

THE
LOW DOWN:

THE LOW DOWN

**IT IS
ALL
INSIDE**

THE LOW DOWN:

| Lex Consult Newsletter: A quarterly 'Low Down' of legal updates
in the corporate world |

LEX CONSULT EDITORIAL | JAN-MAR AND (APR) 2024

SEGMENT ONE

Reserve Bank of India (RBI)



REVISED GUIDELINES ON INVESTMENTS IN ALTERNATIVE INVESTMENT FUNDS

The RBI issued revised guidelines on investments in Alternative Investment Funds (**AIFs**) through a Circular dated 27 March 2024 to address regulatory concerns and ensure uniformity among regulated entities (**REs**).

The revised guidelines aim to enhance transparency and mitigate risks associated with AIF investments while clarifying the applicability of provisions and addressing stakeholder concerns. The earlier circular dated 19 December 2023 focused on mitigating risks of evergreening through AIF investments, requiring REs to liquidate investments in certain schemes within 30 days. However, it failed to recognize the AIF's governance structure. The revised guidelines provide clarifications and modifications, defining downstream investments and revising provisioning requirements. It also clarifies the applicability of certain nuances and introduces capital deduction rules, and the changes aim to streamline AIF investments and address concerns raised by stakeholders.

SEGMENT TWO

Securities and Exchange Board of India (SEBI)

Securities and Exchange Board of India (**SEBI**) issued a Circular dated 11 January 2024, acknowledging the amendments to the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 (**Rules**), as per the Government of India's gazette notifications in March and September 2023. These amendments include revisions to thresholds for determining beneficial ownership. Consequently, para 4.1.2. under Chapter 4 of SEBI's Master Circular dated 31 July 2023, for AIFs has been modified.

The modification specifies that investors or their beneficial owners, as determined in accordance with sub-rule (3) of rule 9 of the Rules, should not be individuals listed in the UN Security Council's Sanctions List or residents of countries identified by the Financial Action Task Force for strategic anti-money laundering or counter-financing of terrorism deficiencies. The Circular also mandates that if an investor onboarded to an AIF scheme, fails to meet the revised conditions, the AIF manager must refrain from drawing down further capital contributions from them.

SEBI has revised Para 1.12 of its Master Circular for Depositories from 06 October 2023, to combat concerns surrounding the unauthorized transfer of securities from Beneficial Owner (**BO**) Accounts.

Notable safeguards include prioritizing investor education on preserving Delivery Instruction Slips (**DIS**), prohibiting the acceptance of pre-signed DIS with blank columns, and mandating immediate reporting of lost or stolen DIS booklets.

Furthermore, the amendments mandate Depositories to issue new DIS booklets only upon receipt of complete instruction request slips, ensuring the authenticity of requests, particularly for inactive or dormant accounts. In addition, provisions restrict the issuance of loose DIS to account holders and introduce checks for signature verification by Depository Participants (**DPS**). Inactive or dormant accounts now require mandatory verification with BOs before any security transfer, with heightened oversight for accounts holding five or more International Securities Identification Numbers (**ISINs**).

AMENDMENT IN FOREIGN INVESTMENT REGULATIONS FOR ALTERNATIVE INVESTMENT FUNDS (AIFS)

ENHANCING SAFEGUARDS FOR SECURITIES TRANSFER IN DEMATERIALIZED MODE

SEBI

FLEXIBILITY FOR INCREASED PARTICIPATION BY NON-RESIDENT INDIANS, OVERSEAS CITIZENS OF INDIA AND RESIDENT INDIAN INDIVIDUALS IN SEBI REGISTERED FOREIGN PORTFOLIO INVESTORS

SEBI by way of a press release dated 30 April, 2024 approved for enhancing participation by non-resident Indians, overseas citizens of India and resident Indian individuals in SEBI registered foreign portfolio investors based out of international financial services centres in India and regulated by the International Financial Services Centres Authority.

SEBI approved a regulatory framework for providing flexibility for increased contribution by non-resident Indians, overseas citizens of India and resident Indian individuals, in the corpus of certain foreign portfolio investors based out of international financial services centres in India and regulated by International Financial Services Centres Authority. The flexibility for such increased participation shall be subject to certain conditions to manage regulatory risk, inter alia.

