to exempt any class or classes of public companies from the application of certain provisions such as issuance and allotment of securities, beneficial ownership, failure to distribute dividends, etc.

(iv) *Corporate Social Responsibility (CSR) -* The amendment allows companies that spend in excess of the CSR requirements to set off such excess in the succeeding financial years. Further, companies obligated to spend less than INR 50,00,000 as part of the CSR requirements are now exempted from constituting a CSR committee. Additionally, administrative overheads are capped at 5% of the total CSR expenditure of the company for any given financial year.

Further, CSR funds may now be spent for carrying out awareness campaigns/programmes or public outreach campaigns on COVID-19 vaccination programme (i.e., such expenditure shall be deemed as an eligible CSR activity under Schedule VII of the Act).

The amendment also pares down the list of 'CSR' activities by excluding the following activities from its ambit (a) activities undertaken in normal course of business, (b) any activities undertaken by the company outside India except for training of Indian sports personnel representing any state at a national level or India at the international level, (c) contribution of any amount directly or indirectly to any political party under Section 182 of the Act, (d) activities benefitting employees of the company, (e) activities supported by the companies on a sponsorship basis for deriving marketing benefits for its products or services, and (f) activities carried out for the fulfilment of any statutory obligation.

(b) COVID related relaxations - MCA introduced a number of COVID related relaxations to reduce the compliance burden of the companies, for instance, (i) timeline for holding EGMs and passing ordinary/special resolutions through video conferencing has been extended to 30 June 2021, (ii) the applicability of the Companies (Auditor's Report) Order 2020, has been extended from FY 2020-2021 to FY 2021-2022, and (iii) timelines for annual return filings were extended.

(c) The Companies (Compromises, Arrangement and Amalgamations) Amendment Rules, 2021 (Companies Amendment Rules): The Companies Amendment Rules, 2021 which came into effect from 1 February 2021 allows 'start-up companies' (i.e., a private company or a limited liability partnership incorporated not more than ten years ago, having turnover of not more than INR 100 crores, etc.) to enter into a fast track scheme of merger or amalgamation between (a) two or more start-up companies; or (b) one or more start-up company with one or more small company. Previously, the legal provisions for executing fast track mergers and amalgamations were applicable solely for 'small companies'.

5. MSME REFORM MEASURES

In line with the government's focus on 'Atmanirbhar Bharat', an upward revision in the classification of MSMEs has been approved along with inclusion of an additional turnover threshold.

An enterprise qualifies as a micro, small or a medium enterprise depending upon the amount of investment made with respect to (i) plant and machinery in case it undertakes manufacturing; or (ii) equipment in case it provides services. In addition to this existing investment conditionality, a new criterion for turnover has been introduced. Further, the prescribed investment thresholds for being included within the definition of MSME have also been increased. Additionally, the distinction between manufacturing and services industries has been done away with.

The table below shows a comparison of the previous position against the new categorisation.

Category	Previous Categorisation		New Categorisation	
	Capital/Investment		Capital/ Investment *(both plant and machinery and equipment)*	Turnover *(both plant and machinery and equipment)*
	Manufacturing *(investment towards plant and machinery)*	Services *(investment in equipment)*		
Micro	Upto INR 25 lakhs	Upto INR 10 lakhs	Less than INR 1 crore	Less than INR 5 crores
Small	Above INR 25 lakhs and upto INR 5 crores	Above INR 10 lakhs and upto INR 2 crores	Less than INR 10 crores	Less than INR 50 crores
Medium	Above INR 5 crores and upto INR 10 crores	Above INR 2 crores and upto INR 10 crores	Less than INR 50 crores	Less than INR 250 crores

In light of the COVID-19 pandemic, the minimum threshold to initiate corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 was increased from INR one lakh to INR one crore, to benefit MSMEs under financial distress. Further, to protect the MSME sector and give a boost to Indian manufacturing and services industries, global tenders have been disallowed in government procurement tenders.

Please click here for a more detailed analysis.

6. CONSUMER PROTECTION (E-COMMERCE) RULES, 2020

The Ministry of Consumer Affairs notified the Consumer Protection (E- Commerce Rules), 2020 (**E- Commerce Rules**) to regulate the marketing, sale and purchase of goods and services online. The E-Commerce Rules apply to all goods and services sold over a digital or electronic network and includes inventory and marketplace models within its ambit. It primarily governs B2C or consumer purchases and users (who are not just consumers) of e-commerce platforms. It imposes specific duties on all e-commerce entities along with additional obligations and liabilities specific to marketplace sellers and marketplace and inventory entities.

Please click here for a more detailed analysis.

LOOKING AHEAD

Keeping in line with the government's mission of bolstering the Indian economy on the lines of 'Atmanirbharta' (self-reliance) and the continued impact of the COVID-19 pandemic, we anticipate further amelioratory legal reforms to streamline and boost the Indian economy in 2021. Additionally, we expect the Indian government to issue clarifications and guidance on the implications of Press Note 3 of 2020, which is presently creating uncertainty.

*For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed **here**.*

TRILEGAL

Update

Competition: Legal Milestones Financial Year 2020-21 And A Look Ahead

The competition law regime in India is undergoing significant transformation and the Competition Commission of India is playing a pivotal role in shaping its implementation. This update covers the key highlights of the financial year 2020-2021 and provides a brief overview of the likely trends in the new financial year.

THE YEAR THAT WAS

The financial year 2020-2021 witnessed significant competition law-related developments, including the advisory for businesses in wake of the COVID-19 pandemic and the market study report on the telecom sector in India. The digital sector faced increased scrutiny, with several technology companies being investigated for alleged anti-competitive and abusive practices in India, as the rapidly evolving digital landscape posed unique challenges.

The Competition Commission of India (**CCI**) has previously indicated that while assessing new-age markets, it will adopt a nuanced and minimalist approach, to avoid stifling innovation incentives which are offered by such digital companies. Google is facing an investigation for alleged abusive conduct by unfairly mandating the use of its payment's app, Google Pay, *inter alia* to purchase apps in the Play Store.

The CCI has also directed an investigation against WhatsApp in respect of its updated privacy policy. The CCI has held that the alleged 'take-it-or-leave-it' nature and the data-sharing provisions of WhatsApp's updated privacy policy is *prima facie* abusive and may have an exclusionary effect in other related market(s) (display advertising), thereby creating barriers to entry and undermining the competitive process.

With respect to mergers, the CCI has continued to adopt a hybrid approach in granting approvals in complex M&A deals, by accepting structural and behavioural remedies, requiring parties to either make a permanent change in the structure of the market (e.g., divestment of assets) or to commit to not act in a certain manner in future (e.g., firewall provisions).

MAJOR DEVELOPMENTS IN THE FINANCIAL YEAR 2020-2021

1. COVID-19 related advisory and other measures

To manage the significant changes in supply and demand patterns arising out of the COVID-19 pandemic, the CCI, similar to its counterparts in other jurisdictions, issued an advisory for guidance to businesses in April 2020. While acknowledging the need for businesses to co-ordinate certain activities to ensure continued supply and distribution of essential products and services, the CCI highlighted that there are in-built safeguards in the Competition Act, 2002 (**Act**) intended to protect businesses from sanctions, provided such arrangements were necessary and would result in increased efficiencies.

The CCI in the advisory specifically noted that only such conduct of businesses, which is necessary and proportionate to address concerns arising from COVID-19, will be considered. Businesses are, however, cautioned not to take advantage of COVID-19 to contravene any of the provisions of the Act. The CCI is also closely coordinating with regulators worldwide to combat the negative economic consequences arising from the pandemic and has signed the 'Statement of the BRICS Competition Authorities on COVID-19'.

The CCI has adopted an accommodative approach towards small and medium-sized enterprises due to the economic hardships faced on account of the pandemic. In two cartel contravention cases, the CCI did not impose any penalties in either case, despite there being evidence (and admission) of cartelisation and ordered the enterprises to cease and desist from anti-competitive practices. This lenient approach is unlikely to carry forward post-economic recovery once the effects of the pandemic subside.

To facilitate smooth functioning and to ensure continuity of work, the CCI enabled parties to submit electronic filings, conducted virtual pre-filing consultations and hearings for merger control and enforcement matters.

2. CCI grants interim relief directing MakeMyTrip and Go-Ibibo to relist FabHotels and Treebo

The CCI issued an interim order dated 9 March 2021 under Section 33 of the Act, granting relief to FabHotels and Treebo by directing MakeMyTrip and Go-Ibibo (collectively, **MMT-Go**) to re-list the properties of FabHotels and Treebo on their online platforms. This interim order has been challenged and is currently pending final adjudication.

The CCI observed that the recent upsurge in digital marketplace platforms has changed the digital distribution architecture for sellers and service providers. The change in digital distribution has made these digital platforms the key access routes for sellers/service providers to reach end-customers. The CCI held that denial of access to a dominant online platform can be lethal to the functioning of businesses relying on such intermediaries to reach their end-customer. As such, the CCI in the interim directed MMT-Go to relist the hotels under FabHotels and Treebo on its platform.

In 2019, the CCI had directed an investigation into the alleged anti-competitive/abusive conduct of MMT-Go for charging excessive commissions, indulging in deep discounting, imposing unfair conditions on the hotels including price parity clauses, giving preferential treatment to Oravel Stays Private Limited under its commercial agreement with MMT-Go etc.

3. Procedural Developments

To ease the burden on enterprises while notifying combinations, the CCI did away with the requirement of an explanation and justification of non-compete restrictions.

Separately, in a welcome development, the CCI updated its guidance notes to Form I (short form) to provide the scope of information and documents to be submitted to the CCI, and also clarified the eligibility criterion for a green channel filing by explaining the meaning of complementary products/ services. The 'green channel route' introduced by the CCI proved to be a success in improving ease of doing business in India, and 27 combinations (until March 2021) have benefitted from the speedy approval under the 'green channel route'.

In a move to extend co-operation among government agencies and ensure better regulatory oversight, the Central Board of Direct Taxes authorised the income tax authorities to share relevant information with the CCI. This arrangement to share information will enable the CCI to evaluate the financial profile of the infringing enterprise/individual and be better equipped with imposing financial penalties under the Act.

In line with the directions issued by the High Court of Delhi in the constitutional challenge by several automobile manufacturers, the CCI (Meeting for Transaction of Business) Regulations, 2009 were amended through a notification dated 2 March 2021. The amendment provides that the quorum of CCI members for final hearings should remain constant, and the same quorum alone should hear and decide upon the case. In the event the same quorum is unable to continue with the hearings, the case would then be heard afresh by a new quorum.

4. Market Studies

In 2020, the CCI initiated or undertook market studies to assess competition law issues in the digital markets, pharmaceutical sector and telecom sector respectively.

(a) Digital Markets The CCI is conducting a study on merger and acquisitions in the digital market. In recent times, digital markets and e-commerce have been the areas where CCI has been building its expertise through market studies, etc. to address the competition issues arising out of digital economy.

(b) Pharmaceutical The pharmaceutical sector plays a pivotal role in the public health agenda of any nation. Some of the areas that the CCI is looking into in its study of this sector include, (i) understanding the role of trade associations, (ii) extent of proliferation of branded generic drugs in India, and (iii) the potential hurdles in the entry of bio-equivalent drugs in India. The CCI has started its consultation process to gather information from the stakeholders including, pharmaceutical companies, stockists, chemists, trade associations, doctors, sector experts and regulators.

(c) Telecom **-** The CCI published its report on 'Market Study on Telecom Sector in India' in January 2021. The market study indicated the emergence of new business models in the telecom sector, based on vertical convergence and made key findings in relation to the shift in focus from price-based competition to non-price competition parameters (consumer privacy); adherence to net neutrality principles; maintaining transparency in peering arrangements; and data privacy as a non-price parameter of competition. A harmonised approach in relation to the overlapping regulatory jurisdictions of the Telecom Regulatory Authority of India, Department of Telecommunications, CCI and the envisaged Data Protection Authority, has also been recommended.

LOOKING AHEAD

In 2021, the CCI expanded its presence with a regional office in Chennai that will specifically cater to states in Southern India, i.e, Tamil Nadu, Kerala, Karnataka, Andhra Pradesh, Telangana and Union Territories, i.e., Puducherry and Lakshadweep. This will enable the CCI to actively focus on curbing anti-competitive conduct and increase its enforcement, investigation, and advocacy functions, in close coordination with its existing office in New Delhi.

The CCI is currently also undertaking a detailed market study with respect to private equity investments in India. This market study aims to understand the trends and patterns of common ownership by private equity investors across sectors in India, and to gauge underlying incentives and motivations behind such investments. The study will specifically focus on minority investments, identify the kind of shareholding rights available to common shareholders, the type of influence these rights provide, and the available safeguards in companies' policies for mitigating competition concerns, if any. This market study will inform the merger control decisions in the years to come.

For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed ***here****.*

TRILEGAL

Update

Labour & Employment: Legal Milestones Financial Year 2020-21 And A Look Ahead

With COVID-19 disrupting business continuity in the first half and the new labour codes being passed in the second half, 2020 was an eventful and landmark year for employment laws in India. This update summarises some key developments witnessed in 2020 and provides a brief overview of what can be expected in 2021.

THE YEAR THAT WAS

With the pandemic flaring in India in 2020, the government's focus was directed more towards containing the spread of the virus. Several directions, orders, advisories and guidelines were issued (both at the Central and State government level) to employers to help them take preventive measures, apply for exemptions to continue business with skeletal staff, and obtain curfew passes for their employees to travel to work amidst the lockdown. Parallelly, being cautious to avoid the negative business impact of COVID-19 trickling-down on employees, the government issued several orders and advisories against terminations, non-payment of salaries and leave adjustments. Labour authorities also closely scrutinised terminations by employers. As the efforts of the government were largely concentrated in this space, no significant legislative changes were introduced during this period. Meanwhile, work-from-home became the 'new normal' for several organisations - more so, for those operating in the information technology space and other service industries.

During the second half of 2020, just as the COVID-19 restrictions were eased, the government's long-concerted efforts to streamline and consolidate existing labour laws into four labour codes came to fruition. While one of the four codes had been passed in 2019, the other three codes were passed and granted Presidential assent in September 2020. These four codes will subsume and replace 29 existing labour laws.

MAJOR DEVELOPMENTS IN THE FINANCIAL YEAR 2020-2021

1. Introduction of four labour codes

The Indian government has almost completed the process of consolidating 29 existing central labour laws into four labour codes, namely Code on Wages, 2019; Industrial Relations Code, 2020; Code on Social Security, 2020; and Occupational Safety, Health and Working Conditions Code, 2020 (collectively, **Labour Codes**). The Labour Codes govern conditions of employment, social security, employee health, safety and welfare, industrial and labour disputes, payment of wages etc. The prime objective of this consolidation exercise is to facilitate the ease of doing business, rationalise penalties, digitise compliances, and to eliminate multiplicity and inconsistency of definitions across laws.

The Labour Codes have already been passed by the Parliament and have received President's assent. The Ministry of Labour and Employment had earlier announced that the Labour Codes were likely to come into effect from 1 April 2021. However, due to the delay in formulation of rules by most State governments, the implementation of the Labour Codes may be postponed by a few months.

One of the key changes under the Labour Codes is a uniform definition of '*wages*' which will cover provisions on gratuity and provident fund computation, rules around deduction, etc. This definition can be bifurcated into three parts:

(a) a substantive part, as per which all guaranteed salary components will be considered as wages;

(b) an inclusion list comprising of 'basic pay,' 'dearness allowance,' and 'retaining allowance' - there is no ambiguity that these components will certainly be included as 'wages'; and

(c) an exclusion list, where certain components, such as conveyance allowance, house rent allowance (**HRA**), overtime wages, employer provident fund contributions, value of house accommodation, etc. are excluded.

The new definition also has two deeming provisions, (a) the value of exclusions exceeding 50% of the total remuneration will be deemed as 'wages'; and (b) the value of remuneration paid in kind (in lieu of whole or part of wages) which does not exceed 15% of the total wages will also be deemed as 'wages'. The new definition of 'wages' will have a significant cost impact on organisations since the computation of provident fund and gratuity payment will no longer be limited to basic wages.

Apart from this, changes have also been brought to various other definitions, including definitions of 'workman' and 'contract labour'. Some of the other key changes under the Labour Codes are:

(i) The Labour Codes introduce a five year limitation period for recovery of provident fund (**PF**) dues. The existing Employees' Provident Funds and Miscellaneous Provisions Act, 1952 does not prescribe a limitation period for initiation of proceedings and recovery of PF dues. There were therefore instances where PF authorities had initiated proceedings for shortfall in payments going back to 10-15 years. This is a welcome change.

(ii) The concept of minimum wages for 'scheduled employments,' (i.e. specific type of industries/employments) is being done away with and going forward the Central government will fix a 'floor wage' by factoring in the minimum standard of living of workers. These floor wages could be different for different geographical areas. State governments will then be required to fix a minimum wage that is at least equal to or higher than the floor wage.

(iii) The Labour Codes increase the applicability threshold for the provisions on engagement of contract labour. It is provided that the contract labour related obligations will apply to (a) establishments wherein 50 or more contract labour will be/were engaged in the preceding 12 months, and (b) to manpower supply vendors who will deploy/had deployed 50 or more contract labour in the preceding 12 months.

The Labour Codes also prohibit, at a pan-India level, the engagement of contract labour in an establishment's 'core activities' i.e., activities for which the establishment has been setup including its essential and necessary activities. Having said that, the definition of contract labour will be narrower it will exclude workers who are regularly employed in the vendor's establishment upon mutually accepted conditions and who receive periodical increments in pay, social security, welfare benefits, etc. The intent is to cover arrangements where manpower/workers are deployed after making special recruitments for the client.

While the Labour Codes are yet to come into effect, some State governments like Bihar, Karnataka, Gujarat, Punjab, Madhya Pradesh and Goa have already increased the threshold for applicability of the current contract labour law (for both, principal employers and contractors/vendors) from 20 contract labour or more to 50 contract labour or more on any day in the preceding 12 months.

(iv) All industrial establishments (which includes commercial establishments) having 300 or more workers now need to obtain certified standing orders (i.e. service rules) after consultation process with the workers.

(v) The threshold for obtaining government permission/approval for retrenchment, lay-off and closure of factories, mines and plantations is increased to 300 or more workers across India (earlier threshold being 100).

