Shardul Amarchand Mangaldas

RECENT DEVELOPMENTS IN INDIAN LAW

October 2024

Contents

Corporate Laws

Amendment to the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016

The Ministry of Corporate Affairs (**MCA**) vide notification dated September 9, 2024, amended the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (**Amended Merger Rules**) to insert new sub-rule (5) to Rule 25A in relation to inbound cross border mergers. Prior to the said amendment, Rule 25A allowed the said mergers only with National Company Law Tribunal's approval under Sections 230 to 232 of Companies Act, 2013 (**CA 2013**). Starting from September 17, 2024, the new sub-rule permits fast-track mergers involving merger of a foreign holding company into its wholly owned subsidiary in India under Section 233 of CA 2013. Set out below are certain key requirements for approval for mergers under the Amended Merger Rules:

- Prior approval from the Reserve Bank of India will be required to be procured.
- Transferee Indian company shall comply with the provisions of Section 233 of CA 2013.
- Transferee Indian company is required to file an application for approval from the Regional Director under Section 233 of CA 2013 and Rule 25 of the Amended Merger Rules.
- In case the transferor company is based in a country sharing a land border with India, then, a specific declaration under Rule 25A(4) of the Amended Merger Rules will be required to be submitted at the time of submission of the application for merger.

Clarification on holding of annual general meeting through video conferencing or other audio-visual means

MCA vide General Circular no. 09/2024 dated September 19, 2024, allowed companies whose annual general meetings (**AGMs**) were due in year 2024 or are due in year 2025, to conduct their AGMs through video conferencing or other audio-visual means on or before September 30, 2025. Further, companies have also been permitted to conduct their extra ordinary general meetings through video conferencing or other audio-visual means or transact items through postal ballot in accordance with the framework provided therein, up to September 30, 2025.

Scope of the term 'Significant Beneficial Owner' under the CA 2013

- The Registrar of Companies, Delhi (ROC) passed an order on May 22, 2024 against LinkedIn Technology Information Private Limited (LinkedIn India) and its directors for:
  - not filing adequate declaration(s) with ROC for registered owner and beneficial owner under Section 89 of CA 2013;
  - failing to identify its significant beneficial owners (**SBO**) under Section 90 of CA 2013 read with Companies (Significant Beneficial Owners) Rules, 2018 (**SBO Rules**); and
  - not making necessary declaration(s) and statutory filing(s) as mandated under CA 2013 read with SBO Rules.
- ROC also imposed penalties on the chief executive officer (CEO) of LinkedIn Corporation, USA (LinkedIn USA) and CEO of Microsoft Corporation (i.e., LinkedIn India's ultimate holding company) (Microsoft).
- As per Section 90 of CA 2013 read with SBO Rules, an SBO is an individual who, acting alone or together or through one or more persons or trust: (a) holds indirectly, or together with any direct holdings, not less than 10%: (i) in shares of a company; or (ii) of voting rights in shares; or (iii) of total distributable dividends arising from shares or any other distribution by a body corporate; or (b) holds the right to exercise, or actually exercises significant influence or control over the company in any manner other than through direct holdings alone.
- In this case, ROC relied on the following three tests to identify the SBO of LinkedIn India by virtue of holding a right to exercise, or actually exercising significant influence or control:
  - **Holding subsidiary relationship test**: Based on an analysis of the information provided by LinkedIn India and facts available in the public domain, ROC concluded that the CEO of LinkedIn USA (which was specified as the holding company of LinkedIn India in its financial statements) held the right to exercise control over the board of directors (Board) of LinkedIn India. Further, it was noted that CEO of LinkedIn USA reported to CEO of Microsoft and was a part

of Microsoft's senior leadership team.

- **Reporting channel test**: ROC noted that the directors on the Board of LinkedIn India were appointed from a pool of Microsoft employees worldwide and therefore, ROC concluded that such employees of Microsoft were Microsoft's 'nominees' on the Board of LinkedIn India. ROC has also relied on the bye-laws of Microsoft and noted that majority of directors of LinkedIn India were employees of Microsoft or LinkedIn group who ultimately reported to the CEO of LinkedIn USA, and the CEO of LinkedIn USA reported to the CEO of Microsoft.

- **Financial control test**: ROC noted that certain related party transactions were carried out on behalf of LinkedIn India by some other group entities. Employees of Microsoft who oversaw these transactions were found to report to the CEO of Microsoft, giving him the "right to exercise control" over LinkedIn India. Further, based on the resolutions passed by the Board of LinkedIn India in relation to operating its bank account(s) and financial transactions, ROC concluded that the ultimate control over the financial transactions of LinkedIn India vested with the employees of Microsoft, who were subject to the supervision of CEO of Microsoft.

On the basis of the above, ROC concluded that both such CEOs would be considered as SBOs of LinkedIn India.

Amendment to the Companies (Prospectus and Allotment of Securities) Rules, 2014

MCA vide notification dated October 27, 2023, amended the Companies (Prospectus and Allotment of Securities) Rules, 2014 (Prospectus Rules), to insert new rules in relation to conversion of share warrants of public companies and issuance of securities by private companies in dematerialised form which are as follows:

- Rule 9 (2) of the Prospectus Rules provides that every public company which issued share warrants prior to commencement of the 2013 Act and has not converted into shares shall inform the RoC about the details of such share warrants in Form PAS-7 within three months of the commencement of the Prospectus rules. Such companies shall, within six months of the commencement of the Prospectus Rules, require the bearers of the share warrants to surrender such warrants to the company and get the shares dematerialised in their account. Further, if any bearer of share warrant does not surrender the share warrants within the specified time, the company shall convert such share warrants into dematerialised form and transfer the same to the Investor Education and Protection Fund;
- Rule 9B of the Prospectus Rules provides that every private company (other than small company) is mandated to issue securities only in dematerialised form and facilitate dematerialization of all its securities within 18 (eighteen) months of closure of the financial year.
- Further, all such private companies making any offer for issue of any securities or buyback of securities or issue of bonus shares or rights offer after the required date of compliance i.e., within 18 (eighteen) months of closure of the financial year, shall ensure that before making such offer, the entire holding of securities of its promoters, directors, key managerial personnel has been dematerialised.
- Every holder of securities of such private companies who intends to transfer such securities on or after the mandated date for compliance with this rule i.e., within 18 (eighteen) months of closure of the financial year, shall get such securities dematerialised before the transfer. Every holder who subscribes to any securities of the concerned private company (whether by way of private placement or bonus shares or rights offer) on or after the mandated date for compliance with this rule, shall ensure that all his securities are held in dematerialised form before such subscription.

Foreign Exchange Laws

Foreign Exchange Management (Non-debt Instruments) (Fourth Amendment) Rules, 2024

In furtherance of the announcements made by the Union Minister of Finance and Corporate Affairs in the Union Budget 2024-25 to simplify the rules and regulations governing foreign investment, the Department of Economic Affairs, Ministry of Finance, Government of India has amended the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (**NDI Rules**), through the Foreign Exchange Management (Non-debt Instruments) (Fourth Amendment) Rules, 2024 (**Amendment Rules**) which were notified on August 16, 2024. These amendments have been brought about with the aim of facilitating global expansion of Indian companies via mergers, acquisitions and other strategic initiatives which would enable them to reach new markets. Set out below is summary of the key changes introduced through the Amendment Rules:

Definition of Control and Startup Company

The definition of the term "control" as provided under Explanation (d) to Rule 23 of the NDI Rules has been omitted and a new definition of such term has been inserted under Rule 2 of the NDI Rules. The introduction of such new definition of the term "control" is clarificatory in nature and there is no change in the construct of the scope of the definition, except that the new definition makes reference to the definition of the term "control" for a company as provided under the CA 2013. Further, no change has been made vis-à-vis "control" of a limited liability partnership.

The definition of the term "startup company" has been amended to align the same with the latest notification issued by DPIIT on February 19, 2019, which provided key changes in relation to the criteria for recognizing a company as a "startup company", which included an increase in the turnover threshold for a company from INR 250 million to INR 1 billion for any of the financial years since its incorporation and also an increase in the time period for recognition as a "startup" from five years to ten years from the date of its incorporation.

Share Swap transaction

Prior to introduction of Rule 9A, Rule 21 (Pricing Guidelines) read with Schedule I of the NDI Rules made provision for, amongst others, issuance of equity instruments by an Indian company to a person resident outside India against swap of equity instruments of another Indian company. Pursuant to this amendment, a new Rule 9A has been inserted under the NDI Rules which makes provision for transfer of equity instruments of an Indian company between a person resident in India and a person resident outside India, against: (i) swap of equity instruments of another Indian company; (ii) swap of equity capital of a foreign company. This amendment is expected to provide an impetus to the investors for entering into more cross-border share swap arrangements. It has been further provided that the requirement of obtaining prior government approval will apply for transfer of equity instruments in such share swap arrangements, wherever government approval is required under law.

