Highlights

Corporate Brief

- MCA constitutes a committee to review offences under the Companies Act, 2013
- SEBI releases a consultative paper: seeks comments on its recently released norms dealing with fiduciaries in the securities market.
- SEBI amends the LODR Regulations splitting the position of Chairperson and Managing Director.
- SEBI releases consultative paper: seeks comments on norms released on the public issue process.
- NCLT rules in favour of Tata Sons: dismisses the plea of Cyrus Mistry alleging oppression and mismanagement
- NCLT makes historic decision: allows cross entity merger between a Private Company and LLP
- EU releases the General Data Protection Regulation: imposes heavy fines upon non-compliance
- Srikrishna committee submits a report and Draft Bill: on data protection: bans personal data storage without consent of data subject
- TRAI approves guidelines on net neutrality: bans any form of discrimination by the ISPs
- Government unveils India's first draft-ecommerce policy
- Lok Sabha clears IBC amendment to include home buyers within the definition of 'financial creditor'

GST Brief

- Reverse Charge Mechanism deferred till September, 18.
- *28th GST Council meet: Significant reduction on GST rates*
- *Government issues guidelines for faster IGST refunds*

RERA Brief

- Penalty of Rs. 4 Lakh imposed for late registration of projects (Bihar RERA).
- Builders must display project details at the construction sites (Bihar RERA)
- Guidelines for registration of project (UP RERA)
- Circular on rate of interest payable by the Promoter (U. P. RERA)
- Secretary of Maharashtra RERA to execute Agreement for Sale on behalf of defaulted builder.

Litigation Brief

- *Arbitrator's Fees: How It Is To Be Calculated*
- *Rajasthan High Court Stays The Order Passed By State RERA Authority*

Corporate Brief

MCA constitutes a committee to review offences under the Companies Act, 2013

The Ministry of Corporate Affairs vide Press Release dated 13th July, 2018, has decided to establish a Committee for review of the penal provisions in the Companies Act, 2013. The primary objective of the committee, chaired by the Secretary of MCA, will be to examine the 'decriminalization' of certain offences. Further, the existing compoundable offences under the Companies Act, 2013 may be re-categorized as civil wrongs or defaults, depending upon their nature. This would mean that a penalty would be imposed by the adjudicating officer upon committal of such a default first and only upon a failure to pay the penalty, would the defaulter be subject to a trial by a special court. Similarly, non-compoundable offences could also be re-categorized into compoundable offences, depending upon the views and analysis of the Committee. The Committee is supposed to submit its recommendations to the Central Government within 30 days from the date issuance of the Press Release. One of the reasons for formulation of this Committee, as stated in the Press Release is that this would allow the trial courts to pay more attention to offences of serious nature.

SEBI seeks comments on its recently released norms dealing with fiduciaries in the securities market.

SEBI released a consultative paper titled 'Proposed SEBI (Fiduciaries in the Securities Market) (Amendment) Regulations', on 13th July, 2018. The scope of the paper covers the entities that undertake any third party fiduciary duties under the securities laws. According to the paper, if a fiduciary undertakes any such fiduciary duties and issues certificates or reports in respect of them, then such documents issued must be true in terms of all material disclosures and aspects. The paper emphasizes on the need to exercise due diligence and ensure complete transparency in the processes and procedures that are involved in the issuance of the abovementioned documents, failing which the Board may take appropriate action. Through this consultative paper, SEBI seeks public comments for the new set of norms it has proposed to establish for fiduciaries working with listed firms, while making amendments to various regulations such as the SEBI (Issue of Capital and Disclosure Requirements) Regulations, SEBI (Issue and Listing of Debt Securities by Municipalities) Regulations, 2015, Securities and Exchange Board of India (Infrastructure Investment Trusts) Regulations, 2014, etc.

The amendments so proposed are especially relevant today, because of cases like the Nirav Modi PNB scam where the role and responsibility of an auditor of a company had come under scrutiny, mainly because of their alleged negligence in the matters of the company, amongst other such cases.

SEBI amends the LODR Regulations splitting the position of Chairperson and Managing Director.

In June 2017, SEBI constituted a committee under the chairmanship of Uday Kotak to formulate certain recommendations/guidelines in order to change the regulatory framework of Indian listed companies relating to corporate governance, read with the Companies Act 2013, along with the rules thereunder. The Kotak Committee submitted its report on 5th October, 2017, providing its recommendations with regards to alignment of corporate governance of Indian listed entities with certain globally accepted norms that would ensure efficiency and transparency within the said entity. On 24th July, 2018, SEBI, based on the Kotak Recommendations, amended the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 splitting the positions of the Chairperson and Managing Director of a listed entity, effective from 1st April, 2020. This segregation should begin from the top 500 listed companies on the basis of market capitalization. This measure is a structural advantage for corporate entities in the sense that it would

prevent an excessive concentration of power with just one person and bring transparency and fairness into the system.