(vi) The Labour Codes impose an obligation on employers with 20 or more workers to constitute a grievance redressal committee (**GRC**) for resolution of individual grievances. The GRC can have up to ten members and will need to have equal representation from the workers.

(vii) Employees on fixed term contracts will now be eligible for gratuity payment even if the qualifying period of five continuous years of service is not met. Hence, organisations will have to be mindful of the increased costs associated with engagement of fixed term employees (**FTE**), specifically, in case of international deputation and secondments (where FTE models are popularly adopted).

(viii) The Labour Codes lay the ground for extension of social security benefits to 'gig workers' and 'platform workers' (which could include drivers associated with cab aggregators, delivery agents, etc.). They envisage beneficial welfare schemes to be framed for gig and platform workers, under which the government and aggregators would be required to make contributions in respect of such workers.

(ix) Currently only very few States such as Maharashtra mandate recognition of trade unions. However, the Labour Codes make it mandatory to recognise a trade union as the sole negotiating union or a group of unions if they meet the prescribed conditions (details of which will be set out in the rules).

(x) The Labour Codes allow establishments with less than ten employees to voluntarily register and de-register from the applicability of the chapter on Employees' State Insurance contributions.

(xi) Compared to existing labour laws, the Labour Codes significantly increase the penalties for non-compliance. Penalties under the Labour Codes are in the range of INR 50,000 to INR 10,00,000 (USD 700 to USD 13,500). The Labour Codes also introduce provisions for compounding of offenses (subject to payment of prescribed fine).

3. Increase in the annual leave carry forward limit under the Karnataka Shops and Commercial Establishments Act, 1961 (Karnataka S&E Act)

The Karnataka S&E Act provides for carry forward of up to 30 days' unused annual leave to the succeeding *year.* By an amendment in February 2021, the Karnataka State government has increased this limit to 45 days. Given this, employees in shops and commercial establishments (**S&E**) in Karnataka will be able to carry forward up to 45 days of unused annual leave.

This change is aligned with the limits prescribed in recent years under the S&E laws in other states (such as, Maharashtra and Tamil Nadu). This change to the Karnataka S&E Act is also aligned with the limit that was proposed under the Model Shops and Establishments Bill, 2016.

The term 'year' under the Karnataka S&E Act is defined as a year commencing on 1 January. Given this, the impact would become relevant when employees carry forward annual leaves from 2021 to 2022. Having said that, organisations for which the leave calendar operates on a financial year (April to March) basis would need to be mindful that the increased threshold applies from February 2021.

5. Some relaxation in the prohibition on employing women at night in Karnataka

The S&E Act generally prohibits the employment of women at night (specifically, between 8 p.m. to 6 a.m.). However, IT/ITeS establishments could apply to authorities to seek an exemption from this prohibition.

By way of an amendment in October 2020, the State government removed this prohibition and has allowed *all* commercial establishments to employ female employees in shops and commercial establishments, subject to obtaining their written consent, providing free transport facility (GPS tracking facilities), employment of women at night on a rotation basis, bearing cost of creche facilities, etc. Consequently, all commercial establishments (and not just those establishments in the IT or ITeS sector) are permitted to employ women at night (subject to compliance with the prescribed conditions), without the requirement to obtain/apply for any exemption from the authorities. Non-compliance with the prescribed conditions can however lead to cancellation of registration certificate granted to such shop or commercial establishment.

7. Haryana Local Candidate Act, 2020 (Local Candidates Act)

The Local Candidates Act, 2020 which provides for State specific reservation for local candidates, received the Governor's assent on 2 March 2021. However, it is currently not in force and will come into effect on a date notified by the State government of Haryana in the Official Gazette.

Once the Local Candidates Act, 2020 it is notified, it will apply to private companies, partnership firms, limited liability partnerships, etc. in Haryana which employ ten or more employees. Such covered employers would be required to provide 75% quota to locally domiciled candidates in posts where the gross monthly salary is INR 50,000 or less (or such other amount that may be notified by the State government).

Employers would also have the ability to claim an exemption from the reservation requirement if adequate local candidates of the required skill, qualification or proficiency are unavailable. Non-compliance with this reservation obligation could be penalised with a monetary fine in the range between INR 50,000 to INR 2,00,000 (USD 700 to USD 2800) in the first instance.

LOOKING AHEAD

The implementation of the Labour Codes will take centerstage in 2021, as they are expected to be brought into effect in 2021. While the date for public/stakeholders' comments on the Central rules under all the Labour Codes has expired, most State governments are yet to publish their draft rules under all the Labour Codes as of date. Therefore, compliances and obligations on employers under all the Labour Codes will need to be revisited once the relevant rules are finalised and published.

Given the significant cost impact the new definition of 'wages' would have on employers, they should re-look at their existing compensation structures and statutory contribution practices to assess if any changes could be made to minimise the impact. Similarly, with the restrictions on contract labour arrangements being introduced at a pan-India level, employers should reconsider the roles in which third-party vendor employees are engaged and assess if they could fall within any exceptions to the prohibition. Effective mechanisms should be put in place to comply with the other obligations as well, such as adhering to restrictions and limits on salary deductions, constitution of a GRC, recognition of unions, etc.

*For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed **here**.*

TRILEGAL

Update

Banking and Finance: Legal Milestones Financial Year 2020-21 and a Look Ahead

A majority of the developments in the banking and finance sector in 2020 were centered around relief to stakeholders from the economic stress caused by the COVID-19 pandemic and the consequent disruption of the global economy. This update summarises some of the key developments and also highlights our expectations for the year ahead.

THE YEAR THAT WAS

In the first half of 2020, the Indian economy witnessed an unprecedented slowdown owing to the global impact of the COVID-19 pandemic and enforcement of one of the world's strictest lockdowns. With a deep contraction in its economic activity, India moved into a technical recession for the first time in its history and the Government of India (**GoI**) undertook a series of measures to alleviate the strain on stakeholders and provide temporary flexibility and relief.

Some of the notable developments included amendments to the Insolvency and Bankruptcy Code, 2016 (**IBC**) to protect corporate entities defaulting on payment obligations during the COVID-19 pandemic from being dragged into insolvency process. On its part, the Reserve Bank of India (**RBI**) issued circulars permitting banks, NBFCs and other lending institutions to grant a loan moratorium for payments on term loans. The period of moratorium was initially three months and, thereafter, extended by a period of another three months i.e., from 1 March 2020 to 31 August 2020.

The year also marked the resolution of distress under the IBC for the first-ever Non-banking Finance Company (**NBFC**), Dewan Housing Finance Limited (**DHFL**). In 2019, DHFL was referred by the RBI (using its special powers under the IBC), to the National Company Law Tribunal (**NCLT**) for initiation of the corporate insolvency resolution process. The year 2020 saw this process unfold with a host of bidders, with the final round of the bidding being submitted in December 2020 and the committee of creditors of DHFL evaluating the bids received. The process was finally concluded in January 2021, with the committee of creditors finally approving the resolution plan submitted by Piramal Capital and Housing Finance Limited.

MAJOR DEVELOPMENTS IN THE FINANCIAL YEAR 2020-2021

1. Supreme Court directs waiver of interest-on-interest during the loan moratorium period declared by the RBI on term loans

With the onset of the pandemic, the RBI issued circulars permitting banks, NBFCs and other lending institutions to grant a moratorium for payments from term loan borrowers due to COVID-19 (**Loan Moratorium Circulars**). The period of moratorium was initially three months and, thereafter, extended by a period of another three months, i.e., from 1 March 2020 to 31 August 2020. However, during the moratorium period, interest-on-interest would accrue.

Aggrieved by the Loan Moratorium Circulars, several stakeholders filed writ petitions seeking directions from the Supreme Court on whether the loan moratorium period could be extended further and if a complete waiver of interest and interest-on-interest during the loan moratorium period could be granted. The Supreme Court also considered whether the government can be directed to grant additional sector-wise relief packages. Interestingly, the government had announced an ex-gratia scheme waiving interest-on-interest on loan moratorium for borrowers who have borrowed up to INR two crores / up to INR twenty million.

The Supreme Court reasoned that interest-on-interest in term loans can be charged only in cases of wilful default and not in cases of non-payment during moratorium. Based on this, the Supreme Court directed that interest-on-interest on all loans covered by the Loan Moratorium Circulars should be waived. It further directed all lending institutions to refund or adjust in subsequent installments, any interest-on-interest collected for the moratorium period. Separately, the Central government's waiver of interest-on-interest on loans up to INR two crores / up to INR twenty million was held to be arbitrary. Lastly, the Supreme Court rejected pleas for extension of the moratorium period, total waiver of interest for the moratorium period and sector-wise relief, observing that these are matters of government policy.

The judgement provided clarity on and substantial relief to term loan borrowers. More importantly, it also balanced the interests of the banking industry that feared a collapse if complete interest amounts were directed to be waived.

2. Resolution Framework for COVID-19 related Stress

Concerned that the financial stress caused by the COVID-19 pandemic would affect the long-term viability of several borrowers that otherwise had a good track record, the RBI on 6 August 2020 issued the 'Resolution Framework for COVID-19 Related Stress' (**Resolution Framework**).

The Resolution Framework provides a window under the existing RBI (Prudential Framework for Resolution of Stressed Assets) Directions, 2019 dated 7 June 2019 enabling lending institutions (**Lenders**) to implement a resolution plan for personal loans and corporate exposures, without requiring a change in ownership, while continuing to classify such exposures as standard assets. It also broadens the ambit of Lenders to include all NBFCs and housing finance companies. The measures under the Resolution Framework reflect the RBI's intent to provide longer-term relief to affected borrowers.

*Please **click here** for a more detailed analysis.*

3. Liquidity measures for the NBFC sector

In March 2020, the RBI had introduced the Targeted Long -Term Repo Operations scheme for NBFCs, but its benefits reached only the big players. Therefore, to further ease financial stress, increase liquidity in the market and facilitate funds flow to small and mid-sized corporates, including NBFCs and micro finance institutions (**MFIs**), the RBI in April 2020 introduced a second set of targeted long-term repo operations for an initial aggregate amount of INR 50,000 Crore (**TLTRO 2.0 Scheme**).

Under the TLTRO 2.0, funds availed by the banks were required to be invested in investment-grade bonds, commercial paper, and non-convertible debentures of NBFCs, with at least 50% of the total amount availed going to small and mid-sized NBFCs and MFIs.

However, under the TLTRO 2.0 Scheme, smaller NBFCs and MFIs received limited relief. While some interest was shown by State-run banks, private banks remained largely silent due to the liquidity crunch and larger chances of delinquencies in small and mid-sized NBFCs and MFIs.

4. Amendments to the IBC

With the advance of COVID-19, several corporates and businesses were hit hard by the pandemic and consequent lockdowns, leading to severe losses. This caused a domino effect where many corporates found themselves reeling under mounting debts with the threat of insolvency looming large over them. To provide some relief to corporates and protect them from facing insolvency proceedings and eventual closure, several amendments were introduced to the IBC through 2020. The amendments included the following:

(a) Increase in threshold

By a notification of the Ministry of Corporate Affairs, the pecuniary threshold for default in payment of debt pursuant to which a creditor or a corporate applicant could initiate corporate insolvency resolution process (**CIRP**) was increased to INR 1 crore from INR 1 lakh under the IBC.

(b) Moratorium on CIRP initiation

A moratorium was imposed on operational, financial creditors and corporate applicants from initiating CIRP for any default arising on or after 25 March 2020. Initially, the moratorium was only for the first six months till 24 September 2020, however, it was extended thereafter and is presently operational till 31 March 2021. For any defaults during the moratorium period, a CIRP can never be initiated.

*Please **click here** for a more detailed analysis.*

(c) Extensions of timelines for actions during CIRP and liquidation

The IBC regulations were amended to provide extensions for various actions under CIRP and liquidation process during the lockdown imposed by the Central government from 25 March 2020 to 29 May 2020 and further extended by some of the State governments.

5. Applicability of SARFAESI Act to Co-operative Banks

A constitutional bench of the Supreme Court, in the judgement of *Pandurang Ganpati Chaugule vs. Vishwasrao Patil Murgud Sahakari Bank Limited* (**Pandurang case**), held that cooperative banks may seek remedies available under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**SARFAESI Act**) for recovery of their dues.

In 2003, the Central government had issued a notification making the SARFAESI Act applicable to multi-state co-operative banks. Subsequently, by way of Section 2 of the Enforcement of Security Interest and Recovery of Debt Laws (Amendment) Act, 2012, the definition of 'bank' under the SARFAESI Act was amended to include multi-state co-operative banks. The addition of multi-state co-operative bank to the definition of banks was heavily disputed on the ground that co-operative banks fall under Entry 32 of List II (State List) of the Seventh Schedule of the Constitution of India and therefore the Parliament does not have the jurisdiction under Entry 45 of List I (Union List) of Seventh Schedule of the Constitution of India to legislate on co-operative banks. This view was supported by a three-judge bench of the Supreme Court in *Greater Bombay Co-op Bank Limited vs. United Yarn Textiles Private Limited* (**Greater Bombay Judgement**), while holding that co-operative banks cannot approach debt recovery tribunals under the Recovery of Debts and Bankruptcy Act, 1993 for recovery of their dues.

In 2020, in the Pandurang case, the Supreme Court had an opportunity to consider this issue while deciding on the applicability of the SARFAESI Act to co-operative banks. Overruling the Greater Bombay Judgement, the Supreme Court held that co-operative banks are covered under the framework of the SARFAESI Act. The Court observed that the Greater Bombay Judgement required 'reconsideration and clarification'. It held that while the 'regulation' and 'winding up' of co-operative societies are covered under Entry 32 of List II, banking activities of such co-operative societies fall under Entry 45 of List I. The Court also observed that co-operative banks are registered and regulated under the Banking

Regulation Act, 1949 which is a legislation enacted under Entry 45 of List I itself.

The Supreme Court's judgement in the Pandurang case has brought much-awaited clarity by finally settling the issue on the applicability of the SARFAESI Act to co-operative banks.

LOOKING AHEAD

With the pandemic resulting in a deep contraction of the Indian economy, the year 2020 saw the government taking several steps to provide relief to the banking sector. While these reliefs may have temporarily addressed some of the problems, it will be interesting to see how the government decides to roll these back with the gradual stabilisation of the economy. The RBI recently reported that the health of banks may be dented and the extent of the gross non-performing assets of the banks will only be reflected once normalcy of banking operations is resumed.

Due to stringent lockdowns, consumers in the banking sector were heavily reliant on digital platforms in 2020. We expect this higher dependence on information technology and digital banking to continue in 2021, accelerating further growth in the fintech industry.

While India's GDP had shrunk in the first two quarters of the Financial Year 2020-21 amid the COVID-19 pandemic and lockdowns, marking a technical recession, the third quarter of the fiscal year clocked a rise in the GDP. Global rating agencies have predicted that the recent vaccination drive will allow many sectors like hospitality, aviation, and tourism to gradually open up and recover. The International Monetary Fund in its World Economic Outlook report for January has projected an 11.5% growth rate for India's economy in 2021. Economists believe that the correct economic policies and proper implementation can lead to a strong resurgence of the Indian economy.

The second wave of the COVID-19 pandemic has not yet destabilised the economy's recovery but localised lockdowns, may impact growth in the April-June 2021 financial quarter, with current data indicating significant signs of incipient stress.

*For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed **here**.*

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Update

Indian Capital Markets: Legal Milestones Financial Year 2020-21 And A Look Ahead

Indian capital markets witnessed some highs and lows in 2020. While the number of IPOs in 2020 was lower compared to the previous year, the IPO volume was substantially higher this year. 2020 also saw an overall fall in the number of other modes of fund-raising, however, the amount of funds raised through these modes were at a record high. Here we discuss some of the major developments in the financial year 2020-21 along with our expectations for the year ahead.

THE YEAR THAT WAS

The COVID-19 pandemic resulted in a significant slowdown in Indian capital markets in the year 2020. While the total number of initial public offerings (**IPOs**) in 2020 was comparatively lesser than in 2019, the capital raised through these IPOs was higher than that raised through IPOs in 2019. Companies such as SBI Cards and Payments Services, Computer Age Management Services, Burger King, and Mrs. Bectors Food Specialties undertook highly oversubscribed IPOs in 2020.

With the pandemic having an adverse impact on the global economy and lockdowns imposed by the Indian government to tackle the spread of the virus disrupting normal business, the Securities and Exchange Board of India (**SEBI**) introduced various measures in 2020 targeted at providing companies with relaxations from various compliance and disclosure burdens and facilitating fundraising for cash-strapped companies.

MAJOR DEVELOPMENTS IN THE FINANCIAL YEAR 2020-2021

1. Relaxation of Pricing Guidelines and Open Offer Obligations for Preferential Issue by Companies Having Stressed Assets and Introduction of a Temporary Alternate Pricing Option

To enable better access to capital markets by companies having stressed assets, SEBI liberalised regulations governing preferential issues by such companies, by relaxing pricing guidelines under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 (**ICDR Regulations**) and open offer obligations under the SEBI (Substantial Acquisitions of Shares and Takeovers) Regulations, 2011 (**Takeover Code**).

For issuer companies meeting the eligibility criteria of a '*stressed issuer*', the pricing of equity shares has been reduced from the higher of, the average weekly high and low of the volume-weighted average price during 26 weeks or 2 weeks preceding the relevant date, to at least the average weekly high and low of the volume-weighted average price during the 2 weeks preceding the relevant date. SEBI also amended the Takeover Code exempting any acquisition of shares or voting rights in a preferential issue by issuers in compliance with the pricing framework applicable to 'stressed issuers', from the obligation to make an open offer under the Takeover Code.

*Please **click here** for a more detailed analysis.*

Separately, for issuer companies that do not meet the criteria of a 'stressed issuer', SEBI introduced an additional temporary pricing option valid until 31 December 2020, where pricing of equity shares would be at least the higher of the average weekly high and low of the volume-weighted average price during either 12 weeks or 2 weeks preceding the relevant date.

*Please **click here**for a more detailed analysis.*

The 26 weeks' time period led to a wide gap between the price at the beginning of such period and at the time funds were proposed to be raised, making it more expensive for any potential investor to participate in the preferential issue. Additionally, the time period did not allow for pricing to be cognizant of market price post COVID-19 for many companies. These relaxations are intended to lower the price in a preferential issue which would, in turn, incentivise investors to invest in companies.