Requirement for prior government approval

Prior to the amendment, the proviso (i) to Rule 9 (1) of the NDI Rules provided, amongst others, that prior government approval was required for any transfer of equity instruments from any person resident outside India to another person resident outside India, in case the Indian target company was engaged in a sector that required government approval. While this amendment specifically confirms that government approval will still be required for the relevant cases irrespective of the sector in which the Indian target company is engaged, based on past precedents, we believe that this amendment will have no impact on the requirement of obtaining prior government approval, including pursuant to the provisions of Rule 6 of the NDI Rules read with Press Note 3 of 2020 (**Press Note 3**), and that such requirement is already covered under Rule 9. Therefore, we believe that this amendment is merely clarificatory in nature. As per Rule 6 of the NDI Rules read with Press Note 3, for transfer of equity instruments of an Indian target company to an entity situated in / an individual who is a citizen of a country sharing a land border with India or where the beneficial

owner of an investment into India is situated in or is a citizen of any such country, prior government approval is required. Even after the aforementioned amendment, such requirement of obtaining prior government approval will continue irrespective of the sector in which the Indian target company is engaged and irrespective of the transferor or transferee being non-residents.

FDI in White Label ATM operations

A new entry F.11 has been inserted under the table in Schedule I of the NDI Rules in relation to FDI in White Label ATM Operations' sector. It provides that FDI upto 100% under the automatic route is permitted in such sector, subject to specified conditions. This amendment has been introduced to align with Paragraph 5.2.25 (White Label ATM Operations) of the Consolidated FDI Policy (effective from October 15, 2020).

Aggregate foreign portfolio investment

Paragraph 3(a)(iii) of Schedule I of the NDI Rules has been amended in relation to aggregate foreign portfolio investment. Prior to this amendment, a prior government approval was required in the event the aggregate foreign portfolio investment exceeded either 49% of the paid-up capital on a fully diluted basis or the sectoral or statutory cap, whichever was lower, and if such investments resulted in change of ownership and/ or control of the resident Indian company from resident Indian citizens to persons resident outside India. However, this amendment has now omitted the threshold of 49% and provides that if the aggregate foreign portfolio investment is up to the sectoral or statutory cap and it does not result in transfer of ownership and/ or control of the resident Indian company from resident Indian citizens to persons resident outside India, no government approval will be required for the same.

Employment Law

Employees' State Insurance Act, 1948

ESIC has enhanced the threshold to claim interest for delayed payment of contribution from INR 100 to INR 300, with effect from November 01, 2023. ***(October 11, 2023)***

The Bombay High Court held that the liability to pay the dues levied by the ESIC is of the company, and the occupier having ultimate control over the affairs of the company, is liable to meet such demand. However, the liability of the occupier is not personal. ***(ESIC v Dinendra Ratansi and Others, First Appeal Number 731 of 1992)***

The Karnataka High Court noted that the definition of 'employee' under Section 2(9) of the ESI Act is given wide interpretation to cover distant categories of employees employed in primary work as well as cognate activities i.e., doing work which is ancillary, incidental or has relevance to or link with the object of the establishment. In this case, the Karnataka High Court held the owner-cum-drivers engaged by the respondent to be employees of the respondent who were entitled to contributions and protection under the ESI Act. ***(Employees State Insurance Corporation v Bala Tourist Service, Civil Miscellaneous Appeal Number 1813, 2020 and 2042 of 2021)***

Employees' Provident Funds and Miscellaneous Provisions Act, 1952

The EPFO has issued a circular clarifying that accumulations in the reserves and surplus account of a trust fund (in case of exempt establishments) is in contravention of Paragraph 60 of the EPF Scheme, and, among other things, that interest is to be credited in the beneficiary accounts on monthly running balance basis. ***(October 7, 2024)***

With effect from June 14, 2024, where an employer makes default in the payment of any contribution to the employees' deposit-linked insurance fund, employees' pension fund, employees' provident fund, or in the requisite transfer of accumulations or in the payment of any charges payable under the applicable laws, damages may be imposed at the rate of 1% of the arrears of contribution per month or part thereof. ***(June 14, 2024)***

The Karnataka High Court recently struck down Paragraph 83 of the EPF Scheme and Paragraph 43A of the EPS, which contain special provisions for social security contributions with respect to international workers, as unconstitutional. ***(Stone Hill Education Foundation v. Union of India and Ors., WP. No. 18486 of 2012)***

The National Company Law Tribunal, Mumbai ruled that damages imposed on failure to pay required contributions under the EPF Act are classified government dues subject to Section 53 (distribution of assets) of the Insolvency and Bankruptcy Code, 2016 and do not fall under Section 36(4)(a)(iii) (all sums due to workman or employee from the provident fund). (***Regional Provident Fund Commissioner v. Milind B. Kasodekar, Company Appeal (Insolvency and Bankruptcy) / 35 / MB / C-III / 2023 in Civil Petition (Insolvency and Bankruptcy) Number 3806 of 2018***).

The EPFO has announced the approval of the Finance Ministry to credit interest at the rate of 8.25% on provident fund accumulations under Section 60 (1) of the EPF Scheme for the fiscal year 2023-2024. ***(May 31, 2024)***

The EPFO has notified the social security agreement entered between India and Brazil with effect from January 01, 2024. This would allow for, among other things, portability of social security benefits between the two countries. ***(February 13, 2024)***

The EPFO has issued guidelines on calculation of pension for members with multiple employment under the Employees' Pension Scheme, 1995 ("EPS"). The pension calculation will be determined based on the actual pension amount computed on

the date of exit, subject to the total pensionable salaries from all establishments combined remaining within the wage ceiling. Any contribution received on the excess salary will be sent to the employees' provident fund account. ***(January 29, 2024)***

The EPFO has removed Aadhaar from the list of acceptable documents for proof of date of birth, in compliance with a directive from the Unique Identification Authority of India. ***(January 16, 2024)***

The EPFO issued a Standard Operating Procedure for the management and regulation of establishments that are permitted to operate an exempted private provident fund trust under the EPF Act. ***(October 6, 2023)***

Labour Welfare Fund Act

The Government of Maharashtra has revised the labour welfare fund contribution rates for employers and employees. The labour welfare fund contribution rate for an employee has been increased to INR 25, irrespective of their income level, while the contribution rates of the employer has been increased to thrice the amount of contributions payable by an employee, i.e., INR 75. ***(March 18, 2024)***

The Haryana Labour Welfare Board has notified that employers are required to make labour welfare fund contributions on a monthly basis through the online portal. ***(July 9, 2024).***

State specific Shops and Establishments Act

The Maharashtra Government amended the Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Rules, 2018 to introduce the inclusion of insurance related details of establishments in specific forms such as application for registration, renewal of registration, intimation application and annual return filing. ***(July 22, 2024)***

The Tamil Nadu Shops and Establishments (Amendment) Act, 2018 and the Tamil Nadu Shops and Establishments (Amendment) Act, 2023 have been brought into force with effect from July 02, 2024. The amending legislations provide for, among other things, the mandatory registration of new establishments and mandatory intimation requirements for existing establishments, under the Tamil Nadu Shops and Establishments Act, 1947. ***(July 02, 2024)***

In light of the gaining momentum for flexible working hours in the IT Sector, the West Bengal Government has exempted registered commercial establishments in the IT sector from the application of Section 7(2) (hours of work in establishments) of the West Bengal Shops and Establishments Act, 1963, subject to the normal working hours of employees not exceeding 9 hours per day and 48 hours per week. ***(July 1, 2024)***

All shops and commercial establishments in the Union Territory of Chandigarh registered under the Punjab Shops and Commercial Establishments Act, 1958 are permitted to operate 24 / 7 and 365 days, subject to adherence to certain prescribed conditions. ***(June 25, 2024)***

The Telangana Government has extended the exemption to IT/ ITeS establishments from certain provisions of the Telangana Shops and Establishments Act, 1988, including those pertaining to daily working hours, opening and closing of establishments etc., for a period of four years from May 30, 2024. ***(June 7, 2024)***

Shops and commercial establishments registered under the Rajasthan Shops and Commercial Establishments Act, 1958 are exempt from mandatory weekly close day subject to adherence to certain prescribed conditions. ***(May 2, 2024)***

There is no requirement for employers to register shops and establishments in Tripura under the Tripura Shops and Establishments Act, 1970. ***(April 26, 2024)***

The Gujarat Government exempts IT/ITeS establishments and establishments engaged in the financial services sector in the State from certain provisions of the Gujarat Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2019, pertaining to hours of work and spread over of work, for a period of two years. ***(February 5, 2024)***