SEBI releases consultative paper: seeks comments on norms released on the public issue process

SEBI released a consultative paper titled 'Revisiting the public issue process' on 25th July, 2018, streamlining processes to incorporate a more efficient regulatory mechanism for raising funds, by investors and issuers. The current mechanism requires for there to be a time gap of 6 days between the issue closure to listing of the shares. The objective of the paper is to streamline the process of issuance of shares in such a way that the time span for investors to issue shares is reduced which also consequently reduces the market risk for both investors as well as issuers. For simplifying the process of issuance of public shares, SEBI has proposed the use of Unified Payments Interface (UPI) which is an instant payment system that allows an instant and user friendly money transfer to occur between any two bank accounts. The system uses a "payment address" which acts as an identifier of a person's bank account. It was suggested that for the purpose of public issues, the UPI system would allow the investor to authorize blocking of funds for making application, as is done using ASBA." The validation of DP ID and PAN of investors would be on a real time basis, the verification of investors' signature would become automated, amongst other benefits, that are proposed in the paper.

NCLT rules in favour of Tata Sons: dismisses the plea of Cyrus Mistry alleging oppression and mismanagement

The Mumbai bench of the National Company Law Tribunal (NCLT), in what is probably one of the biggest corporate wars of India, announced its verdict on the 9th of July, 2018, dismissing Cyrus Mistry's plea which accused Tata Sons Limited, the holding company of the Tata Group, of oppression and mismanagement of its minority shareholders' rights. The NCLT, while heavily in favour of the Tata Sons, claimed that the allegations of oppression and mismanagement on the company were nothing but a result of a mere "heart-burn" of Mistry, on account of being removed as executive chairman of the company.

Facts: Cyrus Mistry had filed a petition with the NCLT, aggrieved from his removal as executive chairman of Tata Sons Limited. The removal was justified on the basis of a legal opinion, which was however, not presented at the Board meeting, in the course of which he was removed from the said designation.

Arguments advanced: The petitioners contended that the power exercised by Ratan Tata with respect to the affairs of the Company , as contained in the articles of association ("AoA"), was malafide in nature and prejudicial to the public interest. The petitioners primarily seeked for an amendment in the AoA of the Company with respect to a proportionate representation in the board of directors. They also contended that a lot of decisions were taken and resolutions were passed in order to "placate the ego" of Ratan Tata and that he exercised an "omnipresent control" over the affairs of the Company. A serious case of oppression and mismanagement was alleged against the Company. The respondents in their reply stated that there was a significant reduction in the representation of the Company in the boards of all the other major Tata companies, which had resulted due to the mismanagement of Mistry. This undermined the philosophy of the Tata brand which has always valued "ethos, governance principles, group strategies" Further the respondents stated that Mistry was involved in some major unilateral transactions, which he had conducted without consulting the board of the Company.

Order: Oppression depends on the facts of a given case and there are no particular guidelines as such. To establish grievance under Section 247 of the Companies Act, 2013 ("Act"), the complainant has to pass various tests as stated in Section 241 and 242. The reliefs provided under Section 242 cannot be without any concrete proof of oppression or unfairness. The order stated that "unless an action is vitiated by fraud, it will not become a fraud or unfairness." The removal of Mistry cannot "ipso facto" become a grievance unless established under the section 241 of the Act.

NCLT makes historic decision: allows cross entity merger between a Private Company and LLP

The Chennai bench of the National Company Law Tribunal (NCLT) has recently allowed a merger between a private company and a Limited Liability Partnership, marking the first ever such cross-entity merger. It has been held that section 394(4)(b) of the Companies Act, 1956, would cover such a merger, even though there is a lack of explicit provision for the same.. Both the legislations, Companies Act, 2013 and the Limited Liability Partnership Act, 2008 do not expressly allow for such a merger, however, the bench stated that the intention behind the legislations should be seen with respect to their facilitation of "easy of doing business." They aim at creating a comfortable business environment more than focussing on the technicality of certain things.