- (1) 100% contribution limits shall be available subject to the foreign portfolio investors submitting copies of PAN cards of all their non-resident Indians/overseas citizens of India/ resident Indian individual, along with their economic interest in the foreign portfolio investors, to Designated Depository Participants (**DDP**).
- (2) Alternatively, funds set up in International Financial Services Centres (**IFSC**) and regulated by International Financial Services Centres Authority (**IFSCA**), desirous of having upto 100% aggregate contribution in their corpus from non-resident Indians/overseas citizens of India/ resident Indian individual, shall not be required to submit the above mentioned documents, provided they satisfy the following conditions in terms of IFSCA's regulatory framework.

FPI DISCLOSURE REQUIREMENTS

SEBI INTRODUCES RELAXATION IN PPM CHANGES REPORTING FOR ALTERNATIVE INVESTMENT FUNDS (AIFS)

SEBI, by way of a circular dated 24 August 2023, mandated additional disclosures for FPIs under specific criteria, with exemptions for certain conditions.

Through a subsequent circular on 20 March 2024, SEBI introduced the following provisions:

1. FPIs with over 50% of their Indian equity Assets Under Management (**AUM**) in a corporate group need not make extra disclosures if certain conditions are met, including the apex company having no identified promoter, the FPI holding no more than 50% of its Indian equity AUM in the corporate group after excluding its holding in the apex company, and the combined holdings of such FPIs in the apex company being less than 3% of its total equity share capital.
2. Custodians and Depositories will monitor daily utilization of the 3% limit for apex companies without identified promoters, disclosing breaches before trading starts the next day. If the 3% limit is met or breached, FPIs must realign investments within 10 trading days or make additional disclosures. Provisions of the 24 August 2023 circular remain unchanged, and FPIs meeting specific criteria as of 31 October 2023, were required to make additional disclosures by 12 March 2024.

SEBI on 29 April 2024 issued a Circular relaxing the requirement of intimation through a merchant banker for changes in the terms of Private Placement Memorandum (**PPM**) of AIFs. Previously, all changes in PPM terms needed submission through a merchant banker, but based on market feedback, certain changes may now be filed directly with SEBI. Additionally, Large Value Fund for Accredited Investors (**LVFs**) are exempt from this requirement and can directly file PPM changes with SEBI along with a CEO and Compliance Officer's signed undertaking.

SEBI

NAVIGATING UNLIQUIDATED INVESTMENTS

SEBI, on 25 April 2024, introduced the Securities and Exchange Board of India (Alternative Investment Funds) (**Second Amendment**) Regulations, 2024 (**Amendment**), aimed at enhancing flexibility for AIFs and investors in managing unliquidated investments. A subsequent circular dated 26 April 2024 was issued by SEBI elaborating on Dissolution Period.

The Amendment defines the Dissolution Period for the liquidation of unliquidated AIF investments, granting AIFs the option to distribute investments in-specie or enter the Dissolution Period, subject to investor consent.

Conditions for entering the Dissolution Period include a minimum bid requirement, disclosure to investors, notification to SEBI, and restrictions on related parties. Performance during this period is reported separately, and AIF managers cannot charge a management fee.

Mandatory in-specie distribution occurs if investor consent is not obtained or investments remain unsold after the Dissolution Period. Flexibility is provided for AIFs with an additional liquidation period, subject to conditions. Compliance responsibility lies with managers, trustees, and key personnel, with the circular effective immediately.

SEBI on 18 April 2024 issued a Circular standardizing reporting format for the Private Placement Memorandum (**PPM**) Audit Report for AIFs. The Circular will ensure uniform compliance standards, with a standardized reporting format developed in consultation with the Standard Setting Forum for AIFs (**SFA**). All other filing provisions remain unchanged. These requirements are effective from the financial year ending 31 March 2024.

However, in accordance with the Clause 2.4 of the SEBI Master Circular for AIFs, the standardized format is not applicable to (i) Angel Funds as defined in AIFs; and (ii) AIFs/Schemes in which each investor commits to a minimum capital contribution of INR 70 Crore or (USD 10 Million or equivalent).

SEBI, on 25 April 2024, introduced the Securities and Exchange Board of India (Alternative Investment Funds) (Second Amendment) Regulations, 2024 (**Amendment**) and a subsequent circular dated 26 April 2024 providing a framework for Category I and II AIFs to create encumbrances on their equity holdings of investee companies.

The Amendment permits Category I and II AIFs to create encumbrances on investee company equity for borrowing purposes, subject to SEBI's conditions. Key conditions include explicit disclosure in Private Placement Memorandums (**PPMs**) and obtaining investor consent for existing encumbrances.