Rights of Persons with Disabilities Act, 2016

The Rights of Persons with Disabilities Rules, 2017 was amended to insert accessibility standards with respect to healthcare, civil aviation, sports complex and residential facilities for sports persons with disabilities, rural sector, culture sector, public buildings information and communication technology based public facilities and services, inclusive piped water supply, community toilets, port sector, Indian railway stations and facilities, educational institutions, MHA specific built infrastructures, educational institutions and universities and banking sector. ***(May 2023-February 2024)***

Factories Act

The Government of Haryana has issued revised guidelines for the employment of female employees at night, including security measures, anti-sexual harassment measures and transportation facilities. The notification shall be effective for a period of one year. ***(March 14, 2024)***

The Government of Punjab exempts factories in Punjab from certain provision of the Factories Act including those relating to hours of work, spread over and weekly holidays (subject to certain prescribed conditions and limits). (***September 20, 2023***)

The Government of Karnataka notified the Factories (Karnataka Amendment) Act, 2023 amending certain provisions of the Factories Act including those relating to working hours, rest intervals, overtime wages etc. (***August 7. 2023***)

Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

A Company and its key managerial personnel were fined under the Companies Act, 2013 by the Registrar of Companies, Bangalore, for not including a statement in the annual report with respect to compliance with the provisions relating to the constitution of the internal committee under the POSH Act. ***(September 12, 2023)***

State specific Reservation for Local Candidates Act

The Punjab and Haryana High Court has held the Haryana State Employment of Local Candidates Act, 2020 to be unconstitutional as it mandated private sector employers in the state to reserve 75% of certain posts for domicile candidates. ***(IMT Industrial Association and Another v. State of Haryana, 2023 SCC OnLine P&H 2867)***

Platform-based Gig Workers

Jharkhand and Karnataka introduce draft bills providing for the registration, social security and welfare programmes of platform-based gig workers in the States. ***(July 2024)***

The Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023 which provides for social security, welfare programmes and registration of platform gig workers, received the assent of the Governor of Rajasthan. ***(September 12, 2023)***

The Government of Tamil Nadu issued a notification extending the applicability of the Tamil Nadu Manual Workers (Regulation of Employment and Conditions of Service) Act, 1982 to platform-based gig workers. ***(November 30, 2023)***

The Government of India, in its aim to make the e-Shram portal a comprehensive one-stop solution to support the unorganised / migrant workers, has called for the onboarding platform aggregators and registration of gig and platform-based workers. ***(September 16, 2024)***

Motor Transport Workers

The Karnataka Motor Transport and Other Allied Workers' Social Security and Welfare Act, 2024 which provides for social security, welfare programmes and registration of motor transport and other allied workers, was published in the Karnataka Gazette Extraordinary. ***(March 7, 2024)***

The Government of Karnataka notified the Karnataka Motor Transport and Other Allied Workers Social Security and Welfare Rules, 2024 under the Karnataka Motor Transport and Other Allied Workers Social Security and Welfare Act, 2024. (***June 29, 2024***)

Gratuity

The Government of Karnataka notified the Karnataka Compulsory Gratuity Insurance Rules, 2024 on January 10, 2024. ***(January 10, 2024)***

The Government of Karnataka has revised the timeline for obtaining a valid insurance policy under the Karnataka Compulsory Gratuity Insurance Rules, 2024 to 6 months and not 60 days for existing establishments. ***(July 4, 2024)***

In a case where an employee worked in two different institutions under the same management during two distinct periods on a continuity of service basis, the Bombay High Court held that the gratuity amount should not be split for individual service periods in separate institutes but should be calculated in respect of the entire service period under the same management and on the last drawn salary at the time of final cessation of service. ***(Terna Polytechnic v. Ravi Bhadrappa Randale, 2024 SCC OnLine Bom 144)***

Maternity

The Delhi High Court recently held that women professionals are not eligible for maternity benefits since their engagement cannot be equated to employment. ***(Delhi State Legal Services Authority v. Annwesha Deb, Letters Patent Appeal 701 of 2023)***

The Ministry of Women, Child and Development has released the National Minimum Standard and Protocol for Crèche (Operation and Management) to provide for institutionalization of care services to support and promote female labour force participation in all establishments across the country.

Special Economic Zones

The Government of India published the Special Economic Zones (Fourth Amendment) Rules, 2023, which, among other things, provides that a unit may allow the following employees to work from any place outside the special economic zones ("SEZs") up to December 31, 2024: (a) employees of IT/ITeS units; (b) temporarily incapacitated employees; (c) travelling employees; and (d) employees working offsite. In this regard, please note that this would be applicable to employees who are on the rolls of the unit or under a direct contract as well as personnel of another organisations who are expected to report on a day-to-day basis for work to the unit (and the unit administers control on their attendance) . ***(November 7, 2023)***

Other Updates

The Labour Department of Delhi has issued guidelines for establishments, shops, factories and construction sites to address the severe heatwave conditions in the State, including making arrangements for adequate drinking water, fans, proper ventilation, adjusting shift timings etc. ***(May 27, 2024)***

The Manipur Government has enacted the Manipur Labour Laws (Exemption from Renewal of Registration and License by Establishments) Act, 2024 which exempts employers from renewing their registrations / licenses obtained under the Contract Labour (Regulation and Abolition) Act, 1970, Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 and Building and Other Construction Workers (Regulation of Employment and Conditions of Service)Act, 1996, subject to the employer periodically furnishing a self-certification in the prescribed form. ***(March 13, 2024)***

The Bombay High Court upheld that an employer cannot withhold/ deduct the wages of an employee without conducting an inquiry

or investigation, and that the deduction of wages of an employee who was willing to undertake alternative work in the company was unlawful. ***(General Manager, Mutha Founders Private Limited v. Kamal Balu Kurane and Others, 2023 SCC OnLine Bom 2638)***

The Supreme Court of India has held that a failure to challenge a transfer order through the established remedies available for grievance redressal would be a deemed acceptance of the transfer by the employee. ***(UP Singh v. Punjab National Bank,, 2023 SCC OnLine SC 1681)***

The Karnataka High Court recently held OLA drivers to be 'employees', in a claim pertaining to sexual harassment. ***(X v. Internal Complaints Committee, 2024 SCC OnLine Kar 102, decided on 30-9-2024)*** That said, this has been stayed by a division bench of the Karnataka High Court. (**October 4, 2024**)

The Delhi High Court recently held that disputes around the lock-in periods as mentioned in the employment contracts were arbitrable and that reasonable lick-in periods in employment contracts that apply during the term of employment are valid in law and do not violate the fundamental rights of the employees. ***(Lily Packers Private Limited v Vaishnavi Vijay Umak and Others, Arbitration Petition Number 1210, 1212 and 1213 of 2023)***

The Government of India has issued guidelines for a pilot project of a scheme announced during the Budget Session 2024-25 of the Parliament called "**Prime Minister's Internship Scheme – Pilot Project (FY 2024-25**)" for providing internship opportunities in top 500 companies (basis CSR expenditure).

Trends

A recent analysis has indicated that the Indian companies are exhibiting higher levels of inclusivity, in terms of gender-diversity and inclusion of persons with disabilities, in the permanent, managerial and administrative roles as compared to the lower ranks. ***(October 25, 2023)***

According to a recent news report, industrial sectors such as manufacturing, electrical/electronics, NBFCs, retail, e-commerce, FMCG are actively engaging apprentices and providing tailored training to them to address the shortage of skilled labour across the sectors. Further, the IT/ITeS and BFSI sectors are also considered to be the top industries involved in apprentice engagement, considering the high return on investment these sectors provide. (***November 29-30, 2023)***

According to a recent news report, Indian companies across sectors such as pharmaceuticals, insurance, technology, financial services and renewable energy are rolling out 'returnship' programmes to facilitate women to return to the workforce after a break in their career. The aim is to boost gender diversity and tap into a pool of experienced female professionals. ***(November 25, 2023)***

According to a recent news report, Indian companies are making a conscious effort to overcome barriers and biases that set back employees with disabilities and provide them with leadership opportunities, mentoring and future career pathways. ***(December 2, 2023)***

According to a recent report, various organisations are exploring gig work models and are actively hiring gig workers, with startups being the front-runners. The gig work model is considered to provide more job flexibility and a focus on tailored roles with specialised skills. However, there are concerns pertaining to data security. ***(January 19, 2024)***

Market practice indicates an upward trend in the adoption of liberalised leave policies by companies in India. Several companies provide for mental health and wellness leaves, unlimited paid time-off and parental leaves (irrespective of sex, gender, relationship status etc.) to their employees.