EU releases the General Data Protection Regulation: imposes heavy fines upon non-compliance

On 8th April, 2016 the European Union (EU) adopted the General Data Protection Regulation (GDPR) which came into effect from 25th of May 2018, replacing the old directive of 95/46/EC. The GDPR aims at protecting the Personal Data of its citizens, which is defined as any information that is related to an identified or identifiable natural person by implementing a strict regulatory and compliance mechanism. Keeping in mind the constant evolution of digital communication and the ease with which data is handled these days, the regulations have introduced certain

rules and obligations that need to be abided by, by companies with respect to the personal data of their clients as well as employees. The regulations regulate the personal data stored/used by the Controllers (entities that control data and determine the purpose as to why and how the data would be used) and Processors (entities that are responsible for processing/analyzing the data) and the prescribed measures that are required to be taken in respect of the personal data accessed by them. The GDPR has clarified that such Personal Data could mean anything from "name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity." The regulations give power to the data subject over usage of their personal data and consensual requirements over data portability/transfer to third parties, etc. These regulations not only affect entities established in the EU, but also entities established elsewhere including India, that are providing services to the EU nations. In short, if an entity stores the data of EU citizens, whether it is in form of their personal details like name or contact address, or the kind of service that have availed ,whether the entity is established with the EU or outside it, its internal systems and processes need to be GDPR compliant.

- *Srikrishna committee submits a report and Draft Bill: on data protection: bans personal data storage without consent of data subject*

The ten member committee on Data Protection Framework for India, chaired by Justice B. N. Srikrishna was constituted in August 2017, with the objective to examine issues related to data protection and subsequently formulate a law based on the same. The committee submitted a report on 27th July 2018, titled "A Free and Fair Digital Economy – Protecting Privacy, Empowering Indians" and a Draft Bill to the IT ministry. Some of the important aspects that are discussed in the Bill include processing and collection of personal data, right to be forgotten, etc. The Bill proposes, amongst other things, that the copy of all personal data must be stored in India and amongst such personal data, the critical data must be stored with Indian servers. Further, sensitive personal data must not be processed without the explicit consent of the data subject. This may include their financial records, passwords, etc.

- *TRAI approves guidelines on net neutrality: bans any form of discrimination by the ISPs*

The Telecom Regulatory Authority of India has recently accepted the guidelines for net neutrality, called 'National Digital Communications Policy, 2018.' The Policy envisages three primary missions that are: to promote broadband for all, to encourage newer technologies through investments and to ensure safety and efficiency that surrounds digital communications. Further, as a consequence of the policy's implementation, the Internet Service Providers (ISPs) now, cannot be discriminatory in terms of any internet content available, by granting select websites higher speed access, by blocking certain websites, etc. The policy aims at "the unleashing of the creative energies of citizens, enterprises and institutions in India." The primary objective behind these guidelines is the acknowledgement of the fact that the internet is not owned by anybody and especially the ISPs who have the powers that, if used incorrectly, could act as discriminatory and defeat the purpose of free speech rights that are granted in India.

- *Government unveils India's first draft ecommerce policy*

The Government has unveiled India's first Draft National Policy Framework, which aims to streamline the digital economy, its processes and procedures. It proposes to formulate a strict regulatory and scrutiny system in terms of data protection, encourage the market to be more inclusive of all kinds of enterprises, etc. It seeks to promote digital innovation through better infrastructural services, providing tax benefits, amongst providing other incentives. The Policy is not in the public domain yet and has been obtained by stakeholders.

- *Lok Sabha clears IBC amendment to include home buyers within the definition of 'financial creditor'*

MCA had constituted the Insolvency Law Committee vide office order dated 16th November, 2017, under the chairmanship of the Secretary of MCA. The committee had submitted its report in March 2018. One of the recommendations of the Committee was that home buyers of under construction apartments must be treated at par with financial creditors. According to the report, section 5(7) of the Insolvency and Bankruptcy Code, a financial creditor refers to any person to whom a financial debt is owed and is an inclusive definition. The Lok Sabha has now cleared this amendment.

GST Brief

- *Reverse Charge Mechanism deferred till September, 18.*

Central Board of Indirect Taxes and Customs (CBIC) vide notification No. 12/2018-Central Tax (Rate) dated 29th June, 2018, deferred the Reverse Charge Mechanism under the GST, till 30th September, 2018.