AIFs must ensure borrowed funds are solely used for the investee company's development and operations. Encumbrances' duration should align with the AIF scheme's tenure, with compliance required for foreign investment regulations and RBI guidelines. The Circular outlines additional provisions for compliance, implementation standards development by the Standard Setting Forum for AIFs (**SFA**), and trustee/sponsor responsibilities.

SEBI ISSUES CIRCULAR ON STANDARDIZATION OF THE PRIVATE PLACEMENT MEMORANDUM (PPM) AUDIT REPORT

ENHANCED FLEXIBILITY FOR ALTERNATIVE INVESTMENT FUNDS (AIFS) THROUGH ENCUMBRANCE FRAMEWORK

SEGMENT THREE

Ministry of Corporate Affairs (MCA)

**COMPANIES (LISTING OF EQUITY SHARES IN
PERMISSIBLE JURISDICTIONS) RULES, 2024**

MCA on 24 January, 2024 introduced the Companies (Listing of Equity Shares in Permissible Jurisdictions) Rules, 2024 (**Rules**), to regulate the listing of equity shares in specific jurisdictions. The provisions of the Rules apply to unlisted public companies and listed public companies (in accordance with regulations framed or directions issued in this regard by SEBI or the International Financial Services Centres Authority (**Authority**) that issue their securities for the purpose of listing on permitted stock exchanges in permissible jurisdictions. The Rules specifically provide that unlisted public companies (without partly paid-up shares) can issue equity shares for listing on a stock exchange and existing shareholders of the unlisted public company, can offer their equity shares for sale for listing on a stock exchange in a permissible jurisdiction.

Compliance Requirements: The unlisted public company or its existing shareholders must comply with the requirements as laid down in the Rules. Where an unlisted public company intends to get its equity shares listed on a recognized stock exchange in addition to a permissible jurisdiction, compliance with SEBI conditions is necessary.

Listing: After listing on a stock exchange in a permissible jurisdiction, the company must comply with Indian Accounting Standards specified in the Companies (Indian Accounting Standards) Rules, 2015, for financial statement preparation, in addition to any other accounting standard.

Ineligibility Criteria for Listing: Companies registered under section 8 or declared as Nidhi, limited by guarantee and also having share capital, with outstanding public deposits, negative net worth, payment default to creditors, pending winding-up proceedings, or default in filing annual returns are not eligible for listing under these rules.

SEGMENT FOUR

National Company Law Appellate Tribunal (NCLAT)/

National Company Law Tribunal (NCLT)

N C L A T

TREATMENT OF OPTIONALLY CONVERTIBLE DEBENTURES IN INSOLVENCY PROCEEDINGS

The NCLAT on 10 January 2024, made a significant decision where they thoroughly examined the complex nature of financial debt in corporate transactions providing important perspectives on how optionally convertible debentures (**OCDs**) are understood and categorized as financial debt.

Brief facts: The dispute revolved around a Debenture Subscription Agreement (**DSA**) where ASK Trusteeship Services Private Limited, the Financial Creditor, subscribed to OCDs issued by the Corporate Debtor (**CD**). Subsequent defaults led to a section 7 application under the Insolvency and Bankruptcy Code (**Code**), raising questions about the nature of the OCDs and whether they constituted a 'financial debt' under the Code.

Primary Issue: The core aspect the court observed was regarding classification of OCD's as equity or debt.

Decision: Distinguished from compulsorily convertible debentures, OCDs were held as financial debt within the meaning of section 5(8)(c) of the Code. This interpretation aligns with the Tribunal's previous decisions and differentiates from the equity nature of compulsorily convertible debentures.

SEGMENT FIVE

The Supreme Court (SC)/ High Courts (HC)

SC | HC

DESIGNATION OF SEAT OF ARBITRATION IS SIMILAR TO AN EXCLUSIVE JURISDICTION CLAUSE

The Delhi HC on 26 February 2024 in *My Preferred Transformation and Hospitality Private Limited vs. Panchdeep Construction Limited* held that the clause in an agreement designating the seat of arbitration should take precedence and assume pre-eminence over the exclusive jurisdiction clause.

Brief facts: Under the Management Services Agreement (**MSA**), the parties agreed that the respondent's hotel in West Bengal, would be operated by the petitioner. After disputes arose between the parties, the petitioner invoked arbitration. The petitioner's allegations have been disputed on merits and it has been asserted that the courts in Calcutta would have exclusive jurisdiction in all matters arising out of the MSA. By way of the petition, the petitioner approached Delhi HC under section 11 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) seeking appointment of an arbitrator.