Arbitration and Conciliation Act, 1996

Recent Trends and Amendments to the Arbitration and Conciliation Act, 1996

The Arbitration and Conciliation Act, 1996 (**Arbitration Act**) was amended by the Arbitration and Conciliation (Amendment) Act, 2021 (**2021 Amendment Act**). It received Presidential assent on March 11, 2021, and is deemed to have to have come into effect from November 4, 2020.

The 2021 Amendment Act amends Section 36 of the Arbitration Act pertaining to enforcement of an award, to provide for an automatic, unconditional stay on an arbitration award where the Court is satisfied, *prima facie*, that the arbitration agreement underlying the award or the making of the award itself was induced or effected by fraud or corruption. This stay shall have effect till the disposal of the challenge to the award under Section 34 of the Arbitration Act.

It also substitutes Section 43J of the Arbitration Act to provide that the qualifications, experience, and norms of accreditation of arbitrators shall be specified by regulations instead of the Eighth Schedule of the Arbitration Act, which stands omitted.

Recent Case Laws

Seat of Arbitration and Exclusive Jurisdiction of Courts

Two Indian parties can choose a foreign seat of arbitration

The Supreme Court in *PASL Wind Solutions Private Ltd. v. GE Power Conversion Private Ltd.*,[1] has settled the long-standing controversy surrounding the choice of a foreign seat by Indian parties. The Court noted that there is nothing in the Indian contractual laws which bars two Indian parties from adopting a foreign seat. Accordingly, it was held that two Indian parties can choose a foreign seat of arbitration and an award passed therein shall be enforceable as a foreign award under the Arbitration Act. In this regard, the Court also noted that party autonomy is the brooding and guiding spirit of arbitration.

Courts at the seat / venue have exclusive jurisdiction over the matters arising under a contract

The Supreme Court in *BGS SGS SOMA JV v. NHPC*,[2] held that a choice of a venue is also a choice of seat of arbitration in the absence of an express designation of seat of arbitration by the parties. Relying on the same, the Delhi High Court in *S.P. Singla Construction Private Ltd. v. Construction and Design Services, Uttar Pradesh Jal Nigam*,[3] held that the courts at such seat / venue of arbitration will have exclusive jurisdiction over the matters arising under the relevant agreement.

Jurisdiction of two or more courts to adjudicate disputes

The Supreme Court in *Ravi Ranjan Developers Pvt. Ltd. v. Aditya Kumar Chatterjee*,[4] has held that when two or more courts have jurisdiction to adjudicate disputes arising out of an arbitration agreement, the parties might, by agreement, decide to refer all disputes to any one court to the exclusion of all other courts, which might otherwise have had jurisdiction to decide the disputes. The parties cannot, however, by consent, confer jurisdiction on a court which inherently lacked jurisdiction.

Mere designation of venue of arbitration does not make it the seat when contradictions in the nature of exclusive jurisdiction of courts arise from the agreement

The High Court of Delhi in *Meenakshi Nehra Bhat and Another v. Wave Megacity Centre Private Limited*,[5] has held that where exclusive jurisdiction to the courts of a particular place is provided in the arbitration agreement, the absence of a specific mention of a seat would not result in the courts of the venue exercising jurisdiction.

Generic exclusive jurisdiction clause cannot override venue clause

The High Court of Delhi in *Reliance Infrastructure Limited* v.

1 Civil Appeal No.1647/2021 of the Supreme Court. Judgment dated April 20, 2021

2 (2020) 4 SCC 234

3 2021 SCC OnLine Del 4454

4 SLP (C) No. 17397-17398 of 2021 of the Supreme Court, judgment dated March 24, 2022

5 2022 SCC OnLine Del 3744

Madhyanchal Vidyut Vitran Nigam Limited,[6] has held that a generic exclusive jurisdiction clause, not specifically mentioning a particular place whose courts shall have exclusive jurisdiction, cannot override the venue clause. In such a case, the venue will be considered as the seat of arbitration.

Once the arbitration seat of arbitration is fixed by the arbitral tribunal under Section 20(2) of the Arbitration Act, must not be changed, whereas venue can be changed

The Supreme Court in *BBR (India) (P) Ltd. V. S.P. Singla Constructions (P) Ltd.*,[7] has held that the seat, once fixed by the arbitral tribunal under Section 20(2) of the Arbitration Act, should remain static and fixed, whereas the venue of arbitration can change and move from the seat to a new location. Venue is not constant and stationary and can move and change in terms of Section 20(3) of the Arbitration Act. Change of venue does not result in change or relocation of the seat of arbitration. The law of arbitration does not visualise repeated or constant shifting of the seat of arbitration, especially in commercial matters, and the parties should not have a doubt as to the jurisdiction of courts to avail judicial remedies. The Court clarified that the seat of arbitration cannot be changed except by mutual consent of the parties to arbitration.

An arbitration clause would not be void for uncertainties even if it provides for multiple seats of arbitration

The Delhi High Court in *Vedanta Limited v. Shreeji Shipping*,[8] held that an arbitration clause with multiple seats of arbitration will not be void for uncertainty under Section 29 of the Indian Contract Act, 1872. Section 29 of the Indian Contract Act, 1872, states that agreements which are not certain or not capable of being certain are void. The arbitration clause in the present case gave parties the option of three seats. The Delhi High Court clarified that the arbitration clause is not void for uncertainty as the arbitration clause clearly stipulated the seat and merely offered a choice to the parties by specifying multiple seats. There is no ambiguity in the clause, and hence it is not hit by Section 29 of the Indian Contract Act, 1872

Enforcement of Emergency Awards

An emergency award in India-seated arbitration is enforceable under the Arbitration Act

The Supreme Court in a breakthrough judgement for recognition of emergency awards in India in *Amazon.com NV Investment Holdings LLC v. Future Ltd. & Ors.*,[9] held that an emergency award is akin to an order of the arbitral tribunal, once properly constituted, under Section 17(1) of the Arbitration Act. It was thus held that an emergency arbitration award is enforceable in India. In this regard, the Court also clarified that 'arbitration' in terms of the Arbitration Act includes any arbitration whether or not administered by a permanent arbitral institution.

Non-Signatories to Arbitration Agreement

A foreign award in an international arbitration can be enforced against a non-signatory under Part II of the Arbitration Act

In *Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd.*,[10] the Supreme Court noted that a party seeking to enforce a foreign award under Part II of the Arbitration Act is not required to adduce any additional evidence beyond the record of the arbitral tribunal as long as the procedural requirements under Sections 44 and 47(1)(c) are met. Therefore, the requirement to adduce additional and/or substantive evidence to prove that a non-signatory to an arbitration agreement can be bound by a foreign award ought to be dispensed with. The Supreme Court reiterated the holding in *Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan*,[11] that Section 48(1) of the Arbitration Act can be used to resist enforcement when the dispute can be said to be outside the

6 2023 SCC OnLine Del 4894
7 (2023) 1 SCC 693
8 2024 SCC OnLine Del 4871
9 (2022) 1 SCC 209
10 (2022) 1 SCC 753
11 (1999) 5 SCC 651

ambit of the arbitration agreement and observed that it does not extend to determining whether a non-signatory can be bound by the agreement.

Arbitration agreement can bind non-signatories under the Group of Companies doctrine

The Supreme Court in *Cox and Kings Ltd. v. SAP India Pvt. Ltd. And Another,*[12] has settled the position on application of the 'Group of Companies' doctrine in India. The Court has held that the term 'parties' under Section 2(1)(h) read with Section 7 of the Arbitration Act includes both signatory and non-signatory parties. In case of non-signatory parties, the important determination for the courts is whether the party intended or consented to be bound by the arbitration agreement or the underlying contract through their acts or conduct. Once this determination is made, then notwithstanding the requirement of a written arbitration agreement under the Arbitration Act, non-signatories can be made bound to the agreement. The Court held that, while determining the applicability of the 'Group of Companies' doctrine, the following cumulative factors laid down by the Supreme Court in *Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises Pvt. Ltd.,*[13] must be considered:

- The mutual intent of the parties;
- The relationship of a non-signatory to a party which is a signatory to the agreement;
- The commonality of the subject-matter;
- The composite nature of the transactions; and
- The performance of the contract.

The Court has also clarified that the approach adopted in *Chloro Controls India Private Ltd. v. Severn Trent Water Purification,*[14] that the phrase 'claiming through or under' in Section 8 of the Arbitration Act could be interpreted to include the 'Group of Companies' doctrine, is incorrect as it can only assert a right in a derivative capacity. Instead, the basis of applicability of the 'Group of Companies' doctrine is, as stated above, the intention of the parties to be bound by the arbitration agreement.