2. Relaxation in Cooling-Off Period between Two Qualified Institution Placements (QIPs)

To facilitate urgent funding requirements of companies, SEBI reduced the cooling-off period between two QIPs by an issuer company from the previous requirement of six months to two weeks. This move is expected to enable cash-strapped companies to carry out fundraising activities with greater frequency, especially since QIPs are less time-intensive and documentation-intensive compared to other modes of fundraising.

*Please **click here** for a more detailed analysis.*

3. SEBI Advisory on Disclosure of Material Impact of COVID-19 Pandemic on Listed Entities

The Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**Listing Regulations**) require companies to disclose material events having a bearing on a company's performance or operations. To this end, SEBI issued an advisory containing an illustrative list of information for listed companies to provide in order to inform investors about the impact of COVID-19. The advisory also recommends specifying the impact of COVID-19 on financial statements which are to be submitted under Regulation 33 of the Listing Regulations.

*Please **click here** for a more detailed analysis.*

4. Rationalisation of Disclosures in Rights Issue

Through an amendment, SEBI has rationalised disclosure requirements under the ICDR Regulations for companies undertaking a rights issue. A letter of offer was earlier required to either include: (i) exhaustive disclosures of the same nature as required when undertaking an IPO, or (ii) limited disclosures (**Part B Disclosures**), if the company satisfied certain eligibility criteria.

The amendment has further reduced the limited disclosures by doing away with redundant disclosures (i.e. information of the issuer already available with the public), and has introduced an alternate set of limited disclosures (**Part B-1 Disclosures**) for companies which do not meet the eligibility criteria to make Part B Disclosures. The Part B-1 Disclosures, while more detailed than Part B Disclosures, are less extensive than disclosures to be made in an IPO.

5. Relaxation from Provisions of ICDR Regulations in Respect of Rights Issue

SEBI has provided temporary relaxations to companies from certain provisions of ICDR Regulations in respect of rights issue. These relaxations include, relaxations in eligibility conditions for fast-track rights issue, reduction in the minimum subscription threshold from 90% to 75% and the increase in minimum threshold below which filing draft letter of offer is not required. These relaxations are available for rights issue that open on or before 31 March 2021.

*Please **click here** for a more detailed analysis.*

Additionally, as COVID-19 continued to disrupt business operations in 2020, SEBI introduced certain one-time relaxations from the strict enforcement of certain regulations of the ICDR Regulations relating to rights issues.

*Please **click here** for a more detailed analysis.*

6. Relaxation in Eligibility Conditions for Further Public Offer through Fast Track Route

SEBI has provided temporary relaxations on eligibility conditions for Further Public Offers (**FPOs**) made through the fast track route. These relaxations are available for FPOs that open on or before 31 March 2021. The relaxations introduced include reduction in pre-requisite market capitalisation, allowing FPOs even if a show-cause notice is pending against the promoter whole-time director or the company (subject to disclosures being made in the offer document), and allowing FPOs even if the promoter or promoter group or director has settled any violation of securities law through consent or settlement mechanism with SEBI.

*Please **click here** for a more detailed analysis.*

LOOKING AHEAD

In order to mitigate the impact of the COVID-19 pandemic on companies, SEBI has introduced various regulatory relaxations in 2020. Many of these will continue to be available to companies in 2021 and we expect that many companies will avail of these. 2021 is expected to be a strong year for IPOs and is likely to see an increased number of other fundraising activities as well.

*For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed **here**.*

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Update

Financial Regulatory Regime: Legal Milestones Financial Year 2020-21 And A Look Ahead

The financial year 202021 put the securities and financial markets in India under an unprecedented stress test. Reacting proactively, the financial services regulators introduced measures not only to manage and curtail risks, but also to boost investor confidence. This update summarises some of these developments along with our expectations for the year ahead.

THE YEAR THAT WAS

With COVID-19 reaching Indian shores in early 2020, the financial year (**FY**) 2020-21 passed addressing short and long-term consequences of the pandemic. The challenges of the pandemic, including the lockdown and social distancing norms, did not slow down regulatory action and securities market litigation, with virtual hearings replacing the traditional in-person proceedings.

The financial services regulators of the country, including the Securities and Exchange Board of India (**SEBI**) and the Reserve Bank of India (**RBI**), remained proactive in terms of policy decision making, as well as enforcement. As crude oil prices crashed in the US and dipped into red, the ripples were felt in the commodities market in India, a situation which the Indian market had neither contemplated nor was prepared for. The settlement on the Multi Commodity Exchange of India Limited (**MCX**) based on these negative values created a furore but was addressed by SEBI thereafter.

On the governance front, the implementation of the segregation of roles of the chairman and the MD/ CEO in listed companies, which was earlier slated to come into force in April 2020, has been deferred for another two years. Further, disclosure norms for listed entities were expanded to include initiation of forensic audit (along with the other relevant details), as well as final forensic audit report (other than for forensic audit initiated by regulatory/enforcement agencies) along with comments from the management of the listed entity.

MAJOR DEVELOPMENTS IN THE FINANCIAL YEAR 2020-21

1. Broker defaults and changes by SEBI in margin collection

Given the continued instances of misappropriation and/or misuse of client securities by brokers in 2020, SEBI undertook extensive discussions with stock exchanges, clearing corporations, depositories and brokers, to revamp the process of margin collection and mitigate these risks. Through a circular dated 25 February 2020, SEBI mandated the collection of margin in the form of securities through a specific pledge mechanism with effect from 1 September 2020. Pursuant to the above, stock exchanges/clearing corporations have also revised the process of margin collection from members.

As a part of its efforts to make the monitoring mechanism more proactive in identifying risks and early warning triggers which could eventually lead to default on the part of trading and clearing members, SEBI on 1 July 2020, issued a circular (**July Circular**) laying down the standard operating procedure and steps to be followed by the stock exchanges, clearing corporations and depositories in cases of potential or likely defaults. Pursuant to the implementation of the July Circular, stock exchanges and clearing corporations sought undertakings from members on access to their bank accounts in case of a potential default. However, this was met with concerns from the market on the scope and reach of such undertakings.

2. Review of the regulatory framework for Investment Advisers

In January 2020, SEBI initiated a consultation process on its proposal for strengthening the regulatory framework for Investment Advisers (**IAs**). Pursuant to the consultation process, changes were introduced in the regulations governing IAs through an amendment notification in July 2020 (**Amendment**) which came into force in October 2020.

Under the erstwhile provisions, IAs were not restricted from providing advisory and distribution services to the same client. However, post the Amendment, non-individual IAs are obligated to have client level segregation at group level for investment advisory and distribution services, i.e. the same client cannot be offered both advisory and distribution services within the group. Further, non-individual IAs are required to appropriately segregate their activities as investment advisers and distributors.

Some of the other changes the Amendment introduced are:

(a) personnel requirements (such as appointment of principal officer by the IAs, qualification requirements of the principal officer and persons associated with investment advice);

(b) increased net worth requirements;

(c) submission of audit report to SEBI; and

(d) permission to provide implementation services to advisory clients through direct schemes/ products in the securities markets. However, IAs are precluded from receiving any consideration (including fees/ commissions, etc.) for such services.

3. Additional clarifications on the digital database under insider trading laws

In 2018, SEBI had introduced a provision in the SEBI (Prohibition of Insider Trading) Regulations (**PIT Regulations**) regulations directing all listed companies to create and maintain a 'structured digital database' (with appropriate audit trails, internal controls, and time stamps) with the names and PAN (or equivalent identifier) of those who received unpublished price sensitive information (**UPSI**).

Through a clarification in July 2019 and an amendment in July 2020, the requirement of creating the database was extended to all SEBI registered intermediaries and fiduciaries (such as audit firms, law firms, consultants, etc.) that handled UPSI. It was also clarified that this database must specify the nature of the UPSI involved and details of persons with whom such information has been shared by original recipients. The data so collated is to be preserved for 8 years. However, in the event of receipt of any information from SEBI on an ongoing investigation or proceedings, the relevant information in the structured digital database must be preserved till the completion of such proceedings.

Expanding on the requirements regarding the database, SEBI, through revised FAQs issued in October 2020, further clarified that each entity must also maintain details of other advisers and firms as well as natural persons involved in the price-sensitive event.

4. Clarifications pertaining to fraudulent and unfair trade practices

In furtherance of its mandate to curb fraudulent and unfair trade practices in the securities market, and to strengthen the enforcement mechanism, SEBI amended the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (**PFUTP Regulations**) on 19 October 2020. The amendment clarifies, with retrospective effect, that acts involving diversion/ misutilisation of funds/ assets or concealment as well as manipulating the books of accounts or financial statements of listed companies are deemed to be unfair trade practices. As such, the element of dealing in securities or the element of inducing others to deal in securities need not be specifically proved in such cases.

5. Bilateral Netting of Qualified Financial Contracts Act, 2020 and related notifications

With a view to reduce credit risk exposure and systemic risk in the financial market, the Bilateral Netting of Qualified Financial Contracts Act, 2020 (**Netting Act**) was notified with effect from 1 October 2020. The Netting Act, based on the Model Netting Act by the International Swaps and Derivatives Association, confirms the enforceability of bilateral netting and provides the framework for offsetting claims between two parties to a financial contract in order to determine a single net payment obligation.

The Netting Act covers qualified financial contracts (**QFCs**) (to be notified by the Central government, or the RBI/ SEBI/ Insurance Regulatory and Development Authority of India/ International Financial Services Authority) entered into on a bilateral basis between Qualified Financial Market Participants (**QFMP**), either under a netting agreement or otherwise, where at least one of the participants is regulated by any of the regulators mentioned above. The definition of QFMP is broad, and includes not only regulated entities (such as banks, insurance companies, pension funds, etc.), but also individuals, partnership firm, company, any other person or body corporate and includes any international or regional development bank or other international or regional organisation. Further, regulators are permitted to specify any other regulated entity as a QFMP.

On 9 March 2021, in exercise of its powers under the Netting Act, the RBI (i) notified 'derivative' (as defined under the Reserve Bank of India Act, 1934 (**RBI Act**)) and 'repo' and 'reverse repo' (each as defined under the RBI Act) as QFCs for the purposes of the Netting Act; and (ii) specified the following entities as QFMPs: (a) entities licensed by the RBI to do banking business but not included in the second schedule to the RBI Act, (b) Export-Import Bank of India, (c) National Bank for Agriculture and Rural Development; (d) Small Industries Development Bank of India; (e) National Housing Bank, (f) Factors; and (g) Asset Reconstruction Companies. Subsequently, on 30 March 2021, the RBI also issued amendments to the prudential guidelines in this regard.

Actions under the Netting Act are ring fenced from any adverse impact of insolvency laws, including the Insolvency and Bankruptcy Code, 2016.

Please click here for a more detailed analysis.

6. Enhanced governance norms for mutual funds and alternative investment funds

In order to enhance governance obligations of mutual funds (**MFs**) and alternative investment funds **(AIFs**) investing on behalf of, and for the benefit of their investors, SEBI introduced a stewardship code for all MFs and AIFs in relation to their investment in listed equities in December 2019. The code was slated to come into effect from 1 April 2020, however, its implementation was deferred to July 2020 on account of the pandemic.

Being institutional investors in the investee company, the code imposes obligations on MFs and AIFs in relation to engagement, supervision, intervention, voting decisions, avoidance of conflict, etc. The code also requires MFs and AIFs to report compliance with stewardship obligations to their investors.

Separately, through a circular dated 5 March 2021, SEBI issued additional guidelines on voting by mutual funds in investee companies, so as to foster transparency and exercise of greater diligence. The circular identifies certain specified matters on which mutual funds will be compulsorily required to vote with effect from 1 April 2021, including matters pertaining to corporate governance, changes to capital structure, appointment and removal of directors, related party transactions, management compensation, etc., as well as any matter that may affect the interests of the unitholders and/ or shareholders.

7. Amendments to the MF regulatory framework

To bring about greater accountability to the functions performed by fund managers and dealers, SEBI introduced a code of conduct through an amendment to the SEBI (Mutual Funds) Regulations, 1996 (**MF Regulations**) on 29 October 2020. The amendment requires the chief executive officer (regardless of the designation) of the asset management company (**AMC**) to ensure that the AMC has adequate systems in place to ensure compliance with this code, and report any breach to the board of the AMC and the trustee.

SEBI also undertook a comprehensive review of the MF Regulations from a policy change perspective and notified certain key amendments to the MF regulatory framework with effect from 5 March 2021.

One such key amendment was in relation to the relaxation in the profitability criteria for being eligible as a sponsor of an MF. Prior to the amendment, to be eligible as a sponsor one of the prescribed eligibility criteria for an entity was a profitability criteria i.e., to have profits in three of the last five years, including the fifth year. To facilitate innovation, expansion, and new entrants in the mutual fund sector, SEBI has now eased this profitability criteria. Henceforth, entities that do not meet the prescribed profitability criteria would still be eligible to set up an MF or acquire an AMC, if the specified net worth criteria (INR 100 crores) is met, and is maintained on a continuous basis till the satisfaction of the profitability criteria. Additionally, through the amendment, the reporting requirements and compliances of the AMC and trustee have been made more robust. The scope of key personnel of AMC has also been expanded to ensure better compliance.

8. Key changes approved by SEBI pursuant to its board meeting held on 25 March 2021

On 25 March 2021, the SEBI board considered and approved various amendments to the prevalent regulatory framework. While the amendments are yet to be notified, some of the key changes approved are:

(a) rationalisation of the framework pertaining to the reclassification of promoter/ promoter group entities;

(b) requirement of prior approval of SEBI in case of a change in control of a portfolio manager;

(c) key amendments to the listing regulations, such as (a) revised norms for disclosures by listed entities in respect of analyst/ institutional investor meets; (b) applicability, constitution and role of risk management committee; (c) requirement for formulation of the dividend distribution policy; (d) harmonisation of timelines for submission of periodic reports by companies (such as shareholder pattern, corporate governance report and statement of investor complaints); (e) introduction of business responsibility and sustainability report for top 1000 listed companies (by market capitalisation) on a voluntary basis for FY 202122, and on a mandatory basis from FY 2022 23, etc.

9. RBI introduces Margin for Derivative Contracts Regulations, 2020 under foreign exchange norms

In October 2020 and February 2021, the RBI notified regulations and issued directions to regulate the posting and collection of margin for permitted derivative contracts between a person resident in India and a person resident outside India. The framework provides clarity on the nature of, and the manner in which authorised dealer (**AD**) banks may post or collect margins and interest thereof within and outsider India, whether on their own account or on behalf of their clients.

10. Legal Jurisprudence during the year

Despite the challenges of the pandemic, courts and regulators continued to discharge their judicial, investigative and supervisory functions .

(a) The much-awaited decision of the Supreme Court of India in the Tata-Mistry dispute was pronounced on 26 March 2021. At the heart of the dispute was the removal of Cyrus Mistry as the executive chairman of Tata Sons, and subsequently, as the director of Tata Sons and other companies within the Tata group. While answering all legal questions in favour of the Tata group, the Supreme Court held that the allegations of oppression and prejudice could not be sustained, and that Cyrus Mistry could not be reinstated as director on the boards of various Tata group entities.

One of the interesting aspects of the decision is the observation made by the Supreme Court regarding the duty of directors, in that a nominee director owed fiduciary duties to two entities, one of which was the shareholder that nominated such a director, and the other, the company on whose board the director is nominated. Given the prominence that the Supreme Court has accorded to a nominee director's duties to its nominating shareholder, it appears that such duties may emerge differently and gain subjectivity, based on the identity and nature of the nominating shareholder, which in the case of this dispute were public charitable trusts and therefore, less controversial. This is one of the first decisions to interpret directorial responsibility under the Companies Act, 2013 and may have far-reaching implications in the Indian corporate governance landscape.

(b) In relation to the enforcement of insider trading norms, the orders in the WhatsApp leak case and the Manappuram Finance Limited (**MFL**) case are of particular importance.

(i) In the WhatsApp leak case, SEBI penalised individuals employed with financial intermediaries for sharing financial information of certain listed companies, prior to their publication. These cases involved penalising the tippee-turned-tipper, when the original tipper could not be traced. The question was whether the transmission of information by the tippee to other persons over WhatsApp constituted communication of UPSI in breach of the insider trading regulations. In arriving at its decision, SEBI rejected the contention raised that the information shared was in the nature of 'heard on street' (i.e., a common practice among traders, market analysts, institutional investors etc. whereby unsubstantiated gossip is widely shared and is clearly understood as speculation/rumours in the market), and thereby available to the public, and observed that: (a) information was not generally available, but instead was circulated in a closed group; and (b) information was not based on market research/ generally available information.

On 22 March 2021, the Securities Appellate Tribunal (**SAT**) set aside the SEBI order. In doing so, it considered and analysed the definitions of UPSI and 'insider' under the PIT Regulations to arrive at the conclusion that generally available information could not be regarded as UPSI, and that information could constitute UPSI only when the recipient of such information had knowledge of its nature as UPSI.

(ii) In the MFL matter, SEBI was concerned with the trades executed by certain AMCs and whether they were motivated by certain information in a research report published by Ambit Capital Private Limited (**Ambit**). The allegation was that MFL had shared this information with Ambit, prior to it being disclosed to the stock exchanges and that trading by the AMCs, as recipients of the research report, would be insider trading. Interestingly, in the orders passed in this matter, SEBI exculpated the AMCs by holding that these persons could not have known that the research report contained UPSI, since the same were said to be compiled on the basis of publicly available information. As such, the trading entities were extended the benefit of being *bona fide* unaware tippees.

Please click here for a more detailed analysis.

(c) Recently, SEBI also shed light on the interpretation of certain provisions of the SEBI (Investment Advisers) Regulations, 2013 through its order in respect of *Money Maker Research Pvt Ltd and others*. It held that:

(i) investment advisers are required not only to communicate the client's risk profile prior to collection of any fees or payments, but also, the manner in which such categorisation is arrived at;

(ii) any fees collected for rendering investment advice has to be reasonable and that it cannot be disproportionate to the annual income or the proposed investments by the client; and

(iii) investment advice should necessarily correspond to the risk appetite of its recipient.