- *28th GST Council meet: Significant reduction on GST rates*

The 28th GST Council was held on 21st July, 2018, wherein recommendations were made related to exemptions in GST rates, rationalization of exemptions, simplification of the GST return filing process, etc. The key items were provision of multiple reliefs

to sectors like education, agricultural and social security, the creation of GST Appellate Tribunal and rate cuts. There was a recommendation for a significant reduction that should be made to GST rates on certain specified items from 28% to 18%, 28% to 12%, 12% to 5% etc, amongst other proposed amendments.
[*Source: CBIC- www.cbic.gov.in*]

Government issues guidelines for faster IGST refunds

The Government has issued guidelines with respect to refund under the Integrated Goods and Services Tax (IGST), for goods as well as services that are supplied to units in Special Economic Zones (SEZ). The guidelines provide for certain procedural requirements to be followed by the supplying companies, such as maintaining and submitting documents to specified officers. The compliances that are required to be followed thereunder would bring in a more organizational structure within the system and catalyze the process to endorse receipt of goods and services and subsequently get the refund.
[*Source: CBIC-www.cbic.gov.in/*]

RERA Brief

Penalty of Rs. 4 Lakh or 400% imposed for late registration of projects (Bihar RERA)

Bihar Real Estate Regulatory Authority has increased the penalty quantum for delay by the developers in registering their ongoing Projects under RERA. Bihar RERA Authority has increased the penalty amount to Rs. 4 Lakh or 400% of registration whichever is higher, for every late registration from 1st July, 2018. Authority has also increased the penalty amount of a Real Estate Agent to Rs. 10,000 for individuals and Rs. 50,000 for other than individuals, for every late registration from 1st July, 2018.

Builders must display project details at the construction sites (Bihar RERA)

Bihar Real Estate Regulatory uploaded a notice on their official website directing all the real estate builders to display certain details related to the project at the site of construction.

According to the notice, the promoters/developers/builders of all real estate projects be it residential, commercial, mixed or plotted development, shall display the following details on a large notice board/hoarding having minimum size of 6 by 6 feet:

- Name of the Project;
- Name of the Promoter/Developer/Builder of the Project;
- RERA Registration Number;
- If RERA registration is not yet done, the Application number through which application for registration has been submitted to the Authority.
- Website address of RERA, Bihar (www.nagarseva.bihar.gov.in/rerabihar);
- Names of the Registered Real Estate Agent along with their RERA registration number (Company or individuals);
- Date of Commencement of the Project; and
- Proposed date of Completion of the Project.

The notice states that the information should also be displayed at the corporate office, registered office, branch or sales offices of the promoters/developers/builders appropriately and prominently in respect of all real estate projects undertaken by them.

Guidelines for registration of project (UP RERA)

Uttar Pradesh RERA has uploaded the 'Guidelines for Registration of Project' on their official site. They have also uploaded 'Supplementary Guidelines for Creating/Editing a Project' as well. This will benefit the promoters by giving them clarity with respect to the registration process of their Real Estate Projects with Uttar Pradesh Real Estate Authority.

Circular on rate of interest payable by the Promoter (U. P. RERA)

U. P. RERA has issued an Office Order dated 19.6.2018 with a view to bring uniformity in adjudication of the complaints under RERA and compliance of the provisions of Real Estate Act and its Rules. The following are the principal guidelines for adjudication of complaints issued under the said office order:

- In the matters where Agreement between the Allottee and the Promoter prescribes the rate of interest payable in case of refund by promoter, then in case refund is being granted, refund will be of principal along with interest at the rate prescribed in the agreement;
- In the matters where Agreement between the Allottee and the Promoter does not prescribe the rate of interest payable in case of refund by promoter, then in case refund is granted, refund will be of principal along with interest at the rate of State Bank of India's MCLR + 1 % will be applicable;
- In matters where there is a delay by the promoter in offering possession to the allottee and orders are being passed for the delay amounts, then the payment towards the same will be calculated as per the provisions of the agreement between the parties relating to delay amount. In case the agreement

between the parties does not prescribe the payment of amount towards delay by the promoter, then in such cases interest at the rate of State Bank of India's MCLR + 1 % will be applicable from the due date of possession; and

- Designated authorities have been directed not to pass any order with respect to compensation.

All the designated officials have been directed to implement these guidelines and rectification orders be passed earlier, within 15 days of the above mentioned office order as per the powers granted under Section 39 of the Real Estate Regulation Act.

For complete text please visit the following link: http://up-rera.in/pdf/Scan10011.PDF

RERA Case

Secretary of Maharashtra RERA to execute Agreement for Sale on behalf of defaulted builder

Maharashtra Real Estate Regulatory Authority passed an order on 31.5.2018 in the case of Gaurav Makkar vs Sun Shining Constructions, directing the Secretary of Maharashtra RERA to execute and register the agreement of sale on behalf of the promoter in case the promoter defaults in execution of the Agreement for Sale. The cost for the same would be payable by the promoter.

The Adjudicating Officer, said, "In case of respondents' failure to execute and register the agreement, the Secretary of MahaRERA shall execute and register the agreement on behalf of the respondents at the cost of the complainant."