Unliteral appointment of sole arbitrator

Sole arbitrator cannot be unilaterally appointed

In consonance with the recent juridical precedents on the issue, the Delhi High Court in *Jyoti Sarup Mittal v. Executive Engineer-XXIII, South Delhi Municipal Corporation,*[15] reiterated that it is not permissible to unliterally appoint an arbitrator in terms of the Arbitration Act unless the non-appointing party agrees to the same, in writing, after the dispute arises.

Arbitration and the Indian Constitution

Presence of an arbitration agreement is not an absolute bar to availing remedies under Article 226 of the Indian Constitution

In *Unitech Ltd and Ors. v. Telangana State Industrial Infrastructure Corporation and Ors.,*[16] the Supreme Court concluded that the presence of an arbitration agreement in a contract between State instrumentality and a private entity is not an absolute bar to availing remedies under Article 226 of the Constitution of India. This decision is a reiteration of the principle that a contract is not a bar to invoke writ jurisdiction against the State of its instrumentalities for their arbitrary action. However, it ought to be decided on a case-to-case basis as to whether recourse to public law remedy can be justifiably invoked.

High Courts can invoke Article 227 of the Indian Constitution against an arbitral tribunal's order in exceptional circumstances

In terms of Article 227 of the Constitution of India, the High Court has superintendence over all courts and tribunals in India. In this

12 2023 SCC OnLine SC 1634

13 (2022) 8 SCC 42

14 (2013) 1 SCC 641

15 2021 SCC OnLine Del 3674

16 Civil Appeal Nos.317-319,2021 of Supreme Court, judgment dated February 17, 2021

regard, the Delhi High Court in *Surender Kumar Singhal v. Arun Kumar Bhalotia*,[17] reiterated the holding of the Supreme Court in *SREI Infrastructure Finance Ltd. V. Tuff Drilling Private Ltd.*,[18] that the term 'tribunal' in Article 227 would include arbitral tribunals constituted under the Arbitration Act. However, the High Court has powers to interfere with orders passed by an arbitral tribunal rejecting its jurisdiction only in the exceptional circumstance that the orders are so perverse that the only possible conclusion is that there is patent lack of jurisdiction.

Arbitration Agreement

Validity of arbitration clause in an insufficiently stamped agreement

The Supreme Court In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899, has settled the position by overruling the judgment by the 5-judge bench of the Supreme Court in *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.* The Court has held that agreements which are not stamped or inadequately stamped are not void ab-initio or unenforceable. These agreements are admissible in evidence. Non stamping or inadequate stamping is a curable defect. An objection as to stamping does not fall for determination under Sections 8, 9 or 11 of the Arbitration Act. Further, any objection in relation to the stamping of the agreement falls within the ambit of the arbitral tribunal. The Stamp Act sets out the procedure for payment of stamp duty and any deficiency thereof, making the latter a curable defect. Since the Arbitration Act is a self-contained code and a special legislation, the general procedure set out in the Stamp Act and the Contract Act, which are general legislations, would be impliedly excluded. The provision of separability under Section 16 of the Arbitration Act ensures that an arbitration agreement survives as separate from the underlying contract to give effect to the true intent of the parties. Further, an arbitral tribunal is competent to adjudicate the issue of stamping pursuant to Sections 33 and 35 of the Stamp Act, as the arbitral tribunal is a person having authority "by consent of parties" to receive evidence. Further, the Court observed that the courts are not required to deal with the issue of stamping at the stage if granting interim measures under Section 9 of the Arbitration Act.

Arbitration agreement lacking 'mutuality' as invalid

The High Court of Delhi in *Tata Capital Housing Finance Ltd. v. Shri Chand Construction and Apartment Private Limited,*[19] held that an arbitration clause providing for arbitration of the claims of one party and the remedy of approaching the court or any other fora for the claims of the other party, with respect to the same defined legal relationship, cannot be valid.

Modification Of Arbitral Awards

Courts cannot modify an arbitral award in setting aside proceedings

With its decision in *National Highways Authority of India and Anr v. M. Hakeem and Anr.*,[20] the Supreme Court has settled the debate on whether courts can modify an arbitral award under Section 34 of the Arbitration Act providing for setting aside of the award. In stating that a court cannot modify, vary, or alter an award under Section 34, the Court upheld the fundamental principle of minimal judicial interference which underlies the Arbitration Act.

Arbitral Awards cannot be modified under Section 34 and Section 37 of the Arbitration Act

The Supreme Court in *S.V. Samudram v. State of Karnataka and Others*,[21] clarified that the court lacks the authority to modify an arbitral award under Section 34 of the Arbitration Act. The Supreme

17 CM (M) No. 1272/2019 of High Court of Delhi, judgment dated March 25, 2021

18 2018 11 SCC 470

19 2021 SCC OnLine Del 5091

20 2021 SCC OnLine SC 473

21 2024 SCC OnLine SC 19

Court referred to its decision in *Dakshin Haryana Bijli Vitran Nigam Limited v. Navigant Technologies Private Limited*,[22] which stated that under Section 34 of the Arbitration Act, the court can dismiss the objections filed, uphold the award, or set aside the award, but there is no power to modify the arbitral award. The Supreme Court further emphasised that the court is only supposed to go into the merits of an arbitral award if the arbitral award is contrary to the public policy of India. If the view taken by the arbitrator is plausible, it cannot be substituted for its own by the court.

Narrow Scope of Juridical Interference

Limited scope of modification of arbitral award under Section 33 of the Arbitration Act

Section 33(1) of the Arbitration Act provides that an award can be modified in the event of an arithmetic and/or clerical error. In this regard, the Supreme Court in *Gyan Prakash Arya v. M/s Titan Industries Ltd.*,[23] held that when the computation in the award is based on the claim made in the pleadings, the same does not amount to arithmetic and / or clerical error made by the sole arbitrator therein. Accordingly, the award cannot be modified under Section 33 on such ground.

Limited scope of review of merits of dispute for enforcement of a foreign award under Section 48 of the Act

The High Court of Calcutta in *EIG (Mauritius) Limited v. McNally Bharat Engineering Company Limited*,[24] observed that there is a subtle distinction between 'enforcement' of a foreign award under Section 48 as opposed to the 'award' itself having to pass muster under Section 34. The High Court also had an interesting perspective on the award, wherein it construed the award as a money award simpliciter that awarded damages, without having any bearing on the public policy of India in the context of either the Securities Contracts (Regulation) Act, 1956 or Foreign Exchange Management Act, 1999.

An arbitral award which does not record findings on contentious issues cannot be remitted back to the tribunal

The Supreme Court in I-*Pay Clearing Services Private Limited v. ICICI Bank Limited*,[25] clearly laid down the scope of courts' powers under Section 34(4). It clarified that patently illegal awards, where findings are not recorded on contentious issues, cannot be remitted back to the tribunal under Section 34(4) of the Act. The interpretation of the Supreme Court is sound because any findings to the contrary would have opened the floodgates to countless applications being filed across Indian courts for correction of patently illegal arbitral awards. Doing so would have allowed parties a second bite at the cherry, which is opposed to the Act's objective of speedy dispute resolution.

Enforcement of a foreign award can only be refused in exceptional circumstances under Section 48(2) of the Arbitration Act

The Supreme Court in *Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited*,[26] has held that there should be minimal judicial interference in the execution of foreign arbitral awards under Section 48(2) of the Arbitration Act, and a review on the merits at this stage is impermissible. It was further observed that India should adopt an internationally recognized narrow standard of public policy while dealing with the grounds of bias of an arbitrator, and this ground can only be attracted when the most basic notions of morality or justice are violated.

Payment of Award Amount and Post-Award Interest

22 (2021) 7 SCC 657

23 2021 SCC OnLine SC 1100

24 2021 SCC OnLine Cal 2915

25 2022 SCC OnLine SC 4

26 2024 SCC OnLine SC 345

Supreme Court holds that an arbitrator has discretion to award post-award interest on a part of the 'sum' under Section 31(7)(b) of the Act

The Supreme Court in *Morgan Securities & Credits Pvt. Ltd. v. Videocon Industries Ltd*,[27] reaffirmed the powers of an arbitrator in relation to granting post-award interest on a part of the 'sum' under Section 31(7)(b). Further, it was observed that an arbitrator can decide whether or not to grant post-award interest after taking into account all relevant factors in the facts and circumstances of each case, including the merits / demerits of the claims made, equities to be balanced between the parties and ensuring compliance with the award.

Date for determining the applicable exchange rate is the date on which the decree becomes final and Executable

The High Court of Delhi in *M/s Karam Chand Thapar & Bros. (Coal Sales) Ltd. V. MMTC Ltd.*,[28] reaffirmed that in an action to recover an amount under an arbitral award payable in a foreign currency, the date for determining the applicable exchange rate is the date on which the decree becomes final and executable.