(d) In its order in the matter of *Kirloskar Brothers Limited*, SEBI penalised certain individuals, including directors, for dealing in securities while in possession of non-public information. In doing so, it clarified that:

(i) Section 12(A)(e) of the SEBI Act, 1992 prevents a person from dealing in securities if such person possesses any of the two categories of information, i.e. material information ***or*** non-public information, in the manner prohibited by any of its regulations;

(ii) where the non-public information is price sensitive, dealing in securities is regulated under the PIT Regulations; and

(iii) dealing in securities while in possession of the non-public information / material information which undermines ethical standards and good faith dealings between parties engaged in business transactions, is unfair trade practice which is prohibited under PFUTP Regulations.

However, this order has been partially stayed by the SAT through an interim order passed in December 2020.

LOOKING AHEAD

Drawing from the experience of a tumultuous FY 2020-21, the trend of virtual hearings and conferences by regulators may become more frequent and regular. It is expected that the measures put in place by regulators to maintain resilience of market as well as market participants are likely to continue in the near future.

With a legal framework to govern data protection and privacy on the horizon, we expect a major change in policies and procedures adopted by data collectors and processors in order to comply with this new law.

The Netting Act is likely to have a major impact in over the top (**OTC**) derivative transactions by ensuring that financial participants are not required to set aside more capital for trading in the OTC derivatives market. Given its potential to reduce hedging costs and liquidity requirements, it will also encourage greater participation in credit default swaps.

In its commitment to strengthen and revitalise the regulatory framework for derivatives, the RBI has proposed draft directions in relation to (a) credit derivatives and rupee interest rate derivatives transactions undertaken in OTC markets and on recognised stock exchanges in India; (b) market makers in OTC derivatives; and (c) variation margins. Upon their notification, these directions should provide additional clarity on the regulatory framework and encourage greater participation in derivatives.

In January 2021, the RBI issued a discussion paper proposing a scale-based regulatory approach for NBFCs, with an objective to replace the existing one-size-fits-all regulatory approach. The revised framework proposes that the degree of regulation should be commensurate with the systemic significance of the NBFC, in terms of risk the entity poses to the financial system and scale of its operations. Upon finalisation, the regulatory framework for NBFCs is likely to undergo substantial changes.

Additionally, SEBI's proposed legislative reforms in relation to independent directors, particularly the dual vote mechanism for the appointment and removal of independent directors, as well as the grant of performance-based compensation to independent directors, aligned with the general principle of more 'skin in the game' is likely to have a steady but profound impact not only on the institution of independent directors in India, but also on the role of public shareholders and shareholder activism.

For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed ***here****.*

TRILEGAL

Update

Dispute Resolution: Legal Milestones Financial Year 2020-21 And A Look Ahead

The financial year 2020-21 was significant in terms of legislative amendments and landmark judgements to assist businesses through the economic slowdown caused by the COVID-19 pandemic and resolve commercial disputes efficiently. Here we discuss some of the major developments in the past year and provide a brief overview on what to expect in the coming financial year.

THE YEAR THAT WAS

For the dispute resolution practice, the past financial year has been shaped primarily by the COVID-19 pandemic. Despite the initial disruption due to the national lockdown imposed by the Indian government, the legislature and judiciary moved swiftly to take measures to ensure fairness to pandemic-affected parties and seamless dispensation of justice.

The Insolvency and Bankruptcy Code, 2016 (**IBC**) remained suspended to prevent further strain on cash strapped businesses affected by the pandemic. An extension to the limitation period declared by the Supreme Court ensured that a party's right to seek relief against a counterparty was unaffected by delays caused due to the pandemic. Further, a significant transition, albeit temporary, of the judicial system to virtual meeting platforms offered a glimpse into the possible future of the Indian justice system.

The year also witnessed key developments in the insolvency and arbitration space. Pursuant to amendments to the IBC and related regulations in March 2020, initiation of corporate insolvency resolution process (**CIRP**) for defaults occurring since the pandemic-induced national lockdown remained suspended. Further, extensions for actions under CIRP and liquidation timelines were provided due to the nationwide lockdown. Separately, the Supreme Court provided much-needed clarity on the ability of the National Company Law Tribunal (**NCLT**) and National Company Law Appellate Tribunal (**NCLAT**) to adjudicate contractual disputes concerning a corporate debtor undergoing insolvency resolution.

Under the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) unconditional stay will now be granted for enforcement of domestic arbitral awards if there is a *prima facie* case of fraud or corruption. Further, courts have rendered certain key decisions including those favoring enforcement of foreign awards; clarifying the validity of reliefs granted in emergency arbitrations; and holding that landlord-tenant disputes (not covered by Rent Control laws) are arbitrable.

MAJOR DEVELOPMENTS IN THE FINANCIAL YEAR 2020-21

1. COVID-19 Related Updates

(a) Amendments to Insolvency and Bankruptcy Code (IBC) and related regulations

Several corporates and businesses were hit hard by the pandemic and consequent lockdowns, leading to severe losses. This caused a domino effect where many corporates found themselves reeling under mounting debts with the threat of insolvency looming large over them.

In this backdrop, the IBC and its relevant regulations were amended in March 2020 and in subsequent months, to provide relief to corporates, particularly medium and small enterprises and protect them from insolvency proceedings and potential closure. These amendments include:

(i) *Moratorium on CIRP initiation*: A moratorium was imposed on operational creditors, financial creditors and corporate applicants from initiating CIRP for any default arising on or after 25 March 2020. At first, the moratorium was only till 24 September 2020. However, given the continuing domino effect of the pandemic on businesses, the moratorium period was extended twice and made operational till 24 March 2021. No further extensions have been notified and hence creditors would now be able to initiate CIRP. For any defaults during the moratorium period, a CIRP can never be initiated. *Please click here for a more detailed analysis.*

(ii) *Extension of timelines for actions during CIRP and liquidation*: The IBC regulations were amended to provide extensions for various actions under the CIRP and liquidation process during the lockdown imposed by the Central government from 25 March 2020 to 29 May 2020. While the regulations provided extension of timelines for only the nationwide lockdown period imposed by the Central government, certain NCLTs provided extension of these timelines in cases where State governments imposed further lockdowns.

(b) Supreme Court extends the period of limitation

Given the difficulties faced by litigants in undertaking filings for various proceedings within the statutory limitation periods during the pandemic, the Supreme Court, *suo moto,* extended the period of limitation for all proceedings from 15 March 2020. In *Sagufa Ahmed's* case, the Supreme Court clarified that it had extended only the period of limitation and not any additional period beyond the limitation period during which the courts/tribunals have the discretion to condone delays. *Please click here for a more detailed analysis.*

Recently, the Supreme Court considered the relative normalcy of the situation and ended the extension of limitation with effect from 14 March 2021. Discontinuing the extension, the Supreme Court clarified that while computing limitation period, the period from 15 March 2020 to 14 March 2021 will stand excluded. Further, parties have been given a period of 90 days from 15 March 2021 to file any legal actions where the limitation period ended during the exclusion period or within 90 days thereafter.

The Supreme Court's extension of the limitation period provided much-needed relief to lawyers and litigants who were struggling to adhere to timelines and limitation periods during the lockdown and due to limited functioning of courts. With the lifting of limitation extension, lawyers are expected to initiate all pending legal actions, in a timely manner.

(c) Supreme Court directs waiver of interest-on-interest during the loan moratorium period declared by the RBI on term loans

With the onset of the pandemic, the Reserve Bank of India (**RBI**) issued circulars permitting banks, NBFCs and other lending institutions to grant a moratorium for payments from term loan borrowers due to COVID-19 (**Loan Moratorium Circulars**). The period of moratorium was initially three months and, thereafter, extended by a period of another three months, i.e., from 1 March 2020 to 31 August 2020. However, during the moratorium period, interest-on-interest would accrue.

Aggrieved by the Loan Moratorium Circulars, several stakeholders filed writ petitions seeking directions from the Supreme

Court on whether the loan moratorium period could be extended further and if a complete waiver of interest and interest-on-interest during the loan moratorium period could be granted. The Supreme Court also considered whether the government can be directed to grant additional sector-wise relief packages. Interestingly, the government had announced an *ex-gratia* scheme waiving interest-on-interest on loan moratorium for borrowers who have borrowed up to INR two crores (INR twenty million).

The Supreme Court reasoned that interest-on-interest in term loans can be charged only in cases of wilful default and not in cases of non-payment during moratorium. Based on this, the Supreme Court directed that interest-on-interest on all loans covered by the Loan Moratorium Circulars should be waived. It further directed all lending institutions to refund or adjust in subsequent instalments, any interest-on-interest collected for the moratorium period. Separately, the Central government's waiver of interest-on-interest on loans up to INR two crores (INR twenty million) was held to be arbitrary. Lastly, the Supreme Court rejected pleas for extension of the moratorium period, total waiver of interest for the moratorium period and sector-wise relief, observing that these are matters of government policy.

The judgement provided clarity on and substantial relief to term loan borrowers. More importantly, it also balanced the interests of the banking industry that feared a collapse if complete interest amounts were directed to be waived.

(d) Other Judicial Decisions

In the case of *Zee Learn*, the Bombay High Court considered if the Loan Moratorium Circulars would also allow moratorium on redemption of debentures. The court held that the moratorium offered by the Loan Moratorium Circulars does not apply to redemption of debentures and mutual funds. The Delhi High Court also issued a similar order. *Please click here for a more detailed analysis*.

In another interesting development, the Delhi High Court, in *Ramanand v. Girish Soni*, held that a tenant cannot claim suspension of payment of lease or rental amount merely on account of non-use of the premises pursuant to the lockdowns imposed to curb the spread of COVID-19, unless the lease agreement provides for a waiver or suspension of rent. *Please click here for a more detailed analysis*.

2. Supreme Court's decision on jurisdiction to adjudicate contractual disputes affecting the ability of a corporate debtor under CIRP to continue as a 'going concern'

In the case of *Astonfield Solar*, the Supreme Court held that a valid termination of a contract with a corporate debtor under CIRP can be stayed if such termination would disable the corporate debtor from continuing as a 'going concern' and result in the certain death of the corporate debtor.

Further, the Supreme Court held that the NCLT and NCLAT have jurisdiction to decide such contractual disputes that arise solely from or relate to a corporate debtor's insolvency. In this regard, the reason provided was that the NCLT is the forum vested with the responsibility of ensuring continuation of CIRP, which requires preservation of the corporate debtor as a going concern. However, the Supreme Court also cautioned that, the NCLT and NCLAT while exercising such jurisdiction should not usurp the legitimate jurisdiction of other courts, tribunals and forums when a dispute is unrelated to the insolvency of a corporate debtor.

3. Arbitration

(a) Amendment to the Arbitration Act

The Arbitration and Conciliation (Amendment) Act, 2021 (**Arbitration Amendment Act**) received Presidential assent on 11 March 2021. Some of the key changes introduced by the Arbitration Amendment Act are:

(i) *Unconditional stay on arbitral award* Prior to the Arbitration Amendment Act, the Arbitration Act did not provide for automatic conditional stays on domestic awards, if the award was challenged before the courts. This entailed courts typically requiring the defeated party to deposit the claim amount with the court pending the challenge. The amendment now provides an exception to this rule. Now, courts must grant unconditional stay on domestic awards if it is *prima facie* satisfied that the contract, arbitration agreement or arbitral award are induced/effected by fraud or corruption. The amendment is applicable to all arbitrations and related court proceedings, irrespective of when the arbitral or court proceedings were commenced.

(ii) <u>*Norms for accreditation of arbitrators*</u> In 2019, the Arbitration Act was amended to introduce a Schedule containing norms for accreditation of arbitrators such as neutrality, equity, best international practices etc. The Schedule attracted criticism as it restricted the ability of parties to nominate arbitrators, especially foreign arbitrators. By way of an amendment, the Arbitration Act, now omits the Schedule and the amended Arbitration Act states that qualifications, experience and norms for accreditation of arbitratorswill be specified by the regulations. These regulations are yet to be notified.

The amendment omitting the controversial Schedule aids party autonomy in arbitrations seated in India and is a welcome step. However, providing for an unconditional stay upon *prima facie* existence of fraud and corruption will likely open a window for disruption, since this could encourage insincere parties to raise claims of fraud and corruption in challenge proceedings to scuttle the enforcement of arbitral awards.

(b) Supreme Court's decision on the validity of an arbitration clause in the event of non-payment of stamp duty on the underlying contract

In the *N.N. Global Mercantile* case, the Supreme Court considered the issue of whether an arbitration agreement would be non-existent in law, invalid or unenforceable, if the underlying contract was not stamped as per the applicable stamping laws. The Supreme Court held that non-payment or underpayment of stamp duty on an underlying contract, does not invalidate an arbitration agreement contained in a contract. Further, due to contrary judgements by coordinate benches on this point, the Supreme Court referred the matter to a Constitution Bench for conclusively deciding the issue.

(c) Supreme Court's decision in Vidya Drolia v. Durga Trading Corporation on arbitrability of tenancy disputes

The Supreme Court settled the long standing issue of arbitrability of tenancy disputes by holding that landlord-tenant disputes (outside of Rent Control laws) are arbitrable as they are not actions *in rem* (against the world) but pertain to subordinate personal rights of the parties in dispute. The court noted that the Transfer of Property Act does not contain a bar against arbitration and carved out an exception for landlord-tenant disputes governed by rent control legislation where specific courts have been designated to exclusively hear disputes. *Please <u>click here</u> for a more detailed analysis.*

(d) Supreme Court's pro-enforcement decision in Government of India v. Vedanta Limited and Ors

This case concerned challenges to enforcement of an arbitral award passed in an arbitration seated in Malaysia, between two Indian parties, namely *Government of India and Vedanta*. Pursuant to arbitration proceedings between the parties seated in Malaysia, the Government of India challenged the award in a Malaysian court on the grounds that the award was in conflict with public policy. The challenge was rejected by the Malaysian court. Vedanta filed an enforcement petition in India, which was challenged before the Delhi High Court by the Government of India on grounds of limitation and it being contrary to the public policy of India.

On the issue of limitation, the Supreme Court ruled that the general limitation of 12 years is not applicable to foreign decrees and therefore, the limitation period for execution of a foreign decree is three years from when the right to apply accrues. Further, on the issue of whether the enforcement of an arbitral award can be refused in this case, the Court observed that the enforcement may be refused only if it violates the most basic notions of morality, justice or public policy of India. The enforcement court would, however, not second-guess or review the correctness of the judgement of the seat courts while deciding the challenge to the award. This judgement again reflects the increasing pro-arbitration stance taken by Indian courts and their positive efforts towards enforcement of foreign awards in India.

(e) Delhi High Court's recognition of 'Emergency Awards'

InFebruary 2021, an interim order was passed by a single judge bench of the Delhi High Court in the *Future Retail v.*

Amazon.com dispute, *prima facie* upholding the validity of emergency relief by an emergency arbitrator in an India seated arbitration between the two Indian parties. In this interim order the single judge held that emergency arbitration provisions under the Singapore International Arbitration Centre Rules are not contrary to the mandatory provisions of the Arbitration Act. A stay on this order was however granted by a division bench of the Delhi High Court, an appeal to which is presently pending before the Supreme Court.

Recently, the single bench of the Delhi High Court also issued its final judgement in the dispute holding that an emergency arbitrator is an arbitrator for all intents and purposes and an order passed by an emergency arbitrator is an order enforceable under the Arbitration Act. The single judge's decision upholding the emergency reliefs reflects the Indian judiciary's effort to uphold party autonomy. Notably, the single judge's judgement has been appealed before and stayed by the division bench of the Delhi High Court. It is also likely that the decision from the division bench would be further appealed before the Supreme Court, who will hopefully settle the issue of validity of emergency arbitrations and enforceability of emergency reliefs.

(f) Gujarat High Court's decision on two Indian parties arbitrating outside India and seeking interim reliefs

The Gujarat High Court in the case of *GE Power Conversion v. PASL Wind Solutions* held that the Arbitration Act does not per se prohibit two Indian parties from choosing a foreign seat of arbitration and an award passed in such an arbitration is not contrary to the public policy of India.

The High Court further considered whether any interim reliefs under Section 9 of the Arbitration Act can be passed by Indian courts pursuant to a foreign seated arbitration by two Indian parties. The High Court observed that apart from domestic arbitrations, Section 9 applies only in cases of foreign seated 'international commercial arbitration', where one party must necessarily be non-Indian. It was therefore, held that Indian courts cannot issue interim reliefs in foreign seated arbitrations between two Indian parties.

This decision of the Gujarat High Court creates an anomaly in so far as it allows two Indian parties to arbitrate abroad but deprives them of the right to avail interim reliefs from Indian courts. This could create practical issues for Indian parties who want to choose a foreign seat of arbitration. An appeal is presently pending before the Supreme Court against the aforesaid decision and we expect that the Supreme Court will conclusively decide the issue of legality of two Indian parties arbitrating outside India and their ability to seek interim reliefs in India.

LOOKING AHEAD

Despite the onslaught of the COVID-19 pandemic and subsequent nationwide lockdowns, the Indian judicial and arbitration system has in the financial year 2020-2021 seen several changes. The year saw significant developments in arbitration law- evincing the consistent, pro-arbitration approach of the Indian courts. It will be interesting to see how the law evolves from here, on various seemingly open issues such as arbitration by two Indian parties at a foreign seat, interim reliefs to such parties and validity of emergency reliefs under Indian law.

Further, March 2020 onwards, insolvency laws were suspended to protect corporate debtors and requisite changes were made to the justice dispensation system to accommodate urgent cases. As the economy now revives itself, what remains to be seen is how the insolvency framework will be amended to balance the interests of corporate debtors with those of creditors who have suffered equally due to mounting defaults of debtors. Additionally, the provisions under the IBC in relation to insolvency of individuals have currently been brought into effect only for personal guarantors of corporate debtors. The year ahead could also witness insolvency provisions in respect of all defaulting individuals being brought into effect.

Lastly, since the judiciary in the past financial year has primarily been hearing only urgent matters, this financial year could see a greater burden on the courts to deal with all matters, urgent or otherwise. It would also be especially interesting to see how much of the accommodations made in the last financial year in terms of provisions for virtual hearings would be permanently adopted and carried forward by the judiciary in future.