Issue: Whether the designation of a seat as New Delhi confers jurisdiction to the Delhi HC over the section 11 of the Arbitration Act proceedings when the MSA provides that, the courts at Calcutta will have, 'exclusive jurisdiction in all matters arising out of the MSA?

Decision: The designation of seat is akin to an exclusive jurisdiction clause. In an agreement featuring distinct forum selection and seat clause, the clause designating the seat takes precedence and assumes pre-eminence.



SECURITY DEPOSIT MAY CONSTITUTE A FINANCIAL DEBT UNDER CERTAIN CIRCUMSTANCES

The SC by way of its judgement pronounced on April 25, 2024, consented with the view taken by NCLAT regarding dispute on the real nature of an underlying transaction where security deposit carrying annual interests were submitted by the creditor under a sales promotion agreement.

Brief facts: CIRP under the Insolvency and Bankruptcy Code, 2016 (**Code**) proceedings were initiated against the Corporate Debtor (CD) in lieu of unsecured loans provided to the CD and subsequent to group of appeals and claims (Appeals) against the CD in respect of security deposit submitted to the CD.

Primary Issue: The sole issue before the SC was whether the amount submitted to the CD in the form of security deposits would be construed as a financial debt under section 5(8)(f) of the Code and whether the entities providing such security deposit be considered as financial creditors?

Decision: The SC consented with the view taken by NCLAT that transaction having the commercial effect of borrowing and being used as a tool for raising finance should be considered as financial debts under the Code. The SC also observed that there is an existence of a debt along with interest, which is disbursed against the consideration for the time value of money. Hence, the SC held that *While deciding the issue of whether a debt is a financial debt or an operational debt arising out of a transaction covered by an agreement or arrangement in writing, it is necessary to ascertain what is the real nature of the transaction reflected in the writing.*

The case of ***NBCC (India) Limited v. Zillion Infraprojects Private Limited*** is a significant judgment by the Supreme Court of India, which delves into the intricacies of arbitration proceedings within the context of contractual disputes.

Brief facts: The appellant, a public limited company and government of India undertaking, was engaged in the construction of power plants and other infrastructure projects. The respondent was a private limited company engaged in the construction and infrastructure sector. The respondent was awarded a contract for the construction of the weir across river Damodar at Jharkhand. Pursuant to certain disputes which arose between the parties where the respondent invoked arbitration and sought consent from the appellant for the appointment of a former HC Judge as the sole arbitrator.

The appellant failing to reply to the arbitration notice, the respondent filed an application under section 11(6) of the Arbitration Act. The HC by an interim order allowed the arbitration petition and appointed a former judge of the Delhi HC as the sole arbitrator.

Aggrieved by the above orders, the appellant filed appeals before the Apex Court challenging the interim order and the final judgement and order.

Issue: Whether general reference to another contract would have the effect of incorporating arbitration clause?

Decision: The SC emphasized that mentioning another contract in a document does not have the same legal impact as actually including an arbitration clause from that contract. The SC made a distinction between referencing arbitration in a contract and actually incorporating the arbitration clause into the contract. The SC also clarified that for a reference to arbitration to be effective, it must demonstrate the intention to include the arbitration clause from the referenced document into the contract.

**REFERENCE TO ANOTHER CONTRACT WOULD NOT
HAVE THE EFFECT OF INCORPORATING ARBITRATION
CLAUSE**

In the case of ***State of Maharashtra and Anr. vs. National Organic Chemical Industries Limited***, which was heard on April 2024, the SC examined the matter of stamp duty pertaining to modifications made to a company's articles of association, specifically those changes that result in an increase in its authorized share capital.

Brief facts: The respondent company had an initial authorized capital of Rs. 36 Crores. Later, it increased the share capital to Rs. 600 crores in 1992 and therefore paid a sum of Rs. 1,12,80,000/- as stamp duty in accordance with Article 10 of the Bombay Stamp Act, 1958. The article of the Bombay Stamp Act got amended and a maximum cap of Rs. 25 Lakhs was added in 1994. Consequently, the respondents increased its share capital to Rs.1,200 crores and paid Rs. 25 lakhs of stamp duty. The respondents applied for a refund of Rs. 25 lakhs as they claimed it was wrongly paid. This request was denied by the appellant on the grounds that stamp duty is payable on each occasion at the time of filing and not just as a one time measure. Pursuant to this, the respondents filed a writ petition in the Bombay HC in which the court allowed the writ petition and directed the refund with interest. Hence, the Appeal was filed by the appellants.