Alternate Dispute Resolution Mechanism

Pre-institution mediation under the Commercial Courts Act, 2015 is mandatory

The Supreme Court in *M/S. Patil Automation Private Limited and Ors. V. Rakheja Engineers Private Limited*,[29] held that pre-institution mediation under Section 12A of the Commercial Courts Act, 2015 is mandatory. It was observed that a win-win situation resulting from assigning a greater role to the parties themselves in mediation represents a better and the *"only meaningful choice"* in the era of docket explosion which will alleviate the burden on the Indian judicial system.

Pre- Period of limitation for referring the disputes to arbitration would commence only after parties exhaust pre-arbitration steps in the agreement

A Division Bench of the High Court of Delhi in *Welspun Enterprises Ltd. V. NCC Ltd.*,[30] has held that if the contract between the parties contemplates pre-arbitration steps such as negotiation, mediation, etc., before commencing arbitration, then the period of limitation for initiating arbitration would start only after the parties exhaust such steps. If the arbitration clause requires the parties to engage in negotiations or to attempt to resolve the disputes in mediation or conciliation, the right to refer the disputes to arbitration would arise only after the negotiations for an amicable settlement have failed and the parties have exhausted their endeavours to resolve the disputes.

Arbitrability Of Oppression and Mismanagement Disputes In India

NCLT has exclusive jurisdiction in cases of oppression and mismanagement, principle of comity has limited application

The High Court of Bombay has reiterated in *Anupam Mittal v. People Interactive (India) Private Limited*,[31] that the cases of oppression and mismanagement are not arbitrable in India and the NCLT has exclusive jurisdiction to decide such disputes. Further, it was observed that when the subject matter of the dispute is not capable of being settled by arbitration in India, enforcement of such an award in India becomes impossible, irrespective of the chosen seat of arbitration. The Court also held that, in the instant case, since the only recourse for the Plaintiff to resolve disputes concerning oppression and mismanagement is before the NCLT, any injunction restraining such right of the Plaintiff will render him remediless, thus, causing him irreparable harm.

27 2022 SCC OnLine SC 1127
28 2022 SCC OnLine Del 949
29 2022 SCC OnLine SC 1028
30 2022 SCC OnLine Del 3296
31

Extension of mandate of arbitral tribunal

The mandate of an arbitral tribunal can be extended even after its expiry

The Supreme Court in *Rohan Builders (India) Private Limited v. Berger Paints India Limited*,[32] has held that an application for extension of time in domestic arbitrations under Section 29A of the Arbitration Act, is maintainable even after the expiry of the twelve-month or extended 6-month mandate of the arbitral tribunal. The Supreme Court adopted a broad interpretation of "terminate" under Section 29A of the Arbitral Act, and acknowledged that a restrictive interpretation would be contrary to legislative intent. The Supreme Court further clarified that the power of the court to extend time is to be exercised only in cases where there is sufficient cause for such extension.

Grounds for setting aside an arbitral award

Ignoring vital evidence leads to perversity and patent illegality of an arbitral award, which are grounds to set aside an arbitral award

The Supreme Court in a Curative Petition in the *Delhi Metro Rail Corporation v. Delhi Airport Metro Express Private Limited*,[33] overturned its prior decision and affirmed the decision of the Division Bench of the Delhi High Court to partially set aside an arbitral award under Section 37 of the Arbitration Act. The Supreme Court observed that the Division Bench was correct in holding that the Arbitral Tribunal ignored vital evidence and specific terms of the clause, which resulted in perversity and patent illegality of the arbitral award, and which warranted interference under Section 37 of the Arbitration Act. The Supreme Court further rejected its own prior decision which overturned the decision of the Division Bench, stating that the Supreme Court in a Special Leave Petition must interfere sparingly, only when exceptional circumstances arise, and only if the previous court exceeded its jurisdiction under Section 37 of the Arbitration Act.

32 2024 SCC OnLine SC 2494

33 2024 SCC OnLine SC 522

Competition Law - India's Merger Control Regime Gets A Major Overhaul

On 9 September 2024, the Government of India notified several provisions of the Competition (Amendment) Act, 2023 (***Amendment Act***) on merger control along with related rules. Additionally, the Competition Commission of India (***CCI***) also published the Competition Commission of India (Combinations) Regulations, 2024 (***Revised Combination Regulations***). The Amendment Act, related rules[34] and the Revised Combination Regulations (***Merger Control Changes***) come into effect from today, i.e., 10 September 2024. The key changes brought in by these Merger Control Changes are as follows:

i) **Introduction of deal value thresholds**: Transactions with a deal value exceeding INR 20 billion (~ USD 240 million) and where the target enterprise has "*substantial business operations in India*" (***SBO***) will need to be notified. If a transaction meets both these tests, it will not be eligible for the target-based exemption. Transactions which were signed prior to 10 September 2024, but have not been completely consummated as of this date, will need to be reassessed for the applicability of deal value thresholds (***DVT***). If a transaction requires a notification, such transaction must immediately observe standstill obligations (including at a global level) until CCI approval is obtained or attract penalties for gun jumping.

ii) **Exemption for categories of combinations**: The Exemption Rules exempt certain categories of combinations from mandatory pre-notification requirements, replacing the previous exemptions provided in the former Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. The Exemption Rules are not significantly different from the draft exemption rules released by the CCI earlier in March 2024. The Exemption Rules also propose a uniform test of 'change in control', which refers to a change along the spectrum of control. Similar to DVT, transactions which were signed prior to 10 September 2024 but have not been completely consummated as of this date, yet will need to be reassessed for the applicability of exemptions under the Exemption Rules.

iii) **Expedited merger review timelines**: The CCI now has 30 calendar days (formerly 30 working days) to form a *prima facie* view on a notified transaction. If the CCI does not issue a *prima facie* opinion within 30 calendar days, the transaction is deemed approved. The total merger review period has also been shortened from 210 to 150 calendar days. However, there are several time exclusions built into the review timeline, which may effectively elongate this timeframe.

iv) **Revised definition of 'affiliate'**: For the assessment of overlaps as well as determination of the Green Channel route, the new definition of "affiliate" now requires consideration of entities, where an enterprise has the right or ability to access commercially sensitive information (***CSI***) of the other enterprise in addition to the shareholding or board representation criteria. The CSI criteria is a departure from the previous criteria of the right or ability to exercise any special rights not available to an ordinary shareholder.

v) **Derogation from standstill for on-market transactions**: Enterprises can now seek derogation from standstill obligations for on-market purchases, including open offers, and seek post-facto approval from the CCI, subject to certain conditions being met.

A detailed analysis of the key Merger Control Changes introduced are set out below:

Transitional Provisions

At the outset, it is critical to note that effective 10 September 2024, the Revised Combination Regulations and the new Rules become applicable to all qualifying transactions that have not

34 Competition (Criteria for Exemption of Combinations) Rules, 2024 (***Exemption Rules***), Competition (Minimum Value of Assets or Turnover) Rules, 2024 (***De Minimis Rules***), and Competition (Criteria for Combination) Rules, 2024 (***Green Channel Rules***). The Exemption Rules, De Minimis Rules, and Green Channel Rules are collectively referred to as ***Rules***.

been completely consummated or come into effect, even though the trigger event (either the approval by board of directors or execution of transaction documents) may have taken place prior to such date. These transactions need to be re-evaluated to determine whether a notification under the new Rules and Revised Combination Regulations is warranted.

If CCI approval is required, given the mandatory and suspensory nature of the Indian merger control rules, parties must observe standstill obligations and refrain from any form of gun jumping until the transaction is approved. For transactions in this category, the Revised Combination Regulations provide that no penalties will be levied for pre- 10 September 2024 transgressions. This implies that any acts in violation of standstill obligations post- 10 September 2024 will be subject to gun jumping penalties. Therefore, time is of the e‡ssence in assessing the notification requirement in light of the new Rules and the Revised Combination Regulations.

Deal Value Threshold

Transactions where: (a) the value is in excess of INR 20 billion (~ USD 240 million); and (b) the target has "*substantial business operations in India*", would meet DVT, and the target based exemption would be inapplicable to such transactions.

Computing "Value of the Transaction" for DVT

The Revised Combination Regulations state that the value of a transaction must include every valuable consideration, whether direct or indirect or current or future, including but not limited to:

i) any separately agreed consideration on account of any undertaking or restriction imposed on any party (including for example, non-compete fees);
ii) all incidental arrangements entered into between the parties within two years of the transaction coming into effect, including technology assistance agreements, licensing of intellectual property rights, and supply of materials, etc.;
iii) for call options, assuming full exercise of such call option (without discounting to present value);
iv) the value attributable to all inter-connected steps; and
v) consideration payable (as per best estimates) based on the occurrence of a future event / outcome captured in the transaction documents.