For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief *insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed **here**.*

TRILEGAL

Update

White-Collar Crime Investigations: Legal Milestones Financial Year 2020-21 and a Look Ahead

Despite the onslaught of the global pandemic and nationwide lockdowns, enforcement and investigative agencies were aggressively active in 2020. The year also witnessed increased online forensic and internal investigations. This update summarises some of these developments along with our expectations for the year ahead.

THE YEAR THAT WAS

The year 2020 commenced with India being ranked 86th in the Corruption Perception Index of Transparency International (a leading not-for-profit organisation) - a six-rank drop compared to the previous year. The banking sector was severely hit by fraud and corruption-related issues, involving alleged misappropriation of approximately INR 600 billion. Consequently, enforcement and investigative agencies remained busy through the year along with a deeper scrutiny by the regulators.

Given the global impact of the COVID-19 pandemic and various nationwide lockdowns, the year witnessed a shift in the approach and methodology of conducting forensic and internal investigations. Investigators adapted quickly to online methods of collecting data, conducting interviews etc. On the legislative front, much movement was seen, with major developments such as the notification of the Lokpal (Complaint) Rules 2020; enactment of the Companies (Auditor's Report) Order, 2020 (**CARO, 2020**) and amendment of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**SEBI LODR**).

MAJOR DEVELOPMENTS IN THE FINANCIAL YEAR 2020-2021

1. Major Investigations in India

The Central Bureau of Investigation (**CBI**) registered 596 cases, and around one-third of the cases were related to bank frauds. Amongst these cases, a few high profile matters included the alleged fraud concerning, (a) the then fifth largest private sector bank of India (and its MD and CEO, among others); (b) a Hyderabad based engineering and construction company for approximately INR 79 billion; and (c) a Mumbai based export and trading company for approximately INR 36 billion.

The CBI also booked companies and their officials under the newly enacted corporate criminal liability provisions of the Prevention of Corruption Act, 1988. A notable instance was the booking of a Delhi based import/export company on the allegation of providing illegal gratification to the officials of the Inland Container Depot for extending undue favors for inspection and clearance of import assignments. In another case, the CBI also booked a few Kolkata, Delhi and Hyderabad based project and infrastructure companies on allegations of bribery to get undue advantage in securing bids from the Export Promotion Council of Handicrafts.

Recently, the CBI conducted a special drive against multiple defaulting firms which had cheated, diverted funds, and submitted false documents to multiple nationalised banks. The raids were related to more than 30 bank fraud cases amounting to INR 37 billion.

The Enforcement Directorate (**ED**) registered some high-profile cases and also probed various matters and registered cases under the Prevention of Money Laundering Act, 2002. The notable ones included registering a money laundering case against a prominent TV channel in the television rating point rigging scandal and against a Bollywood actress over the allegations of mishandling of a late Bollywood actor's bank accounts. Prominently in the year 2020, the ED also filed charge sheets in the Embraer defence deal money laundering case and ICICI Bank-Videocon money laundering case.

The Serious Fraud Investigation Office (**SFIO**) also showed significant activity this year, investigating the affairs of a Vadodara based power transmission and distribution company, concerning an alleged INR 26 billion bank scam. SFIO also made arrests in relation to an accounting fraud of around INR 65 billion in connection with a Kanpur based company, among others.

2020 was also marked by instances of multiple investigative agencies (such as CBI, ED, and SFIO) investigating a single matter. A prominent example of such involvement can be traced to the probe of a Mumbai based private housing finance company, where CBI, ED and SFIO were all involved.

2. Prominent Legal Developments

In 2019, the government had appointed the first Lokpal (anti-corruption ombudsman) under the Lokpal and Lokayuktas Act, 2013 (**Lokpal Act**). Following this appointment, in 2020, the Indian government notified the Lokpal (Complaint) Rules, 2020 under the Lokpal Act. These rules enable the Lokpal to act on pleas made against public servants in corruption-related issues.

The Companies (Amendment) Act, 2020 was passed soon after the notification of the 2019 amendments to the Companies Act, 2013. While the 2019 amendments decriminalised 16 corporate offences, the 2020 amendments further focused on decriminalising, re-categorising and rationalising of less serious offences. Some 48 sections have been decriminalised, however, the offences involving serious fraud, public interest and which are of non-compoundable nature still attract criminal sanctions.

In addition to the changes in the Companies Act 2013, the CARO, 2020 was introduced requiring certain companies to report all whistle-blower complaints to their auditor. However, the Ministry of Corporate Affairs has deferred the applicability of the CARO, 2020 till 1 April 2021 due to the COVID-19 pandemic. The CARO, 2020 will require applicable companies to take significant steps to improve procedures to deal with whistleblower complaints that they may receive.

This year, the Institute of Chartered Accountants of India (**ICAI**), has issued 13 Forensic Accounting and Investigation Standards, with another eight standards in the pipeline. The standards would be useful for law enforcement agencies, corporates, banks and other stakeholders and will help in formation of common practices and procedures for conducting forensic accounting and investigations.

The Securities and Exchange Board of India (**SEBI**) also amended the SEBI LODR on 8 October 2020, requiring listed companies to disclose to stock exchanges the initiation of any forensic audit. The amendment requires listed companies to disclose the fact of initiation of a forensic audit, the name of the entity initiating the audit, the reasons for the same (if available) and the final forensic audit report (other than where the audit is initiated by regulatory/enforcement agencies).

On the judicial front, the Delhi High Court in the case of *Deepti Kapur v. Kunal Julka* considered the question of whether illegally procured evidence is admissible in courts. The court while permitting a man to place an audio-video recording of his wife's conversation with a friend on record held that any evidence collected by breaching someone's privacy does not automatically make it inadmissible in court. The court further held that even though privacy is recognised as a fundamental right, that alone cannot make evidence collected in breach of that inadmissible.

3. Implementation of the Fugitive Economic Offenders Act, 2018

While the Fugitive Economic Offenders Act, 2018 (**FEO Act)** was enacted in 2019, the impact of its implementation was largely felt in 2020. One such significant action under the FEO Act in 2020 was the ED's confiscation of assets worth INR 3.29 billion of diamond merchant Nirav Modi in connection with an alleged bank fraud (exceeding USD 2 billion) at a Punjab National Bank branch. In another notable case, a Delhi local court declared four accused involved in a multi-crore bank fraud case as fugitive offenders and paved the way for confiscation of their properties.

4. Internal Investigations and the COVID-19 Pandemic

With enforcement agencies being particularly active in the white-collar crime space this year, internal investigations in the Indian corporate market gained significant momentum despite the limited availability of resources during the COVID-19 pandemic. Many investigations initiated in 2020 were pursuant to whistle-blower complaints. Also, a majority of internal investigations were conducted in banking and IT sector companies over allegations of financial misappropriation.

While a majority of the internal investigations were inevitably conducted through online means, this posed a challenge for the companies from a data privacy and data protection perspective. Concerns revolved around the higher standards of data privacy and data protection that companies needed to adopt in these circumstances, such as express consent requirement for data procurement and sharing, protection of sensitive personal data and personal data of the employees, etc.

5. Scrutiny by Foreign Regulators and Multilateral Development Banks

The year 2020 saw only one settlement with US regulators on charges of bribing public servants in India. In this settlement, a US based company engaged in business of production and distillation of beverages agreed to pay a penalty of nearly USD 20 million to resolve a Department of Justice (**DOJ**) investigation into FCPA violations involving its Indian subsidiary. No India related settlements were observed with UK regulators during the year.

Further, the World Bank took action against three Indian companies. It imposed a two-year conditional non-debarment on the Indian entity of a French construction consultancy company for corrupt and fraudulent practices in two World Bank financed projects in India. In another case, an engineering, procurement and construction company based out of Gurgaon was sanctioned with debarment, with conditional release after a minimum period of four years. As a member of a joint venture, bidding on multiple contracts under a World Bank financed project, this Gurgaon based company made some misrepresentations and was found liable for fraudulent practice. Based on the World Bank debarment, the Asian Development Bank also cross debarred some of these Indian entities, but did not pursue any debarment actions of its own this year.

LOOKING AHEAD

In 2021, we are likely to see a continuation of the aggressive approach of the ED through the FEO Act and more actions and confiscations under this Act. Further, the notification of the Lokpal (Complaint) Rules, 2020 could open the floodgate of complaints to ombudsman in months to come.

To cushion the impact of the COVID-19 pandemic and consequently, the ease of doing business in India, reports indicate that the Government may consider further amendments to the Companies Act, 2013. Additionally, the implementation of CARO, 2020 may help curtail fraud at an early stage and lead to an increase in internal investigations conducted by companies.

*For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed **here**.*

Update

Technology, Media and Telecommunications Law: Legal Milestones Financial Year 2020-2021 and a Look Ahead

2020-21 was a remarkable year for the technology and telecommunications sector, forcing companies and governments to rethink the way things worked, resulting in disruptive changes in the sector. While the pandemic fast-tracked some long due legal and policy changes, many other expected changes were put on a slow burner. This update summarises some of these developments along with our expectations for the year ahead.

THE YEAR THAT WAS

As expected, many of the changes in 2020 in the sector were in response to the COVID-19 pandemic. While the last year saw a lot of activity on the regulation of personal data, 2020 marked discussions on the report regulating non-personal data released by the committee constituted by the Ministry of Electronics and Information Technology (**MEITY**). Further, the retail payments space saw a lot of changes, facilitating the proliferation of digital payments in light of COVID-19. The enactment of the Consumer Protection (E-Commerce) Rules, 2020 (**E-Commerce Rules**) also brought focus to consumer protection in the age of e-commerce and online retail. The e-commerce sector also came under additional tax obligations in the form of equalisation levy.

The telecommunication sector saw one of the biggest changes with relaxations to the regulatory framework for Other Service Providers. The introduction of the Wi-Fi Access Network Interface brought the focus on providing wider and easier access to internet across the country.

Anti-trust authorities across the world and in India examined the operations of technology companies, including their data collection and processing activities, for anti-trust measures and consumer protection.

The government also took initiatives in formulating policy and regulation around data in different sectors, such as the Data Empowerment and Protection Architecture (**DEPA**) and the Health Data Management Policy.

MAJOR DEVELOPMENTS IN THE FINANCIAL YEAR 2020-2021

1. Technology and Data Protection

(a) Regulation of non-personal data

The MEITY had constituted a committee of experts (**Committee**) in 2019 to devise a framework for regulation of non-personal data (**NPD**). The Committee released its report for public consultation on 12 July 2020 (**Draft Report**). The Draft Report proposes the introduction of a legislation governing NPD (**NPD Legislation**) and lays down key principles to be incorporated in the NPD Legislation. The report also proposes the establishment of an NPD authority (**NPDA**) to enforce the NPD Legislation. The objective of having an NPD Legislation is to create a framework for establishing India's rights over its NPD and to address re-identification concerns and misuse or harm of NPD.

Pursuant to the public feedback and suggestions received on the Draft Report, the Committee released a revised version of the report on 16 December 2020 (**Revised Report**), for another round of public consultation.

Pleaseclick here for a more detailed analysis.

(b) Developments in relation to retail payments

The retail payments space saw many changes in 2020, with a heavy focus on promoting safe, secure, and seamless payments and innovation. Some of the important developments are:

(i) *Framework for New Umbrella Entity/ entities (**NUEs**) for retail payments*

The Reserve Bank of India (**RBI**) released the Framework for Authorisation of Pan-India New Umbrella Entity/ entities (**NUEs**) for Retail Payments. The scope of activities of such NUEs include setting up and operating payment systems within the retail payment space and operating clearing and settlement systems for banks and non-banks. The NUE must be a company incorporated in India under the Companies Act, 2013, either as a for-profit or a non-profit company, and will be authorised by the RBI under the Payment and Settlement Systems Act, 2007. The NUEs are expected to be interoperable and interact with the National Payments Corporation of India (**NPCI**), the umbrella entity that currently manages retail payments in India.

Pleaseclick here for a more detailed analysis.

(ii) *Streamlining Quick Response (**QR**) Code Infrastructure*

The RBI has directed all banks and non-banks who have their own proprietary QR codes across their merchant networks to move to the United Payments Interface (**UPI**) or the Bharat QR codes (which are interoperable with each other) by 31 March 2022. QR code-based payment is a contactless method where payments are carried out by scanning the QR code through a mobile phone. They are generally considered as a secure and low-cost digital payment option.

The move for all networks to move to UPI or Bharat QR codes has been made to ensure user convenience through better interoperability as proprietary QR codes may not be interoperable with each other. The RBI has also prohibited the launching of any new proprietary QR codes.

(iii) *Framework for Recognition of a Self-Regulatory Organisation for Payment System Operators*

The RBI had envisaged the setting up of a Self-Regulatory Organisation (**SRO**) for Payment System Operators (**PSO**) in its Payment and Settlement Systems Vision 2019-21. Pursuant to this, the RBI released the framework for recognition of an SRO for PSOs in October 2020. Under this framework, the SRO will be required to submit an application to the RBI for a letter of recognition and adhere to any guidelines issued to them by the RBI. The SRO will act as the representative for its members in public discussions and interactions with the RBI. Some of the important functions of SRO will include working towards (i) establishing benchmarks, ethics and behavioural standards, (ii) promoting research and development in the payments ecosystem and (iii) establishing a uniform grievance redressal framework.

(iv) *Volume cap in UPI*

In order to combat the risks arising with the scaling of the UPI ecosystem, the NPCI issued 'Guidelines on volume cap for Third Party App Providers (**TPAPs**) in UPI' (**Guidelines**). Under the Guidelines, payment service providers (**PSPs**) and TPAPs are required to ensure that UPI transactions on their platforms do not exceed 30% of the overall volume of transactions during the preceding three months (on a rolling basis), effective from 1 January 2021. The existing TPAPs who are exceeding this cap will have a period of two years to comply with the Guidelines in phases.

(v) *Increase in limit for e-mandates and transactions with contactless cards*

With an aim to promote the adoption of digital payments in a safe and secure manner, the RBI announced enhanced limits for contactless card payments and e-mandates that allow collection of payments without human intervention, on cards and UPI (including recurring transactions) from INR 2,000 to INR 5,000, effective from 1 January 2021.

(vi) *RBI Regulatory Sandbox*

The RBI in 2019 announced the opening of the first cohort of its Regulatory Sandbox (**Sandbox**) with retail payments as its theme, with an expectation to spur innovation in the digital payments space. In 2020, testing of products under the Sandbox commenced with two entities starting their test phase.

(c) Developments in healthtech

(i) *Data Access and Knowledge Sharing Protocol*

In response to the privacy related controversies following the launch of the Aarogya Setu mobile application (**App**) as a contact tracing tool during the COVID-19 pandemic, an Empowered Group on Technology and Data Management under the Disaster Management Act, 2005 issued a Data Access and Knowledge Sharing Protocol (**Protocol**). The Protocol provided for basic principles on data collection and processing through the App. It also stated the specific purposes for which the data could be used and the circumstances in which it can be shared with parties for processing.

(ii) *Health Data Management Policy*

The Ministry of Health and Family Welfare (**MoHFW**) released a draft Health Data Management Policy (**Policy**) under the National Digital Health Mission (**NDHM**) this year, which was later approved in December 2020. The objective of the Policy is to provide guidance for the creation of a data protection and privacy framework pertaining to health data, for healthcare professionals, governing bodies within the MoFHW, professional bodies and organisations etc.

The Policy provides for a consent framework where data principals must have control of all data relating to them, incorporation of appropriate technological means to guarantee the integrity of access permissions by the data principal and to ensure interoperability across all players in a nationwide integrated digital health ecosystem. The Policy will be rolled out and implemented by the National Health Authority under the MoHFW.

(d) Developments in gaming

(i) *Ban on online real money gaming in States*

In 2020, the States of Andhra Pradesh and Tamil Nadu promulgated ordinances to ban all real money online games within the states including online rummy. This move is despite a 1967 Supreme Court ruling in State of Andhra Pradesh v. K. Satyanarayana and Ors. that 'games of skill' are legal and that rummy for stakes is a game of skill. There is no national level legislation for regulating gaming in the country and the State governments have the power to regulate gaming or gambling within their respective territories. Some states have adopted the Public Gambling Act, 1867 which prohibits public gambling. While most states prohibit only games of chance (and not games of skill), some states like Telangana, Assam and Orissa have a blanket prohibition on all real money gaming, whether they are games of chance or skill.

(ii) *Guidelines for gaming advertisements*

In November 2020, the Advertising Standards Council of India (**ASCI**) introduced guidelines to make real-money gaming advertisements safer and increase awareness amongst users of the financial and other risks involved in online games with real money. The guidelines require certain details of the games to be provided, including a disclaimer containing the financial risks and possibility of addiction, the age requirement of 18 years to engage in the online game, etc.

(iii) *Discussion Paper on Self-Regulation of Fantasy Sports Platforms*

In December 2020, Niti Aayog proposed a government-recognised self-regulatory organisation (**SRO**) for online fantasy sports platforms in a discussion paper. The SRO will be responsible for ensuring that fantasy gaming companies follow applicable rules, resolve customer complaints, and liaise with State governments. This is seen as a step forward to have a national level framework for gaming laws in the country.

(e) FDI in news and digital media

Pursuant to Press Note 4 of 2019 **(PN 4 of 2019**) and subsequent amendments (on 5 December 2019) to the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019 (**NDI Rules**) the government released guidelines on FDI in the news digital media sector. The amended NDI Rules provide that FDI in a company engaged in the business of *'uploading/ streaming of news & current affairs through digital media*' is permitted up to 26%, with government approval. Prior to this, FDI in digital media was unregulated, and the restriction on FDI in news was limited to 26% in print media and 49% in broadcasting content services.

Pursuant to various stakeholders seeking clarifications on the type of entities to whom this is applicable, the Department for Promotion of Industry and Internal Trade clarified that the FDI restrictions would be applicable to the following entities located or registered in India- (i) a news agency which gathers, writes and distributes/transmits news, directly or indirectly, to digital media entities and/or news aggregators; (ii) a news aggregator, which, using software of web application, aggregates news content from various sources, such as news websites, blogs, podcasts, video blogs, user submitted links, etc in one location and (iii) a digital media entity streaming/ uploading news and current affairs on websites, apps and other platforms. This has impacted the operations of various digital news aggregators as well as digital media agencies who were relying on foreign funding to carry out their activities.