Issues:

- (1) Notice sent to the Registrar under section 97 of Companies Act falls under the term instrument as defined in section 2 (l) of Stamps Act?
- (2) The maximum cap payable on stamp duty is applicable every time there is an increase in the share capital or is this a one-time measure?

Decision: The SC held that filing of Form No. 5 is only a method prescribed and it cannot be construed as an instrument. The notice of an increase in share capital or of members of a company has to be sent to the Registrar. It is only the articles which are an instrument within the meaning of section 2(l) and according to section 31 of the Companies Act, any alterations in the articles are valid as if it were originally contained therein, therefore, any increase in the share capital of the company shall be valid as if it were originally there when the articles of association were first stamped.

SC also held that the ceiling of Rs. 25 lakhs in column 2 of the Schedule I in Stamp Act is applicable to the articles of association and the increased share capital therein, not on every increase individually. The SC also referred to the Maharashtra Stamp (Amendment) Act, 2015, which amended Article 10 of the Stamp Act by including the phrase increased share capital in column-2. This means that the cap will now be applicable to each individual increase.

The order of HC was upheld, and the appellants were directed to refund the stamp duty to the respondents with interest.

**STAMP DUTY NOT PAYABLE ON
EVERY INCREASE IN THE
AUTHORIZED CAPITAL OF A
COMPANY WHERE THE
PRESCRIBED MAXIMUM DUTY IS
ALREADY PAID**

LIABILITY OF A CO-PROMOTER IN REAL ESTATE PROJECTS UNDER REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016 (RERA)

In a landmark judgment pronounced on 26 February 2024 in *Wadhwa Group Housing Private Limited vs. Mr. Vijay Choksi and SSS Escatics Private Limited*, the Bombay HC held that the co-promoter will be equally liable to pay refund if possession of flat is delayed.

Primary Issues: Whether a promoter who has not received any consideration from an allottee can be made liable for giving refund with interest under section 18 of the RERA.

Decision: The HC held that according to the explanation to section 2(zk) of RERA, the term Promoters encompasses individuals or entities involved in constructing or converting buildings into apartments or developing plots for sale. The Bombay HC emphasized that the appellant's registration as a Promoter during the project's registration establishes its role as such and it cannot deny this responsibility. The Bombay HC further stated that the appellant's obligations and liabilities under the RERA, along with its rules and regulations, cannot be waived simply because the disputed flat is part of the second respondent's share as specified in the joint development agreement. The HC explained that the responsibilities of different promoters in various areas are not limited or defined by the RERA, and therefore, joint liability applies for all purposes under RERA, its rules, and regulations.

The SC in *M/S. Divgi Metal Wares Ltd. vs. M/S. Divgi Metal Wares Employees Association & Anr.* explained that the terms of the appointment in the appointment order of the employees clearly stipulates that their services can be transferred to any other department or any other office in the country, then such company can transfer its employees from one factory to another factory in another state.

Brief facts: The Appellant is a company which manufactures automobile gears at two factories, one in Pune, Maharashtra and the other at Sirsi, Karnataka. The respondent is a trade union registered under the provisions of the Indian Trade Unions Act, 1926. The appellant had transferred 66 employees from its Karnataka factory to Pune, Maharashtra on account of reduction in orders and lack of sufficient work. Despite being provided advance payment for travel expenses, the transferred employees did not report to the Pune factory and raised an industrial dispute. Prior to this, the company had passed a standing order regarding the transfer of its employees within the country under the Industrial Employment (Standing Orders) Act, 1946. These workmen, whose services were transferred raised industrial disputes. The learned industrial tribunal on 30 May 2002 held that the transfers made were not malafide. A writ petition was filed before the Bombay HC by the respondents challenging the said award dated 30 May 2002.

Issue: Whether the terms of appointment permits transfer to any department/office of company?

Decision: The SC ruled in favour of the transfer of workmen from Divgi Metal Wares Ltd. stating that the terms of their appointment clearly stated that their services were transferable to any department or work office within the country.