"The agreement for sale executed by the Secretary of MahaRERA will be deemed to be the agreement executed by the respondents themselves and shall be binding on them", he added.

Litigation Brief

Arbitrator's Fees: How is it to be calculated?

In the matter of: Delhi State Industrial Infrastructure Development Corporation Ltd. Vs. Bawana Infra Development (P) Ltd. (Decided By High Court of Delhi)

Issue: Whether the "sum in dispute" mentioned under Fourth Schedule of the Arbitration and Conciliation Act (Amendment) Act, 2015 **("The Act")** would include both claim and counter claim cumulatively or separately?

Facts:

- The present petition was filed under Section 39(2) the Act seeking an interpretation of the fee schedule as provided under the Fourth Schedule of the Act.
- The said question arose when the Hon'ble Court appointed the sole Arbitrator and directed that the fee charged by the Arbitrator must be in accordance with the Fourth Schedule of the Act.
- The Arbitrator appointed was of the opinion that the "sum in dispute" would be the amount of both the claim and the counter claim separately, rather than cumulatively.

Court's Observations:

- The Petitioner put forth that the legislature has intentionally not prescribed separate fee for the claim and counter claim amount and has, thus, used the phrase "sum in dispute". The Petitioner further quoted the Delhi International Arbitration Centre rules which state that the "sum in dispute" shall include any counter claim made by the party.
- The Respondent contented that the Proviso to Section 38(1) of the Act empowers the Tribunal to fix separate deposits for the claim and counter-claim.
- The Ld. Amicus Curiae appointed by the Court drew the attention of the Hon'ble Court to the 246th Law Commission Report which had recommendations on the basis of which the amendment to the Act was carried out in 2015. It was observed that domestic especially ad hoc arbitrations were ridden by arbitrary, unilateral and disproportionate fixation of fees by the arbitrator and if arbitration is to really become a cost effective solution for dispute resolution in the domestic context then there should be some mechanism to rationalize the fee structure. The Fourth Schedule was, therefore, introduced to the Act to deal with the issue of disproportionate fees. This threw light on the legislative intent behind the provision and the phrase "sum in dispute".
- The Petitioner also presented the prevalent rules regarding the fee structures of various institutions which conduct arbitral proceedings both in India and abroad. The Court concluded that a bare perusal of the aforesaid illustrate that the concept prevailing around the world is that the fee of the Arbitral Tribunal is fixed on the cumulative value of the claim and counter claim.

- With regard to the proviso to Section 38(1) of the Act, the Hon'ble Court held that it can only apply when the Arbitral Tribunal does not fix its fee in terms of the Fourth Schedule of the Act. Although it would not have any bearing on the interpretation put to the Fourth Schedule. The Arbitral Tribunal would be free to fix the amount of fee as per Section 38 (1) of the Act in case where the Tribunal is involved in an ad-hoc arbitration conducted without the intervention of the Court or where the Tribunal is appointed by the Court under Section 11 but no rules are framed under Section 11(14) of the Act.

- In the light of the above, it was held that the Sole Arbitrator/Respondent would not be allowed to set the arbitral fee beyond the ceiling set by Fourth Schedule of the Act and that the fee would include claim and counter-claim amount cumulatively.

Rajasthan High Court Stays the Order Passed By State RERA Authority

Vivek Kohli, Managing Partner, Zeus Law appeared and argued on behalf of the Petitioners in a batch of matters challenging the Notifications nominating the Real Estate Regulatory Authority ("**RERA**") and Real Estate Appellate Tribunal ("**Tribunal**") in the State of Rajasthan. The petitions also challenged the orders passed by RERA on the ground that the Authority has not been constituted, as mandated, within a period of one year from coming into the force the Real Estate (Regulation and Development) Act, 2016 ("**the Act**").

The Hon'ble Court noted that the position was same in regard to the Tribunal where the power has been designated to Food Safety Appellate Tribunal headed by a Retired District Judge. As per the provisions of the Act, the Tribunal is to be headed either by a sitting or retired judge of the High Court. Therefore, even the Tribunal has not been constituted as per the provisions of the Act. The Court also remarked that no one appeared on behalf of the State Government despite service.

According to the provisions of the Act, RERA and the Tribunal should have been constituted within one year of the passing of the Act, i.e., by May 2017 but that hasn't happened till now.

The Division Bench of Justice Bhandari and Justice Somani observed that the government failed to comply with the mandate of the Act passed by the Parliament and stayed the execution of the orders passed by RERA till the next date of hearing.

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