Please*click here for a more detailed analysis.*

(f) Amendment to the Information Technology Act, 2000

The Government has commenced internal discussion on amendments to the Information Technology Act, 2000 (**IT Act**) in January 2021. The amendments are expected to include regulation of e-commerce, digital payments, AI, data security, and cyber crime.

The Second Schedule to the IT Act was amended by MEITY in September 2020. The amendment recognises signatures where e-authentication technique and procedure for creating and assessing the subscriber's signature key is facilitated by a 'trusted third-party'.

(g) Consumer Protection (E-Commerce Rules), 2020

The Ministry of Consumer Affairs notified the E-Commerce Rules to regulate the marketing, sale and purchase of goods and services online. The E-Commerce Rules apply to all goods and services sold over a digital or electronic network and include inventory and marketplace models within its ambit. It primarily governs B2C or consumer purchases and users (who are not just consumers) of e-commerce platforms. It imposes specific duties on all e-commerce entities along with additional obligations and liabilities specific to marketplace sellers and marketplace and inventory entities.

Please[click here](#) for a more detailed analysis.

(h) Ban on mobile applications by the government

In June 2020, the MEITY blocked 59 mobile applications (**Apps**) under the IT Act, citing that the activities of the Apps are prejudicial to national security and public order. Section 69A of the IT Act along with Information Technology (Procedure and Safeguards for Blocking of Access of Information by Public) Rules, 2009 allows the government to issue such orders directing an intermediary to block public access to any information on concerns of national security. After the initial blocking order in June 2020, the MEITY during the course of the year passed more such orders, resulting in about 267 Apps being banned. The ban on the Apps has resulted in popular Apps losing a significant user base in India. In January 2021, the MEITY has issued notices to several mobile applications with an objective of permanently banning such Apps in India.

(i) Displaying country of origin on product listings

The government directed e-commerce entities to display the country of origin (**COO**) for all products as mandated under the Legal Metrology (Packaged Commodities) Rules, 2011 (**LM Rules**). The LM Rules contain a provision mandating declaration of 'country of origin' for manufacturers, importers, packers and e-commerce entities. The Consumer Protection (E-Commerce) Rules have also incorporated this requirement. The mandate gained ground in 2020 owing to the 'Atmanirbhar Bharat' and 'Make in India' initiatives of the government. As a result, e-commerce entities were required to make changes to their product listings for new as well as products that were already listed.

(j) Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021

The MEITY, in consultation with the Ministry of Information and Broadcasting, notified the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 (**IDMC Rules**) seeking to regulate intermediaries and publishers in the digital media space. They supersede the erstwhile Information Technology (Intermediary Guidelines) Rules, 2011, and considerably expand the scope to impose additional obligations on social media intermediaries and digital media entities. The IDMC Rules impose certain due diligence requirements on intermediaries. It further imposes additional obligations on certain social media intermediaries and aim to regulate online content by prescribing a code of ethics and a three-tiered grievance redressal mechanism for publishers of digital media. The intermediaries classified as significant social media intermediaries under the IDMC Rules have additional due diligence requirements such as having a local presence and appointing resident officers, identification of first originator of messages, filing monthly compliance reports and use of automated tools to identify and remove unlawful content.

*Please **[click here](#)** for a more detailed analysis.*

(k) Geospatial Data Guidelines, 2021

The Department of Science and Technology (**DST**) released guidelines for acquiring and producing geospatial data and geospatial data services including maps (**Guidelines**). These Guidelines were issued with the aim of liberalizing the regulations in relation to the collection, acquisition and use of geospatial data. Geospatial Data is positional data, with or without attribute data tagged, whether in the form of images, videos, vector, voxel and/or raster datasets or any other type of geospatial dataset in digitized or non-digitized form or web-services. The Guidelines provide for a self-certification regime that all entities who use geospatial data have to follow for demonstrating adherence to the Guidelines and a specific list of sensitive attributes to be shown on any map. The Guidelines permit only Indian entities to undertake certain activities in relation to geospatial data such as collection, storage, generation and dissemination of geospatial data, carrying out surveying activities and using technologies for real-time positioning. The Guidelines liberalize the export of maps and constitutes the Geospatial Data Promotion and Development Committee for governing and promoting activities in relation to geospatial data.

*Please **[click here](#)** for a more detailed analysis.*

(I)
Developments in blockchain and cryptocurrency

(i) *Draft National Strategy on Blockchain*

The MEITY has released the draft National Strategy on Blockchain (**Strategy**), proposing the creation of a National Level Blockchain Framework (**NLBF**) and for adoption of the technology in public and government projects. The NLBF will host multiple blockchain platforms for various sectors which would help in adoption and use at a large scale. The draft Strategy also provides for a roadmap for the implementation and recommends utilisation of existing data center infrastructure, encouraging research, and creating a national resource for providing Blockchain-as-a-service (Baas).

(ii) *The Cryptocurrency and Regulation of Official Digital Currency Bill, 2021*

The Cryptocurrency and Regulation of Official Digital Currency Bill, 2021 (**Cryptocurrency Bill**) has been proposed to be introduced in the Parliament. The Cryptocurrency Bill inter alia proposes the creation of a facilitative framework for a digital currency, which would be issued by the RBI.

2. TELECOMMUNICATIONS

(a) Relaxations to the Framework for Other Service Providers

On 5 November 2020, the Department of Telecom (**DoT**) released the new Guidelines for Other Service Providers (**OSP Guidelines**) overhauling the existing framework for business process outsourcing (**BPO**) in India. The new framework applies only to entities carrying out voice-based BPO activities. Several provisions have been removed such as the requirement for registration, bank guarantees, network diagrams, restrictions on interconnection, and penalty and audit provisions. India's IT sector may now implement modern network structures, work from home facilities and infrastructure sharing for greater efficiency. Security-related obligations such as requiring OSPs to maintain call data records and to avoid toll bypass have been retained.

Pleaseclick here for a more detailed analysis.

(b) Changes to the interconnection framework

(i) *The Telecommunication Interconnection (Second Amendment) Regulations, 2020*

The TRAI has notified the Telecommunication Interconnection (Second Amendment) Regulations, 2020 (**Amendment**), amending the Telecommunication Interconnection Regulation, 2018. Interconnection is the commercial and technical arrangements under which service providers connect their equipment, network and services to enable their customers to have access to the customers, services and networks of other service providers. The Amendment provides for the location of Point of Interconnection (**POI**) for calls between two fixed line networks or between a fixed line network and an NLD network to be mutually decided by the interconnection provider and the interconnection seeker. If the interconnection seeker and interconnection provider fail to agree on a mutual location, then the POI will be at Long Distance Charging Centre (**LDCC**).

(ii) *The Telecommunication Interconnection Usage Charges (Sixteenth Amendment) Regulations, 2020*

In April 2020, the Telecom Regulatory Authority of India (**TRAI**), released the Telecommunication Interconnection Usage Charges (Sixteenth Amendment) Regulations, 2020 (**IUC Amendment**). Interconnection usage charges are charges payable by one service provider to another service provider, in whose network the call terminates. This is paid for covering the network usage costs, as the service provider on whose network the call terminates is required to carry the call to the customers which requires infrastructure investment. The IUC Amendment mandates a non-discriminatory rate of termination charges, for all international calls terminating on a service provider's network and specifies a range within which the charges may be levied. It is pertinent to note that the IUC Amendment is applicable only for international calls. The IUC for domestic calls is zero from January 2021 pursuant to the Telecommunication Interconnection Usage Charges (Fifteenth Amendment) Regulations, 2019.

(c) Judgement on Adjusted Gross Revenue and payment of dues

In 2019, the Supreme Court in *Union of India vs Association of Unified Telecom Service Providers of India etc*. upheld the Telecom Disputes Settlement and Appellate Tribunal's order that certain non-telecom revenues like rent, profit on sale of fixed assets, dividend and treasury income would be included in the definition of Adjusted Gross Revenue (**AGR**), on which a proportionate license fee would have to be paid by Telecom Service Providers (**TSP**) to the government. The review petitions filed against the judgement in 2020 were dismissed by the Supreme Court. However, the Supreme Court has allowed staggered payment of the AGR dues over a period of 10 years. The payment instalments begin from 1 April 2021 and TSPs are required to report the compliance of the direction and the payment details to the DoT. The decision of the Supreme Court allowing the staggered payment of the AGR dues comes as a much-needed relief to TSPs, as some of them were facing the prospect of winding up their operations as a result of upfront payment of the dues. In January 2021, some TSPs have approached the Supreme Court pointing out errors in the calculation of the AGR as claimed by the DoT in the decision.

(d) TRAI Recommendations on Cloud Services

Pursuant to the feedback on the consultation paper on cloud services released in 2019, the TRAI released recommendations for regulating cloud services. The recommendations call for the creation of a registered not for profit industry body working in conjunction with the DoT/TRAI to which the Cloud Service Providers (**CSP**) are required to be members. The scope of the CSPs contemplated under the recommendations is limited to providers offering Infrastructure as a Service (**IaaS**) and Platform as a Service (**PaaS**) in India or to customers in India. The recommendations seek to bring CSPs into a 'light touch' regulatory regime on the basis that they are a service provider under the TRAI Act. This may potentially lead to CSPs being subject to TRAI's oversight, especially in relation to consumer protection and quality of service aspects.

(e) TRAI Recommendations on Over-The-Top Services

Pursuant to its consultation paper on Over-The-Top (**OTT**) Communication Services, the TRAI released its recommendations. The recommendations note that the telecom sector has witnessed a drastic growth with an increase in usage of OTT. As a result, the recommendations essentially call for no regulatory intervention at the moment and allowing market forces to respond to the growth of OTT, as prescribing any regulation now may have an adverse impact on the industry as a whole. However, the situation will be monitored and intervention may be carried out at an appropriate time.

(f) Framework and Guidelines for Wi-Fi Access Network Interface

The Union Cabinet, in order to accelerate the proliferation of broadband internet services and to provide last mile connectivity through public wi-fi network in the country, gave its approval to DoT's proposal for setting up of Public Wi-Fi networks by Public Data Office Aggregators to provide pan-India public Wi-Fi services, known as PM-WANI.

The DoT has also come up with the Framework and Guidelines (**WANI Framework**) for registration of Wi-Fi Access Network Interface. The WANI Framework envisages the provision of broadband connectivity to consumers through public Wi-Fi access points. It also provides details regarding the architecture and the ecosystem.

The WANI Framework has essentially liberalised the resale of bandwidth and is a step towards paving the way for large scale proliferation of broadband without the burden of onerous compliance, license and fees. In furtherance to the WANI Framework, the DoT issued instructions in March 2021 to the licensees to enter into necessary commercial arrangements with Public Data Offices for providing internet bandwidth.

(g) Transparency in Tariff Publications and Advertisements

(i) *Directions on tariff publications and advertisements*

The TRAI issued directions on tariff publishing in September 2020, in light of the (i) introduction of 'transparency' in the tariff framework through the Telecommunication Tariff (63rd Amendment) Order, 2018 (**63rd Amendment Order**) and (ii) inadequacy of the existing requirement of publishing tariff plans in a prescribed format. The directions call on TSPs to make certain specified essential disclosures in relation to specific types of tariff plans such as special tariff vouchers, add-on packs and combo vouchers and also provide for the mediums on which such disclosures must be published.

Similarly, the TRAI also issued directions in tariff advertising in light of the requirement of transparency under the tariff framework.

(ii) *Supreme Court on segmented tariff offers*

The 63rd Amendment Order provides for the disclosure of segmented tariffs by TSPs. The Telecom Disputes Settlement and Appellate Tribunal (**TDSAT**), while hearing the challenge to the 63rd Amendment Order, had permitted TRAI to ask for details of segmented tariffs. This was further allowed by the Supreme Court, which passed an interim direction requiring the TSPs to make these disclosures.

(h) Spectrum Auction

On 1 and 2 March 2021, the Government conducted and concluded the auction for allocation of spectrum in the 700, 800, 900, 1800, 2100, 2300 & 2500 MHz bands.

The DoT thereafter released the provisional results from the auction specifying the service area, band, price per block and company allotted the specific band, subject to scrutiny and approval by the Government. The DoT also clarified that the spectrum usage charges will be levied at 3% of the AGR excluding the revenue from wireline services.

(i) Amendment to telecom licenses on procurement of telecom equipment

The DoT in March 2021 amended the security conditions in various license agreements pertaining to procurement of telecom equipment. Pursuant to the amendments, the Government is empowered through the National Cyber Security Coordinator (**NCSC**) to impose conditions on procurement of telecom equipment on grounds of defence of India or national security. The NCSC will notify the trusted sources, associated telecommunication equipment (**Trusted Products**) and a list of designated sources from where no procurement can be done. Licensees must only connect Trusted Products in its network and seek permission from the NCSC for any upgradation of existing networks utilizing telecommunication equipment not designated as Trusted Products.

LOOKING AHEAD

The dynamism in technology regulation and policy making in FY 2020-21 will likely continue into FY 2021-22. The PDP Bill that underwent revisions and consultations in 2019, was introduced in the Lok Sabha in 2020 and is currently with the Joint Parliamentary Committee (**JPC**). The JPC has proposed to increase the scope of the PDP Bill to include all types of data, including NPD, with a special focus on digitisation and localisation of data. The PDP Bill is also likely to undergo changes in light of the Revised Report on NPD, especially in relation to provisions on the government's access to NPD. The JPC has reportedly suggested 89 amendments to the PDP Bill, including a change in its title. In the recently concluded Parliamentary session, the JPC has been granted an extension up to the first week of the monsoon session 2021 to submit its report. The monsoon session of Parliament is likely to commence in July 2021.The enactment of the Personal Data Protection Bill, along with regulation around non-personal data is expected to put India on the map in relation to a robust framework for data management and regulation.

In the telecommunication sector, this year is going to pave the way for 5G Further, given the government's consultations and regulation around cloud services in 2020, more developments in this space can be expected. TRAI has also carried out consultations on unbundling specific layers of telecommunication such as network, infrastructure and services through differential licensing. The recommendations on the same can be expected in 2021. More relaxations may be expected in the license conditions of Virtual Network Operators (**VNO**), such as relaxations in security conditions, FDI, etc. which will further help providing localised services and last mile connectivity.

The Indian Space Research Organisation (**ISRO)** has also come out with a draft Space Based Communication Policy (**Spacecom Policy**), which is expected to be finalised this year. The Spacecom Policy would serve as the successor to the Satellite Communications Policy of 1997 and will significantly alter the policy landscape of satellite communications in the country. The ISRO also released a draft Remote Sensing Policy which has taken into consideration the advancement of technology and the demand for remote sensing data.

While 2020-21 has laid down considerable groundwork for legislative and policy changes in the technology and telecommunication space, more changes are expected in 2021-22.

*For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed **here**.*

TRILEGAL

Update

Energy & Infrastructure: Legal Milestones Financial Year 2020-21 And A Look Ahead

Various policy initiatives and regulatory changes brought in by the government in the financial year 2020-21 are hoped to have a positive impact and pave the way for greater investment opportunities in the energy and infrastructure sector in India in the year ahead.

THE YEAR THAT WAS

With the black swan impact of the COVID-19 pandemic, much like other sectors, the Indian energy and infrastructure sector was affected to a great extent. The pandemic disrupted the supply chain and derailed project development, with several projects being delayed or postponed. Various structural reforms were proposed by the government to combat the slow growth rate of renewable energy generation and ease investment norms for the infrastructure sector.

With an aim to achieve a USD 5 trillion economy by the Financial Year (**FY**) 2024-25, the government is currently working towards implementing the National Infrastructure Pipeline (**NIP**) which envisages total project capital expenditure in infrastructure in India at approximately INR 111 trillion (approximately USD 1.56 trillion) from 2020 to 2025, in various sectors including energy, roads, urban development, railways, rural and social infrastructure. Recently, during the second review meeting of the NIP, it was highlighted that despite the pandemic, the NIP has managed to achieve substantial progress and has now been expanded to include more than 7,300 projects against 6,835 projects when it was launched in 2019. At present, projects worth INR 44 trillion (approximately USD 619 billion) out of the INR 111 trillion (approximately USD 1.56 trillion) are in the implementation phase and projects worth INR 22 trillion (approximately USD 309 billion) are in the developmental phase. The NIP's progress so far augurs well for the future of the Indian infrastructure sector.

MAJOR DEVELOPMENTS IN THE FINANCIAL YEAR 2020-2021

1. Renewable power

(a) COVID-19 related relief measures

In view of the pandemic, various relief measures were provided to ease the liquidity problems of distribution companies (**Discoms**). Some of these were:

(i) Renewable energy projects were accorded a must-run status during the entirety of the lockdown period imposed due to the outbreak of COVID-19.

(ii) Commissioning timelines were extended by five months for all renewable energy projects which were under-implementation as on 25 March 2020 (date of commencement of the lockdown).

(iii) Till 31 May 2020, a 50% reduction was provided in the payment security mechanism to be maintained by Discoms with the generating companies. Additionally, a moratorium of three months to make payments to generating companies and transmission licensees was also provided.

(b) Waiver of inter-state transmission system charges

The Ministry of Power (**MoP**) extended the waiver of inter-state transmission system (**ISTS**) charges and losses on all solar, wind, and hybrid projects, with or without energy storage, commissioned before 30 June 2023. The waiver is for a period of 25 years from the date of commissioning of the power plants. Further, MoP has recently notified that this ISTS waiver will also be given to those renewable power projects which had their scheduled commissioning date on or before 30 June 2023 but have been granted an extension of time either due to delays caused by the transmission licensee or a government agency or due to force majeure and the power plant is commissioned before such extended date.

(c) Issue of the Electricity (Rights of Consumers) Rules, 2020

The Ministry of Power (**MoP**) has issued the Electricity (Rights of Consumers) Rules, 2020 laying down the rights of power consumers to minimum standards of quality and obligations of distribution licensees. The rules lay down that the prosumers will have the same rights as that of consumers. The rules define a prosumer as a person who consumes electricity from the grid and can also inject electricity into the Discom's network, using the same point of supply.

Further, in relation to solar rooftop systems, the rules mandate net-metering only for loads up to ten kW and gross metering for loads greater than ten kW.