TERMS OF APPOINTMENT LETTER PERMITS TRANSFER OF AN EMPLOYEE TO ANY DEPARTMENT/OFFICE OF SUCH EMPLOYER

The Delhi HC on 30 April, 2024, has directed the former MD of Resilient Innovations Private Limited (**Company**), Ashneer Grover (**Defendant**), not to transfer or create any third-party rights in the shares transferred to him by the company's co-founder, Bhavik Koladiya (**Plaintiff**). The case involves a Letter Agreement (**Agreement**) dated 03 December, 2018 between the Plaintiff and the Defendant, regarding the sale of shares of the Company (**Suit Shares**). The Agreement specifies that property in the Suit Shares would transfer to the Defendant only upon payment of the sale consideration. Disputes have arisen concerning the nature of the Agreement, the passing of property rights, and the payment of consideration. The Delhi HC held that the prima facie case supports plaintiff's claim that property in the Suit Shares was to transfer only upon payment by the defendant, in accordance with the Agreement terms. This interpretation aligns with the provisions of section 4(3) of the Sale of Goods Act (**SoGA**), categorizing the Agreement as an agreement to sell rather than a sale. The Agreement's clauses and the expectations regarding payment of consideration suggest that it falls within the scope of an agreement to sell under section 4(3) of the SoGA. Further, given the absence of documentary evidence of payment and the ambiguity in the defendant's statements regarding the payment of consideration, the Delhi HC held that a prima facie view favours the plaintiff and prohibited the defendant from transferring or creating third-party rights in the Suit Shares until the suit is conclusively resolved.

In the case of *Mahanadi Coalfields Limited v. Brajrajnagar Coal Mines Workers' Union* pronounced on 12 March 2024, the SC held that workers who are engaged in the performance of work which is regular or permanent in nature would not be classified as contractual workers.

Brief facts: The respondent-union espoused the cause of the workmen who were engaged by the contractor and sought permanent status for them. The Industrial Tribunal by way of judgment dated 23 May 2002 allowed the dispute and directed regularization of remaining 13 (Thirteen) workmen. The Tribunal held that the work was regular and perennial in nature. The appellant challenged the said decision through a writ petition before the Orissa HC, which was dismissed.

Issue: Amongst other issues, the core issue was that whether the work performed by the 13 (Thirteen) workers, could be considered permanent and perennial in nature?

Judgement: The SC, inter alia, held that the denial of regularization of 13 (Thirteen) workmen is wholly unjustified. These workers stand on the same footing as the regularized employees and there is no distinction between the 19 (Nineteen) workers who were regularized and the 13 (Thirteen) workers who were left out. The SC held that the nature of the duties performed by the 13 (Thirteen) workmen are perennial in nature and that there are no grounds in the artificial distinction asserted by the appellant.

RESTRICTION IMPOSED ON ASHNEER GROVER FOR TRANSFERRING OR CREATING 3RD PARTY RIGHTS IN BHARATPE SHARES

WORKERS WHO ARE ENGAGED IN THE PERFORMANCE OF WORK WHICH IS PERENNIAL OR PERMANENT IN NATURE WOULD NOT BE CLASSIFIED AS CONTRACTUAL WORKERS

PRICE CONTROL FOR HOSPITAL TREATMENT CHARGES

The SC by way of its order in *Bishwanath Prasad Singh v. Union of India* dated 27 February 2024, has directed the Government of India to fix the rates chargeable by hospitals.

Facts: A public interest litigation (PIL) petition was filed by the non-profit organisation Veterans Forum for Transparency in Public Life. In the PIL, it was noted that the cost of cataract surgery in a private hospital can range from INR 30,000 to INR 1,40,000 per eye, whereas the rates in a government hospital are up to INR 10,000 per eye.

Issue: The core aspect in consideration before the SC was to standardise the hospital treatment charges.

Decision: The SC held that, if the Government fails to decide on a proposal for notifying standard rates, the rates that have been fixed under the Central Government Health Scheme (CGHS) may be made applicable for all patients in the interim. Given that the Clinical Establishments (Registration and Regulation) Act, 2010 (Act) is not applicable to all the states, the requirement that CGHS rates be imposed for all services would not be binding across the country, which could result in vast disparities between the prices chargeable in states that have and have not adopted the Act. Imposing CGHS rates for all patients could make it commercially unfeasible for hospitals to offer certain services, which could result in reduced access to care for patients within these states.