The Revised Combination Regulations explain that consideration of all acquisitions between the parties within two years prior to the trigger event shall be included to calculate the value of the transaction. In case of a transaction involving an open offer, full subscription to the offer must be considered for the computation of the value of such transaction.

Critically, the Revised Combination Regulations provide that, if the precise value of a transaction cannot be established with reasonable certainty, the transaction may be considered to exceed the prescribed deal value of INR 20 billion.

Determination of "Substantial Business Operations in India"

Under the Revised Combination Regulations, the target has "*substantial business operations in India*" when:

i) the target's gross merchandise value (***GMV***), in India, in the twelve months preceding the trigger event is 10% or more of the global GMV **AND** more than INR 5 billion (~ USD 60 million); **OR**
ii) the target's turnover, in India, in the preceding financial year is 10% or more of its global turnover, **AND** more than INR 5 billion (~ USD 60 million);
iii) specifically for digital services, (a) 10% or more of the target's business users or end users are in India, **OR** (b) the target's GMV in India in the 12 months preceding the trigger event is 10% or more of its global GMV; **OR** (c) the target's turnover in India, in the preceding financial year is 10% or more of its global turnover.

Notably, the definition of 'digital service' is wide and includes the provision of a service or one or more piece of digital content, or any other activity by means of the internet with or without consideration, to end users or business users (to be calculated based on the average number of such users for the past one year preceding the trigger event).

Exemption Rules

The Exemption Rules replace schedule I of the combination regulations, which until now provided exemptions from the notification requirement, including exemptions for minority share acquisitions, intra-group transactions, bonus issues, stock splits and creeping acquisitions.

The key changes introduced by the Exemption Rules are as follows:

Minority Share Acquisition Exemption Revamped

The Exemption Rules split the former minority share acquisition exemption into two separate exemptions.

Acquisitions in the Ordinary Course of Business

This relates to the acquisition of shares in the 'ordinary course of business' (***OCB***). Previously, the CCI in its decisional practice had held that OCB meant "*revenue transactions, done solely with the intent to get benefited from short term price movement of securities*". The explanation to Rule 1 now limits the application of OCB to the acquisition of shares or voting rights only by underwriters, stockbrokers, and mutual funds.

This exemption is available as long as the acquirer does not hold more than a specified threshold of shares or voting rights as provided below:

- Acquisition of unsubscribed shares as underwriter: <25%
- Acquisition of shares as stockbroker: <25%
- Acquisition of shares as mutual fund: <10%

Acquisitions Solely for Investment Purposes

This relates to the acquisition of less than 25% of shares or voting rights of the target, not leading to an acquisition of control or right or ability to access CSI, solely as an investment, only if the:

- Acquirer does not acquire the right or ability to appoint a director or an observer to the board; and
- Transaction does not lead to any horizontal overlaps, or vertical or complementary relationships (***Overlaps***); and
- If Overlaps exist, the exemption would only be available where the acquirer holds less than 10% of the shares or voting rights of the target, after the acquisition.

Exemption for Acquisition of Incremental Shareholding or Voting Rights

An incremental acquisition of shares or voting rights by an existing shareholder holding less than 25% of shares or voting rights (both prior to and after such acquisition) is exempt. However, such acquisition should not result in the acquisition of control or provide the acquirer with the right or ability to access to CSI of the target, depending upon the nature of Overlaps, as explained below:

- If no Overlaps exist: no cap on the incremental acquisition up to 25%;
- If Overlaps exist: cap of 5% on the incremental acquisition (whether through a single acquisition or a series of acquisitions);
- If Overlaps exist and the existing shareholding or voting rights is less than 10% and after the transaction shareholding is more than 10%: exemption not available.

Intra-group Transaction(s) Exemption

Under the Competition Act, 2002, 'group' means two or more enterprises which, directly or indirectly, are in a position to: (a) exercise 26% or more of the voting rights in the other enterprise; or (b) appoint more than 50% of the members of the board of directors in the other enterprise; or (c) control the management or affairs of the other enterprise.

It is clarified that for the purposes of the Exemption Rules, the acquirer and its group entities mean the ultimate controlling person of the acquirer and other entities forming part of the same group.

Acquisition of Shares and Voting Rights

Acquisition of shares or voting rights where the acquirer or its group entities already hold 50% or more shares or voting rights in the target prior to such acquisition are exempt, provided such

acquisition does not result in change in control.

Acquisition of Assets

Acquisition of assets of another entity, within the same group, is exempt, except in cases where there is a change in control over the assets being acquired.

Mergers and Amalgamations

A merger or amalgamation of enterprises within the same group is exempt, provided that the transaction does not result in change in control.

'Change in Control' Test

The Amendment Act codifies the 'material influence' standard into the defintion of control. Under the earlier Combination Regulations, various exemptions including those relating to bonus issue or stock splits and creeping acquisitions were based on a test of change of control from 'joint' to 'sole' control. The Exemption Rules introduce a uniform test of 'change in control' for such exemptions, i.e., such exemptions are available as long as the transaction does not result in a change in control. It remains to be seen whether 'change in control' would only include a change from joint control to sole control (*or vice versa*) or would also include a change along the spectrum of control.

Introduction of Demerger Exemption

The Exemption Rules exempt: (a) demergers; and (b) the issuance of shares to the demerged company or to its shareholders, as a consideration for the demerger.

Green Channel Rules

The Green Channel Rules codify the current criteria for filing a notice under the 'Green Channel' route. The 'Green Channel' route is available if the parties, their respective group entities and / or their 'affiliates' have no Overlaps, and the notified transaction is deemed approved on the day of the filing. The Green Channel Rules remain unchanged from the draft Green Channel rules published by the CCI for public comments.

The one notable change in the criteria for qualifying under the 'Green Channel' route is in the definition of an 'affiliate', as reflected in the table below:

Old 'Affiliate' Test*	New 'Affiliate' Test
Direct or indirect shareholding of 10% or more; **OR**	10% or more of the shareholding or voting rights of the enterprise; **OR**
Right or ability to nominate a director or observer to the board; **OR**	Right or ability to have a representation on the board of directors of the enterprise either as a director or as an observer; **OR**
Right or ability to exercise any special right (including any advantage of commercial nature with any of the party or its affiliates) that is not available to an ordinary shareholder.	Right or ability to access CSI of the enterprise.

**As provided in the Notes to Form I published by the CCI.*

Notably, the meaning and scope of 'CSI' has not been provided in either the Green Channel Rules, the Amendment Act, or the Revised Combination Regulations.

Derogation From Standstill for On-market Transactions

In the past, the suspensory merger control regime has created hurdles for transactions involving open market purchases / stock market acquisitions, including extant Takeover Regulations. The Merger Control Changes allow acquirers the ability to seek a derogation from standstill obligations for open market purchases, thereby allowing them to capitalise on market opportunities. An application for derogation is subject to: (a) the parties filing a notification form (within 30 days of the first on-market acquisition); and (b) the acquirer not exercising ownership or beneficial rights or interest in such securities (including exercising voting rights, but excluding (i) receipt of economic benefits such as dividends etc. and (ii) exercise of voting rights in matters relating to liquidations

and / or insolvency), until the CCI approves the transaction. However, the acquirer must not directly or indirectly influence the target enterprise in any way by exercising these rights. As such, these amendments make it easier to implement open offers and other on-market purchases.

De Minimis Rules

The De Minimis Rules codify the existing *de minimis* thresholds as set out in the Ministry of Corporate Affairs' notification dated 7 March 2024 (***De Minimis Notification***). The De Minimis Rules mirror the De Minimis Notification, prescribing that a transaction need not be notified to the CCI for its prior approval, if the target has either assets of not more than INR 4.5 billion (~ USD 54 million) in India or turnover of not more than INR 12.5 billion (~ USD 150 million) in India.

Unlike the De Minimis Notification, the De Minimis Rules do not have an expiry date. Therefore, unless the De Minimis Rules are amended or revoked, the De Minimis Rules will continue to be in force.

Procedural Changes

Shortened Timeline for Phase I Review and Approval if CCI's 30 Calendar Day Deadline Expires

As per the Amendment Act, the CCI now has 30 calendar days (as opposed to the earlier 30 working days) to form a *prima facie* opinion on whether a transaction causes or is likely to cause any appreciable adverse effect on competition in India. Where the CCI fails to give a *prima facie* opinion on a transaction within 30 calendar days, such transaction will be deemed to be approved. The overall timelines for the CCI to complete its review have also been reduced from 210 calendar days to 150 calendar days.

The shortened review timelines may lead to increased risks of invalidation. However, the Revised Combination Regulations allows the parties to withdraw-and-refile notifications with the CCI's permission and provides for the adjustment of filing fees if such refiling is done within 45 days.