(d) Guidelines for procurement of wind-solar hybrid power through a competitive bidding process

In October 2020, the MNRE issued guidelines for procurement of wind-solar hybrid power through a tariff-based competitive bidding process. The guidelines provide a framework for procurement of electricity from ISTS (inter-state transmission system) connected wind-solar hybrid power projects, with or without storage, through a transparent process of bidding.

(e) Electricity Amendment Bill, 2021

Through the Electricity Amendment Bill, 2021, the government has proposed to delicense the electricity distribution sector, allowing any company who meets the eligibility criteria and registers with the relevant state electricity regulatory commission to supply power in any area. With this amendment, the government intends to improve efficiencies within the electricity distribution sector by creating an environment for greater competition and empowering consumers to switch between Discom networks. The bill also proposes to impose penalties on Discoms which fail to meet their renewable purchase obligations (i.e., fail to procure the minimum prescribed quantum of power from renewable sources).

(f) CERC (Power Market) Regulations, 2021

The Central Electricity Regulatory Commission (**CERC**) has notified Power Market Regulations, 2021. These regulations will be applicable to power exchanges, market participants and over-the-counter (**OTC**) market, and will be applied to (i) contracts transacted on power exchange, (ii) contracts relating to renewable energy certificates, (iii) contracts relating to energy saving certificates, (iv) contracts in the OTC market, and (iv) any other contracts as may be approved by CERC. The regulations also propose the introduction of OTC platform as an electronic platform for facilitating information exchange amongst buyers and sellers of electricity in the OTC market.

(g) Highlights of the energy sector in the Budget speech 2021-22

The Union Budget for the FY 2021-22 lays emphasis on the development of renewable power sources. A few key highlights in relation to the energy sector in the Union Budget are:

(i) Additional capital infusion of INR 10 billion (approximately USD 138 million) to Solar Energy Corporation of India Limited (**SECI**) and INR 15 billion (approximately USD 207 million) to Indian Renewable Energy Development Agency Limited.

(ii) Import duty on solar inverters raised to 20% from 5% and on solar lanterns raised to 15% from 5%.

(iii) Government to launch hydrogen energy mission in the FY 2021-22.

(iv) INR 3 trillion (approximately USD 41 billion) allocated to Discoms over the next five years for financial improvement and infrastructure development.

(v) In line with Power System Operation Corporation in the power sector, an independent gas transmission operator will be set up.

(h) Some challenges faced in the sector

While the developments discussed above were a step in the right direction, certain developments in the sector have hurt investor confidence, such as:

(i) *Delay in signing of power sale agreements*- One of the biggest challenges solar project developers are currently facing is long delays in the signing of power sale agreements (**PSAs**) with the Discoms by the SECI. Typically, SECI first signs a power purchase agreement with the project developers, and then a PSA with the Discoms to sell the power generated by these projects to the offtaker. There is a massive backlog of such unsigned PSAs, which is a primary concern for developers who find it difficult to secure debt funding from lenders who insist on signed PSAs.

(ii) *Threat of curtailment of solar and wind power for commercial reasons*- Although, MNRE has given 'must run status' to renewable energy projects which means that renewable power cannot be curtailed except for grid stability, developers continue to face curtailment of renewable power by Discoms, citing reasons of grid security.

2. Boost to Electric Vehicles (EVs)

(a) Amendment in the revised guidelines and standards for charging infrastructure for EVs

The MoP has issued an amendment to its guidelines and standards for the charging infrastructure of EVs. The amendment has now specified that the tariff for the supply of electricity to the EV public charging stations should not be more than 15% of the average cost of supply of power. This ceiling was not given in the earlier guidelines. Further, the amendment has prescribed definitions of various terms such as battery charging station, captive charging station, public charging station etc.

(b) Electric two-wheelers can operate as taxis

Electric two-wheelers are exempted from the requirement of seeking a permit to operate as a taxi. According to Motor Vehicles Aggregators Guidelines, 2020, State governments would now facilitate the implementation of electric two-wheeler taxis.

(c) Sale of EVs without pre-fitted batteries

To boost the wider adoption of EVs, the Ministry of Road Transport and Highway has announced that all the States and Union Territories can register and sell EVs without pre-fitted batteries.

3. Revival of the Mining Industry

(a) Guidelines for auction of mineral blocks with pre-embedded clearances for mining projects

The Ministry of Mines by way of an order dated 3 June 2020 has issued guidelines for auction of mineral blocks with pre-embedded clearances for mining projects to expedite sale process as well as operationalisation of mineral's blocks. According to the guidelines, each State having mineral resources is required to identify at least five new mining projects for auction with pre-embedded clearance. States will have to set up project monitoring units responsible for completing the preparatory work for obtaining requisite statutory clearances/approval for starting a mining project which, may be transferred to successful bidder seamlessly so that mining operations start without any delay.

(b) Foreign Direct Investment (FDI) permitted in commercial coal mining in India

Under the extant FDI framework, 100% FDI under automatic route in coal mining activities is permitted. However, any FDI in commercial coal mining is subject to applicable laws including Press Note 3 of 2020 under which prior government approval is required for any foreign investment in or acquisition/transfer of an Indian company (directly or indirectly), where the acquirer or beneficial owner of such investment is based out of a country which shares land borders with India.

4. Privatisation of airports

In India, aircraft movement grew at an annual growth rate of more than 9.5%, from 1.60 million in the FY 2016-17 to almost 2.60 million in the FY 2020-21. According to forecasts by the International Air Transport Association, India will overtake the UK to become the third-largest air passenger market by 2024.

With privatisation of six major airports in India, this sector has witnessed a key change in the bidding parameter. The earlier revenue-sharing model has now been replaced with the per-passenger fee model, with the bidder quoting the highest per-passenger fee (which is in the nature of a concession fee payable by the airport operator to the airport authority) winning the bid. The per passenger fee is computed on the basis of the number of embarking and disembarking passengers at the airport. Moving to the per passenger fee model addresses developer's concerns as it offers a more transparent bid parameter and avoids disputes on the calculation of gross revenue.

5. Revised viability gap funding (VGF) scheme

VGF is a grant provided by the Central government with the objective of making an otherwise unviable project, commercially viable. The VGF Scheme is applicable to PPP projects proposed by Central Ministries, State governments or statutory authorities that own the underlying assets.

On 7 December 2020, the government has revised the earlier VGF scheme and has issued an updated Scheme for Financial Support to Public Private Partnerships in Infrastructure (**2020 VGF Scheme**), with a projected outlay of INR 81 billion (approximately USD 1.14 billion). The 2020 VGF Scheme provides a push to the social infrastructure sector in India by specifically earmarking certain amounts of VGF to be allotted for the purpose of developing social infrastructure projects, while also extending the existing scheme to continue lending support to other infrastructure projects.

6. Setting up of an independent Central Transmission Utility

MoP, through its notification dated 9 March 2021, notified the setting up of the 'Central Transmission Utility of India Limited', a government company and wholly-owned subsidiary of Power Grid Corporation of India Limited (**PGCIL**), as the

'Central Transmission Utility' (**CTU**), to undertake and discharge all functions of CTU pursuant to the provisions of the Electricity Act, 2003. The CTU's functions include undertaking transmission of electricity through ISTS and planning and coordination in relation to ISTS.

LOOKING AHEAD

India has set its sight on becoming a USD 5 trillion economy by the FY 2024-25. If India is to achieve this target, it will necessarily need to build and expand a strong network of quality infrastructure assets, which will form the backbone for the Indian economy to grow and flourish. While government support is fundamental to achieving this, the speed and efficiency of the build out will depend to a large extent on the level of commitment shown by private investment and India's ability to attract long-term strategic investments from the top global players.

India has in the previous two decades focused mainly on the development of core infrastructure sectors such as power, roads, airports, etc., and it is now imperative that we turn our attention to a more holistic and inclusive approach to development, and look to innovative solutions (including PPP models) to initiate and hasten the development of social infrastructure assets alongside our continued efforts to further strengthen our core assets.

Some of the aspects that could have a positive impact on the sector in the FY 2021-22 are:

- The Indian government is planning to invest USD 1.83 billion to develop airport infrastructure and aviation navigation services by 2026. The positive financial outlook for the Indian airport sector is buttressed by the evolution of the PPP model, with standard form contracts in place, an independent regulator as well as potentially significant gains to be made from non-aeronautical revenue. Despite the short-term impact of COVID-19, India retains the potential to become the second largest, aviation market in the world over the next two decades.

- For the first time, SEBI has registered a central public sector enterprise in the power sector - Power Grid Infrastructure Investment Trust. This marks the beginning of asset monetisation of transmission assets of Power Grid.

- The Electricity Amendment Bill, 2021, if passed and notified by the legislature, will overhaul the electricity sector as previously discussed.

- So far, the policy and regulatory environment has allowed the EV market to grow. Experts estimate that the market for EV infrastructure in India is projected to grow at a staggering 40% compound annual growth rate between 2019 and 2025.

- Under the NIP, investments worth INR 25 trillion (approximately USD 352 billion) are envisaged in the energy sector, INR 16 trillion (approximately USD 225 billion) in irrigation, rural agriculture and food processing, INR 20 trillion (approximately USD 281 billion) in the highways sector, INR 16 trillion (approximately USD 225 billion) each in mobility and railways and an INR 14 trillion (approximately USD 197 billion) in digital infrastructure, among other sectors. The strong focus on social infrastructure (higher and school education, health and family welfare, sports, and tourism) in the NIP, would help India in reviving the economy and maintaining investor confidence while at the same time balancing social and welfare objectives in the aftermath of the ongoing pandemic.

For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed ***here****.*

TRILEGAL

Update

Direct Taxation: Legal Milestones Financial Year 2020-21 and a Look Ahead

The financial year 2020-21 witnessed key changes to the direct tax regime such as the overhaul of the dividend distribution tax and expansion in the scope of the equalisation levy provisions. Budget 2021 largely focused on simplification of legal provisions and procedures. This update summarises some of the major developments in the past year along with our expectations for the year ahead.

The direct taxation regime witnessed some significant developments in 2020 in terms of structural tax reforms and noteworthy tax rulings. The major reforms that were introduced include faceless appeals, abolition of dividend distribution tax and introduction of taxation of dividend income in the hands of shareholders and the expansion of equalisation levy provisions to include digital transactions in the e-commerce space. Additionally, to incentivise investments, tax exemption was granted to certain incomes of sovereign wealth funds and global pension funds. A new tax regime has also been introduced for Category-III Alternative Investment Funds (**AIFs**) located in International Financial Services Centres (**IFSC**).

To provide interim relief from the impact of the COVID-19 pandemic, tax authorities have introduced certain interim measures, for instance, relaxation in tax residency norms for the financial year 2019-20 for expatriates stranded in India due to lockdown restrictions and reduction in the tax withholding rates. *Please click here for a more detailed analysis.*

For the financial year 2020-21, the tax authorities have requested individuals facing double taxation because of being stranded in India due to the COVID-19 pandemic to file prescribed forms by 31 March 2021. After examining possible situations of double taxation based on such filings, the authorities may consider granting general or specific relief. *Please click here for a more detailed analysis*.

The Budget 2021 seeks to enhance transparency and administrative ease by focusing on simplification of legal provisions and procedures, thereby reducing litigation. However, a few proposals may lead to tax uncertainty and ambiguity. The Finance Act, 2021 has received presidential assent on 28 March 2021.

MAJOR DEVELOPMENTS IN THE FINANCIAL YEAR 2020-21

1. Abolition of dividend distribution tax

Prior to 1 April 2020, in addition to the income-tax chargeable in respect of the total income of domestic companies and mutual funds, any amount declared, distributed or paid by way of dividends was subject to dividend distribution tax**(DDT**) at an effective rate of 20.56%. Such dividend was then exempt in the hands of shareholders (or unitholders).

The Finance Act, 2020 abolished DDT and instead, the classical system of taxation of dividends was re-introduced. Under these provisions, dividend income is subject to tax in the hands of the shareholders (or unitholders) at the applicable tax rate. The domestic company declaring dividend is required to withhold tax at the rate of 10% (plus applicable surcharge and cess) on dividends paid or payable to resident shareholders, and 20% (plus applicable surcharge and cess) on dividends paid or payable to non-resident shareholders.

Unlike the erstwhile DDT regime, where the availability of treaty relief in respect of dividend income was a contentious issue, under the newly introduced classical regime, non-resident shareholders are clearly eligible to avail of the concessional rates of tax applicable to dividend income as provided in the treaty (if any) between India and their country of tax residence.

2. Expanded scope of equalisation levy provisions

Through the Finance Act, 2020, the government has brought in amendments expanding the scope of 'equalisation levy' to cover non-resident 'e-commerce operators' supplying goods or services in India. The Finance Act, 2016 had originally introduced the concept of equalisation levy, at a rate of 6% on the consideration payable to non-residents for provision of digital advertising space and other services relating to online advertisement. With effect from 1 April 2020, the Indian government has enlarged the scope of equalisation levy to cover non-resident e-commerce operators.

Specifically, as per the Finance Act, 2020, an equalisation levy of 2% is payable on the amount of consideration receivable by an '*e-commerce operator*' from '*e-commerce supply or services*' made or provided or facilitated by it to:

(a) a person resident in India; or

(b) a non-resident in specified circumstances, i.e.,

(i) sale of advertisement, which targets a customer who is resident in India or a customer who accesses the advertisement through an internet protocol (**IP**) address located in India; and

(ii) sale of data collected from a person who is resident in India or from a person who uses an IP address located in India; or

(c) a person who buys such goods/services using an Indian IP address.

'*E-commerce operator'* has been defined as a non-resident who owns, operates or manages digital or electronic facility or platform for online sale of goods or online provision of services or both. Further, '*e-commerce supply or services'* in this context means:

- online sale of goods owned by the e-commerce operator; or

- online provision of services provided by the e-commerce operator; or

- online sale of goods or provision of services or both, facilitated by the e-commerce operator; or

- any combination of activities listed above.

The equalisation levy is required to be paid to the Indian government on a quarterly basis. Further, for certain prescribed situations, a non-resident e-commerce operator is excluded from the ambit of equalisation levy provisions. It has also been clarified that amounts subject to equalisation levy would not be subject to income tax.

3. Tax exemption for sovereign wealth funds and pension funds

To incentivise investments in the infrastructure sector, the government has introduced tax exemptions for specified persons (fulfilling prescribed conditions) investing in this sector. On a broad level, the exemption would be available to (i) sovereign wealth funds, (ii) wholly owned subsidiaries of the Abu Dhabi Investment Authority, and (iii) foreign pension funds in respect of interest, dividends, and long-term capital gains income from investments made in specified infrastructure sectors. The law prescribes that eligible investments are those made on or after 1 April 2020 and up to 31 March 2024 and that have been held for at least three years.

4.
Pre-deposit of 20% of disputed demand for grant of stay by Income Tax Appellate Tribunal

Certain circulars issued by the tax department stipulated a pre-condition of 20% deposit of the disputed demand for grant of stay at the first appellate level. However, such circulars were not binding on the Income Tax Appellate Tribunal (**ITAT**).

Through the Finance Act, 2020, the government introduced amendments curtailing the ability of the ITAT to grant stay without a pre-deposit of tax by the taxpayer. Accordingly, under the new provisions, a stay may only be granted by the ITAT subject to the taxpayer pre-depositing at least 20% of the amount of the demand or furnishing security of equal amount.

5. New tax regime for Category III AIF located in IFSC

The characterisation and taxability of income of Category-III Alternative Investment Funds (**CatIII AIFs**) has historically been a controversial issue. The government has brought in amendments through the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (**Taxation Act**), which brings some clarity with respect to taxation of income of Cat-III AIFs located in IFSC. Key amendments under the new regime are:

(a) Introduction of exemptions

Prior to the amendments, tax exemption was available in respect of income of Cat-III AIFs located in IFSC from transfer of specified securities listed on a stock exchange located in IFSC. The amendments seek to also provide tax exemption in respect of:

(i) Income received by a Cat-III AIF located in IFSC as a result of transfer of securities (other than shares of an Indian company);

(ii) Income (interest/dividend) from securities issued by a non-resident and where such income otherwise does not accrue or arise in India;

(iii) Income from securitisation trust under the head profits and gains from business and profession to the extent such income is attributable to units held by non-residents;

(iv) Income received by unit holders from Cat-III AIF located in IFSC or on account of transfer of units of Cat-III AIFs located in IFSC.

These changes not only seek to bring Cat-III AIFs located in IFSC at par with Foreign Portfolio Investors (**FPIs**), but also provide certain additional incentives for investing through IFSC. For instance, while capital gains income earned by FPIs on transfer of debt securities issued by Indian companies is subject to tax in India, such income would be tax exempt in case of Cat-III AIFs located in IFSC.

(b) Tax rates for Cat-III AIFs located in IFSC at par with FPIs

The income tax laws provide a special regime for the taxation of income of FPIs. The Taxation Act has amended the provisions to provide flat rates of tax for taxable income of Cat-III AIFs located in IFSC (as well to the extent of income that is attributable to units held by non-resident investors). As a result, the tax rates applicable to Cat-III AIFs located in IFSC are now at par with those applicable to FPIs (except for dividend and interest income tax rates, which are more favorable for Cat-III AIFs located in IFSC, being 10%, as compared to 20% applicable to FPIs).

6. Direct tax jurisprudence

(a) Payment for resale / use of computer software not in the nature of 'royalty'

The taxation of income from the sale of computer software has been a litigious issue in India. The Indian tax authorities have generally taken a position that payments made by (resident as well as non-resident) distributors and end users of software should be characterised as 'royalty', irrespective of the nature of rights acquired by such distributors and end users in the software. On the other hand, taxpayers have contended that such payments cannot be characterised as royalty (particularly under treaty provisions), considering the limited rights granted to the distributors and end users in the software (i.e. a limited right to use / re-sell the software, without grant of rights of the copyright owner).

In a landmark decision concerning a batch of 103 appeals (with the lead case of Engineering Analysis Centre of Excellence Private Limited), a three-judge bench of the Supreme Court has ruled that payments made to non-residents for purchase of software cannot be taxed as royalty. The ruling has put to rest a two-decades long dispute between taxpayers and the tax authorities. In the ruling, the Supreme Court analysed key terms of agreements entered into by parties for the purchase / use of software in conjunction with the relevant provisions of the Indian copyright and tax laws to hold that a limited right to use software, without grant of rights of the copyright owner, does not qualify as grant of copyright. Hence, such payments would not partake the characterisation of royalty.

This ruling provides certainty to several taxpayers and will apply to a wide range of software related transactions.

(b) Tax rates on dividends specified in the treaty override the provisions of DDT

As previously discussed, until the enactment of the Finance Act, 2020, domestic companies were required to pay DDT on declaration of dividends, while such dividend was tax exempt in the hands of the shareholders. Due to the tax exemption available to the shareholders, the availability of treaty relief (i.e. restricting DDT to the lower rate of tax provided in the relevant tax treaty) to non-resident shareholders was a contentious issue.

On 13 October 2020, the Delhi bench of the ITAT in the case of *Giesecke & Devrient Pvt Ltd v. ACIT* held that the beneficial tax rate under the treaty will override the provisions of DDT. In its ruling, the ITAT observed that DDT was introduced as a matter of administrative convenience and was, for all intent and purposes, a charge on dividends in the hands of shareholders. In terms of economic cost, the burden of DDT was discharged by the shareholders.

Further, the Tribunal noted that DDT was introduced in 1997 while the relevant tax treaty (India Germany, in this case) was notified in 1996. Accordingly, since DDT was introduced after the treaty came into force, the tax rates specified in the tax treaty must prevail over the DDT.

While the ruling is based on the principles of equity and economic substance, it has given rise to certain fundamental questions from a technical-legal perspective that will have to be answered by the higher courts in the course of appellate proceedings.

(c) Karnataka High Court upholds Special Bench ruling in Biocon allowing ESOP discount as a deductible expenditure

Employee Stock Option Plans (**ESOPs**) are frequently utilised by companies as an employee retention tool. Generally, in a conventional ESOP scheme, the company undertakes to issue shares to its employees at a future date, at a price usually lower than the current market price. The employees acquire the right to exercise the options on completion of the vesting period.

In the present case, the taxpayer (i.e. Biocon) claimed a tax deduction of *pro-rata* ESOP discount debited to its profit and loss account as employee compensation expense. The tax authority disallowed the deduction, based on the reasoning that the ESOP discount was a contingent expense since there was no certainty that the options would vest. The first appellate authority upheld the tax authority's order. Aggrieved, the taxpayer appealed before the ITAT. The division bench of the ITAT referred the case to the Special Bench in view of conflicting decisions on this issue between different benches of the ITAT. The Special Bench ruled in favour of the taxpayer and held that discount provided under an ESOP scheme represents certain consideration for services rendered by employees and therefore would be a deductible expenditure.

On further appeal filed by the tax authority**,** the Karnataka High Court upheld the Special Bench ruling and held that by undertaking an obligation to issue shares at a discounted price at a future date, the taxpayer had incurred an obligation towards remunerating the employees for their services, which is nothing but expenditure. Hence, for tax purposes, the taxpayer was entitled to claim a tax deduction of the ESOP discount.

In the absence of specific provisions in the statute, the ruling has provided a measure of certainty to taxpayers in respect of tax deductibility of ESOP discount.

(d) Karnataka High Court's ruling reiterates no withholding obligation in secondment arrangements

In a typical secondment arrangement with a foreign entity, the Indian entity reimburses the foreign entity for the costs incurred by the foreign entity in respect of the individuals seconded to the Indian entity. The characterisation of such reimbursements has been a controversial issue, with tax authorities treating such reimbursements as fees for technical services (**FTS**) received by the foreign entity from the Indian entity and therefore liable for withholding tax, instead of treating them as pure cost reimbursements that are not exigible to withholding tax.

In *DIT v. Abbey Business Services India Pvt Ltd,* the Karnataka High Court has reaffirmed the view that reimbursement by a taxpayer to the foreign entity of expenses incurred by the seconded employees cannot be recharacterised as FTS and therefore are not subject to any withholding tax obligations in India.

In this case, the UK entity had entered into a secondment arrangement with the Indian entity (taxpayer) in order to facilitate an outsourcing agreement. The Indian entity made certain payments to the UK entity, part of which were reimbursement for expenses for hotel and travel, on which the Indian entity did not withhold tax on the grounds that such expenses could not be treated as FTS. The revenue contended that since the seconded employees were highly skilled, the entire payment was in the nature of FTS.

The High Court analysed the substance of the arrangement and held that since the seconded employees were working under the control, direction, and supervision of the Indian entity, they must for all practical purposes, be treated as employees of the Indian entity. Accordingly, the payments to the UK entity were in the nature of pure cost reimbursements, on which there is no obligation to withhold tax.

(e) International arbitral tribunal rules in favour of Vodafone

The international arbitral tribunal constituted in the case of *Vodafone International Holdings BV v. The Republic of India* under the 1995 Bilateral Investment Promotion and Protection Agreement between the Republic of India and the Kingdom of Netherlands (**India Netherlands BIT**) has ruled in favour of Vodafone.

The arbitral tribunal was constituted in respect of retrospective taxes (along with penalties and interest) imposed by India in relation to Vodafone's indirect acquisition of Hutchinson's mobile business in India. Vodafone had acquired an offshore entity that held certain Indian assets, including the mobile business and other assets of Hutchison in India ('indirect transfer'). The Indian tax authorities raised a tax demand on Vodafone, alleging that it should have deducted tax at source before making a payment to Hutchison. Vodafone challenged the demand before the Bombay High Court, which ruled in favour of the tax authorities. Subsequently, Vodafone challenged the High Court judgement in the Supreme Court, which ruled in favour of Vodafone.

Following the ruling of the Supreme Court, legislative amendments were made to the Indian tax laws, allowing the tax authorities to retrospectively tax such indirect transfers. As a result of the amendments, the onus to pay the taxes fell back on Vodafone. Vodafone tried to resolve the dispute amicably with the tax authorities and the Indian government. Following the failure of these negotiations, Vodafone Group initiated proceedings under the India-Netherlands BIT.

In September 2020, the international arbitral tribunal passed an award in favour of Vodafone, for India's violation of the fair and equitable treatment standard under the India Netherlands BIT. The tribunal has directed India to cease the conduct in question and reimburse legal costs of approximately INR 850 million to Vodafone. India has challenged the arbitral award before a Singapore Court.

LOOKING AHEAD

The year 2021 is expected to bring in some important developments on the international taxation front. The arbitration proceedings in the Vodafone dispute (discussed above) have been decided against the government, and the government has appealed the decision. On a similar fact pattern, the dispute with respect to the retrospective tax demand imposed on *Cairn* has been adjudicated in favour of *Cairn* by an international arbitral tribunal constituted under India UK BIPA. The arbitral tribunal has ordered India to compensate *Cairn* for 'total harm suffered' due to breach of treaty obligations. The government has also appealed this decision. It will be interesting to see jurisprudence develop in this area.

Other developments to watch out for include the jurisprudence relating to dividend taxation post the ruling in *Giesecke & Devrient* and the decision of the Delhi High Court in the writ petition filed by Tiger Global challenging the order passed by the Authority of Advance Rulings (**AAR**) that the sale of shares of a Singapore company by Tiger Global's Mauritius entities to offload Tiger Global's stake in Flipkart was *prima facie* designed to avoid tax.

Further, on the legislative front, Budget 2021 largely focuses on simplification of legal provisions and procedures. For instance, it provides for the introduction of a faceless Income Tax Appellate Tribunal and the constitution of a Dispute Resolution Committee to resolve tax disputes of small and medium taxpayers. Further, the Budget 2021 provides for a slew of tax incentives for the housing sector, units in International Financial Services Centre and sovereign wealth funds and pension funds, which should go a long way in boosting investment in these sectors.

From a transaction tax perspective, implementation of the key proposals in the Budget 2021 would have an impact on valuations in M&A transactions. Goodwill is proposed to be excluded as a depreciable asset and depreciation claim on any past goodwill in prior years will not be available going forward. Additionally, it is proposed to cover slump exchange under the tax framework for slump sale, and to tax slump sale transactions based on the fair market value of the business undertaking transferred. *Please click here for a more detailed analysis on Budget 2021.*

For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed ***here****.*

Update

Indirect Taxation: Legal Milestones Financial Year 2020-21 and a Look Ahead

The year 2020 witnessed key changes to the indirect tax regime. Some technology-based changes such as faceless assessment under Customs and e-invoicing and QR code requirements under GST, were also introduced. This update summarises some of the major developments in the past year along with our expectations for the year ahead.

With the onset of the COVID-19 pandemic in 2020 and the consequent lockdowns and disruption to business, indirect tax authorities in India took a proactive approach to address some of the issues faced by tax-payers. Some measures taken included extension of timelines for filing appeals and undertaking Goods and Services Tax (**GST**)/Customs related compliances.

On the Customs front, a faceless assessment programme was introduced to reduce the time taken for Customs clearance and to address the issues of uniformity in classification and assessment. Further, e-invoicing was introduced under GST, making it mandatory for the specified taxpayers to issue GST invoices with Invoice Reference Number (**IRN**).

The High Courts also played a major role in granting relief to taxpayers in various writ petitions filed on contentious issues such as transitioning of Cenvat Credit, levy of GST on ocean freight etc.

Further, the Budget 2021 proposes several changes to strengthen the foundation of indirect tax laws such as the introduction of an online customs portal. It also proposes changes to emphasise building production capabilities in India, such as increasing customs duty rates on certain goods. Several proposals have also been made to reduce the compliance burden for taxpayers under the GST framework such as the removal of requirement of GST audit by a chartered/cost accountant. *Please click here for a more detailed analysis of the Budget 2021.* The Finance Act, 2021 has also now received Presidential assent on 28 March 2021.

1. Faceless assessment of imports introduced

Central Board of Indirect Taxes and Customs (**CBIC**) notified the roll-out of an all India faceless assessment programme also known as '*Turant Customs*' on 4 September 2020.

Under the faceless assessment, all Customs clearance related processes like filing of bill of entry, submission of documents like certificate of origin, packing list etc. are to be carried out through the e-Sanchit portal. The assessing officer can request for information and return the bill of entry for payment of customs duty through this portal, without having to physically interact with the importer or the customs house agent. Faceless assessment also enables the bill of entry filed at one Customs station to be assessed by an assessment officer physically located at a different Customs station. The assignment of bill of entry will take place through the Customs Automated System.

This new faceless assessment system is likely to bring uniformity and anonymity in Customs assessment process. It is also expected to reduce interface between the businesses/ importers and Customs officers, consequently reducing the time required for Customs clearance.

2. E-invoicing and QR codes introduced for specified persons under GST

In a big step towards the goal of curbing tax evasion and easing compliance under the GST framework, CBIC implemented e-invoicing and QR code for specified persons who met a certain turnover threshold.

Under e-invoicing, the invoices generated by a supplier are authenticated electronically on the GST Network (**GSTN**). This authentication is carried out by uploading the invoice (either manually or through an ERP software), to the Invoice Registration Portal (**IRP**) managed by GSTN. Every authenticated invoice carries an IRN which can be used by the authorities to check the authenticity of the invoice.

From 1 April 2021, e-invoicing has been made mandatory for suppliers of goods or services or both having a turnover of more than INR 50 crores (in any financial year from 2017-18) making B2B supplies or export of goods or services or both.

For B2C invoices, suppliers with a turnover of more than INR 500 crores (in any financial year from 2017-18) are mandated to issue e-invoices with QR codes from 1 December 2020.

The QR code contains details of the invoice and payment made. In those cases where the supplier is making the dynamic QR code available to the recipient on a digital display, the QR code is not required on the physical invoice.

3. Time limit for transitioning of Cenvat credit

Section 140 of the Central Goods and Services Act, 2017 (**CGST Act**) allowed a taxpayer to transition Cenvat Credit from the erstwhile indirect tax regime to the GST regime in the manner prescribed under the Rule 117 of the CGST Rules, 2017. However, nascency of this law and technical issues present in the GST online system precluded taxpayers from affecting the transition smoothly. Additionally, the CGST Act did not empower the legislature to impose a time limit on such transition.

Despite the absence of such power, an initial time limit of 27 December 2017 was prescribed in Rule 117 of the CGST Rules, which was then extended, before finally being fixed to 31 March 2020 for special cases where the taxpayers could not upload the mandated Form GST TRAN-1 (**Form**) on account of technical issues on the GSTN portal.

This time limit was challenged by taxpayers across the country before various High Courts. Subsequently, the Delhi High Court in *Brand Equities v. Union of India* decided that the time limit prescribed under Rule 117 of the CGST Rules was without authority of law and went beyond the scope of the CGST Act. The Delhi High Court also observed that while the time limit is not mandatory, the right to transition Cenvat Credit could not exist in perpetuity, and thus, will be subject to the residuary limitation period of three years from the date of enforcement of GST.

Accordingly, the Delhi High Court had allowed the transition of Cenvat Credit from erstwhile indirect tax regime to GST regime till 30 June 2020 which came as a great relief to the taxpayers. This extension included not only those who could not file the Form on account of technical glitches, but also those who had filed the Form with incorrect details or could not file the Form at all for other reasons.*click here for a more detailed analysis*.

However, the respite granted by the Delhi High Court was short-lived. The legislature within a few days of the Delhi High Court order, took cognizance of the lacunae in the CGST Act, amending Section 140 with retrospective effect from 1

February 2020 (in the Finance Bill, 2020 subsequently passed as the Finance Act, 2020). *Please click here for a more detailed analysis.*

The retrospective amendment of Section 140 gave the legislature specific powers to prescribe a time limit for transitioning the Cenvat Credit (retrospectively, from the introduction of the GST laws). This ratified the various cut-off dates previously imposed and reinstated 31 March 2020 as the statutory deadline for filing the Form. This cut-off date was only for taxpayers who could not file the Form on GSTN portal on account of technical issues. Consequently, this has left the taxpayers who could not file the Form for any other reasons without any remedy.

4. Applicability of GST on remuneration paid to directors

The long-standing confusion arising from contrary rulings of the Authority for Advance Ruling (**AAR**) on the issue of applicability of GST on remuneration paid to directors was finally settled in 2020. The CBIC on 10 June 2020, clarified that remuneration paid to a director which is in the nature of salary will not be subject to GST.

The CBIC has clarified that:

(a) Remuneration paid to independent directors or other directors, who are not employees of the company, would be subject to GST on a reverse charge basis.

(b) Remuneration declared as 'salary' in the books of a company and subject to Tax Deduction at Source (TDS) under Income Tax Act, 1961 would not be subject to GST, being consideration for services by an employee to the employer in the course of or in relation to employment. However, remuneration paid to such 'employee-director', not in the nature of salary would be subject to GST on a reverse charge basis.

The Circular came as a welcome move by CBIC. It brought certainty for all body corporates and eased the burden of paying GST on the remuneration paid to its directors.

Please click here for a more detailed analysis.

5. Refund of Input Tax Credit pertaining to input services under inverted duty structure

One of the major concerns for taxpayers making supplies that are zero-rated (namely, supplies to SEZs and exports) or are under inverted duty structure (GST paid on input goods/services exceeds the GST paid on outward supplies) is the refund of accumulated Input Tax Credit (**ITC**).

Section 54(3) of the CGST Act allows for refund of unutilised ITC in cases of inverted duty structure and zero-rated supplies. However, Rule 89(5) of the CGST Rules, that prescribes the formula for the refund of ITC on account of inverted duty structure, only allows for the refund of unaccumulated ITC availed in respect of input goods and not input services.

By necessary implication, Rule 89(5) therefore denies the refund of unaccumulated ITC relating to input services. Therefore, while ITC in respect of input goods can be availed as refund in cases of inverted duty structure, the refund of ITC in respect of input services is not refundable.

This provision was therefore challenged by taxpayers before various High Courts, which ruled as follows:

(a) VKC Footsteps Pvt. Ltd. v. UOI

The Gujarat High Court in **this case**read down Rule 89 (5) on the ground that it is *ultra vires* and contrary to Section 54(3) of the CGST Act which provides for claim of refund of '*any unutilised input tax credit*' and therefore allows for refund of ITC availed in respect of input services as well. Thus, the court allowed for refund of ITC pertaining to input services, in cases of inverted duty structure.

(b) Tvl. Transtonnelstroy Afcons Joint Venture v. UOI

Contrary to the Gujarat High Court decision discussed above, the Madras High Court dismissed the writ petitions challenging the restrictions imposed by Rule 89(5) of the CGST Rules on claiming refund of unutilised ITC on input services in cases of inverted duty structure. It held that the right of refund is statutory in nature and can only be availed strictly in accordance with the conditions prescribed under law.

The conflicting judgements of the two High Courts have created an anomaly on the issue and the vires of Rule 89(5) of the CGST Rules will now likely be decided by the Supreme Court.

6. DRI officers do not constitute 'proper officer' under Customs Act; not authorised to issue show cause notices

The power of the Department of Revenue Intelligence (**DRI**) officers to issue show cause notices under the Customs Act, 1962 had been subject to scrutiny by courts in various instances. In the recent landmark judgment of *Canon India Private Limited v. Commissioner of Customs,* the Supreme Courtsettled this long-standing dispute and held that the DRI officers have no authority to initiate proceeding/ issue show cause notice to recover duty under Section 28 of the Customs Act. Section 28 provides for recovery of customs duties not levied, not paid or erroneously refunded.

The Supreme Court held that the power to issue show cause notice under Section 28 has been conferred to '*the proper officers*'. '*The proper officers*' for the purpose of Section 28 will be the same officer or his successor who had exercised the power of assessment in that particular case. If such re-assessment under Section 28 is to be carried out by an officer of other department (viz. DRI officer), it would result in an anarchial and unruly operation of statue. The Supreme Court also held that Notification No. 40/2012 dated 2 May 2012 which appoints the DRI officers as 'proper officers' for the purpose of Customs Act to be ill-founded under law.

This judgment is likely to impact all pending proceedings that have been initiated by the DRI officers. The implications of this judgment are also being examined by the CBIC. CBIC has directed that all fresh show cause notices in cases being investigated by DRI will be issued by jurisdictional customs commissionerates from where imports have taken place, instead of DRI.

LOOKING AHEAD

Legislative changes are expected in the GST framework to align it with the larger objective of making India an attractive business destination and streamlining compliance related practical issues like filing of returns. Further, given the contradictory rulings of the High Courts on the issue of refund of ITC pertaining to input services under inverted duty structure, we hope that the issue will be finally decided by the Supreme Court in 2021.

For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed ***here****.*