Increase in Filing Fees

The Revised Combination Regulations have significantly increased the filing fees for both Form I (short form) and Form II (long form). The filing fees for Form I have been increased from INR 2 million (~ USD 24,000) to INR 3 million (~ USD 36,000). The filing fees for a Form II have been increased from INR 6.5 million (~ USD 78,000) to INR 9 million (~ USD 107,000).

Format for Offering Modifications

The Revised Combination Regulations now provide a format to offer modifications / remedies to the CCI under Form IV, which requires the following information to be provided: (a) a summary of the modifications offered; (b) details on how the modifications address the identified concerns; (c) details of the divestment products / assets, if any; (d) monitoring arrangements; and, (e) timelines for completion of a divestment, etc.

Conclusion

The merger control regime stands substantially modified due to the suite of changes made by the Government of India and the CCI. Due care and attention must be exercised in evaluating whether transactions require a notification, given that significant additional information, analysis and judgment calls will now be required to come to this conclusion. Most importantly, the transitional provisions mean that all transacting parties which may have previously exclude d an Indian merger notification must urgently revaluate whether these amendments change the position, as they would need to implement a standstill and notify the CCI for approval forthwith.

Recent Developments in Energy Regulations

Great Indian Bustard Area

On the issue of threat to endangered species of bird in the states of Rajasthan and Gujarat, the Supreme Court in its order dated March 21, 2024 has recalibrated its previous directions with respect to undergrounding of electric lines in the 'Great Indian Bustard (**GIB**) area':

- a new expert committee has been appointed to determine the feasibility and extent of overhead and underground electric lines in priority GIB areas in Rajasthan and Gujarat;
- the committee will identify conservation measures for the GIB and other fauna, as well as suitable alternatives for laying future power lines that balance conservation with India's renewable energy commitments;
- the directions imposed in the Initial GIB Order for potential GIB areas have been relaxed, subject to conditions the expert committee may recommend for both potential and priority areas; and
- the committee has the liberty to impose additional measures, including considering the efficacy of bird diverters, and recommend further protective measures to the Supreme Court.

While the expert committee has submitted a draft report, the matter is listed for hearing on November 8, 2024. The outcome of this litigation may impact future requirements for power line installation in GIB areas.

Amendments to the Electricity (Late Payment Surcharge and Related Matters) Rules of 2022

The Ministry of Power (**MoP**) vide notification dated February 28, 2024 issued an amendment to the Electricity (Late Payment Surcharge and Related Matters) Rules of 2022 which inter alia stipulates that the distribution licensee shall communicate its daily schedule for power requisitions to each generating company, with which such distribution licensee has a purchase agreement, at least two hours before the deadline for submitting proposals or bids in the day-ahead market in that day. In the event, the distribution licensee fails to provide such notification, the generating company may offer its surplus power in the power exchanges. In case such power offered by the generating company is not cleared in the day-ahead market then it will subsequently be made available in other market segments, such as the real-time market, within the power exchanges.

Pertinently, such offer of surplus power in the power exchange will be subject to a price ceiling not exceeding 120% of its energy charge, as determined or adopted by the appropriate commission. If the generating company does not offer such surplus power in the power exchanges, the unutilized surplus power, up to the declared capacity and not offered in the power exchanges, will not be factored into the computation of fixed charges. Relevantly, the liability of payment of fixed charges towards the un-requisitioned power shall remain with the distribution licensee.

Amendments to the Electricity Rules

Open access means the non-discriminatory provision of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the appropriate commission. Such provision of distribution/transmission system is subject to levy of open access charges (comprising of several components such as transmission and wheeling charges).

Pursuant to the Electricity (Amendment) Rules, 2024, notified on January 10, 2024, the MoP enacted new provisions (i.e., Rule 22 thereto) within the Electricity Rules to:

- prescribe a formula for computation of wheeling charges wherein, wheeling charges will be computed as 'Annual Revenue Requirement towards wheeling / Energy wheeled during the year';
- establish charges for utilisation of state transmission utility networks by short-term open access consumers or temporary general network access users; and
- rationalise additional surcharge levied on open access.

The MoP, pursuant to a notification dated January 17, 2024, further

amended the Electricity Rules and one of the key modifications introduced, by way of amendment to the aforementioned Rule 22 of the Electricity Rules, is to empower the appropriate commissions to set distinct wheeling charges for various voltage levels in accordance with the formula for computation of wheeling charges.

Order on group captive requirements

A captive generating plant (**CGP**) is a power plant which is set up for generation of electricity, primarily for self-consumption. In India, a captive power plant can be categorized into the following structures: (i) a single captive structure; and (ii) a group captive structure.

In order to qualify as a CGP, Rule 3 of the Electricity Rules, 2005 (**Electricity Rules**) provides the following requirements:

- not less than 26% of the equity share capital (with voting rights) of the company operating the power plant has to be held by the captive user (Equity Requirements); and
- not less than 51% of the annual aggregate electricity generated in such plant should be utilised by the captive user year-on-year (Usage Requirements).

The Supreme Court of India in its order dated October 9, 2023 in Dakshin Gujarat Vij Company Limited v. Gayatri Shakti Paper and Board Limited and Another (Civil Appeal No. 8527-8529 of 2009), addressed the critical issues pertaining to CGPs owned by special purpose vehicles (SPVs). The court determined that SPVs operating CGPs constitute an "association of persons" under Rule 3(1)(a) of the Electricity Rules and accordingly, the test of proportional consumption (which is applicable to an association of persons) will apply even to SPVs. Consequently, the ruling stipulated a unitary qualifying ratio to be satisfied by the captive users, requiring captive users to consume between 1.764% to 2.156% of electricity generated per 1% shareholding in the captive SPV.

Withdrawal of Banking Facilities

Banking of energy is the process under which the energy generator supplies power to a distribution licensee, not with the intent of sale but with the intent of exercising its right to drawback the banked power on a later date subject to payment of banking charges to the distribution licensee for providing such banking facility. Given the intermittent nature of renewable energy, several states in India (as a promotional measure for generation of electricity) have been providing banking facilities to wind and solar power generators.

However, in recent times, some states (such as Tamil Nadu and Andhra Pradesh) have filed petitions to either have more stringent terms for provision of banking services (such as higher banking charges) or do away with banking as a service all together, for instance, in Andhra Pradesh, the distribution licensee has filed O.P. No. 5 of 2020 before the SERC, seeking withdrawal of banking facilities in light of its critical financial condition. Similarly, in Tamil Nadu banking facilities are no longer available for solar energy projects and are only available for wind energy projects.

Notes

Awards and Recognition

Shardul Amarchand Mangaldas & Co., founded on a century of legal achievements, is one of India's leading full-service law firms. The Firm's mission is to enable business by providing solutions as trusted advisers through excellence, responsiveness, innovation and collaboration.

SAM & Co. is known globally for its exceptional practices in mergers & acquisitions, private equity, competition law, insolvency & bankruptcy, dispute resolution, international commercial arbitration, capital markets, banking & finance, tax, intellectual property, data protection and data privacy, technology law and Infrastructure, Energy and Project Finance.

The Firm has a pan-India presence and has been at the helm of major headline transactions and litigations in all sectors, besides advising major multinational corporates on their entry into the Indian market and their business strategy. Currently, the Firm has over 881 lawyers including 178 Partners, offering legal services through its offices at New Delhi, Mumbai, Gurugram, Ahmedabad, Kolkata, Bengaluru, and Chennai.

Firm Management

Shardul S. Shroff
Executive Chairman
+91 98101 94303
shardul.shroff@AMSShardul.com

Pallavi Shroff
Managing Partner
+91 98100 99911
pallavi.shroff@AMSShardul.com

Akshay Chudasama
Managing Partner
+91 98210 38898
akshay.chudasama@AMSShardul.com

Practice Area Experts

Rudra Kumar Pandey
Partner - General Corporate & M&A
Japan Desk
rudra.pandey@AMSShardul.com

V R Neelakantan
Partner - Projects & Project Finance
vr.neelakantan@AMSShardul.com

Binsy Susan
Partner - Dispute Resolution
binsy.susan@AMSShardul.com

Pooja Ramchandani
Partner - Employment Law
pooja.ramchandani@AMSShardul.com

Rohan Arora
Partner - Competition Law
rohan.arora@AMSShardul.com

Akshay Sharma
Partner - Dispute Resolution
akshay.sharma@AMSShardul.com

Kriti Kaushik
Partner - Labour Disputes
kriti.kaushik@AMSShardul.com

Vishal Nijhawan
Partner Designate – General Corporate & M&A
vishal.nijhawan@AMSShardul.com