On 29th February 2024, a constitutional bench of the SC in the case of *High Court Bar Association, Allahabad v. State of U.P. and Ors.* has held that there shall be no automatic vacation of stay orders granted by a HC, reversing the earlier position expressed in a 3 judge SC decision in *Asian Resurfacing of Road Agency Private Limited & Anr v Central Bureau of Investigation* (Asian Resurfacing).

Brief Facts: In the case of Asian Resurfacing, the SC had directed that all interim orders of stay granted by HC in civil or criminal proceedings would automatically stand vacated on the expiry of 6 (six) months, unless extended by a specific order. This direction was issued by the SC in exercise of its powers under Article 142 of the Constitution. The present ruling arose out of multiple appeals from different courts filed for non-compliance with the Asian Resurfacing ruling..

Issue: Whether SC can, in exercise of its powers under Article 142 of the Constitution, order automatic vacation of interim orders of stay granted by HC after the expiry of a certain time period?

Decision: The SC held that HC orders staying civil or criminal proceedings do not automatically lapse after 6 (six) months. The directions for automatic vacation of interim orders of stay after the expiry of a certain time period cannot be issued in exercise of the court's powers under Article 142 of the Constitution. The SC overruled its earlier directions in Asian Resurfacing case regarding automatic vacation of interim stay orders and held that such orders cannot be vacated without giving an opportunity of hearing to the parties concerned.

AUTOMATIC VACATION OF INTERIM ORDERS OF STAY BY COURTS AFTER EXPIRY OF TIME PERIOD IS IMPERMISSIBLE

LIMITED SCOPE OF JUDICIAL INTERVENTION IN ARBITRAL PROCEEDINGS

SC in *Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Private Ltd.* held that there is limited scope of judicial intervention in arbitration proceedings, emphasizing that courts should refrain from re-appreciating facts or law unless the arbitrator's decision is so unreasonable that no prudent person would have taken it, or if there's a clear error of jurisdiction.

Brief Facts: Delhi Metro Rail Corporation (DMRC) entered into a concession agreement with a consortium led by Delhi Airport Metro Express Pvt. Ltd. (DAMEPL). Disputes arose when DAMEPL complained of defects in the viaduct and its bearings, leading to termination of the agreement by DAMEPL.

Primary Issue: Whether the division bench of the Delhi HC erred in setting aside the arbitral award and deviating from established principles of non-interference under sections 34 and 37 of the Arbitration and Conciliation Act, 1996?

Decision: The SC upheld the arbitral award in favor of DAMEPL, setting aside the division bench's Judgment. It emphasized the narrow scope of interference under section 34, stating that courts should not re-assess factual findings made by the arbitrator unless they are patently illegal.

DIRECTORS' LIABILITY FOR DISHONOUR OF CHEQUES POST RESIGNATION

SC through its judgment dated February 14, 2024, in the case titled Rajesh Viren Shah v. Redington (India) Limited held that a director holding his post, cannot be held liable for failure in realization of cheques issued by the company as they cannot be held responsible for the conduct of business at the relevant time post their resignation.

Brief Facts: The directors had resigned from the company and appropriate filings were updated by the company in this regard. However, they were accused by a complaint filed under Section 138 of the Negotiable Instruments Act, 1881 (NI Act) for amounts of INR 7,10,085, INR 1,85,09,054, and INR 10,00,000.

Issue: Whether the directors which have resigned can be made liable for non-realization of a cheque.

Decision: The SC held that the complainants have not placed any materials on record indicating that the directors were involved in the crime. SC also noted that the directors did not have any role in the issuance of the cheques, which was evident from the filings made in relation to their resignation, thus clearly stating that the directors who have resigned from their posts cannot be held liable for the dishonour of cheques issued by the company and cannot be held liable for company's action post their resignation.

SEGMENT SIX

Foreign Direct Investment (FDI) / FEMA

INDIA'S SPACE SECTOR REFORMS: OPENING THE DOOR TO PRIVATE PARTICIPATION

In 2023, with a view to unlocking the potential of private players in the space sector, the Indian Space Research Organization (**ISRO**) released the Indian Space Policy 2023 (**Space Policy**) permitting Non-Government Entity (**NGEs**) to carry on end-to-end activities through establishment and operation of space objects, ground-based assets and related services, such as communication, remote sensing, navigation, etc., subject to such guidelines/regulations as prescribed by Indian National Space Promotion and Authorization Centre (IN-SPACe).

Reforms

With a view to accelerate the vision of India to revolutionize and promote entrepreneurship in the space sector, the Union Cabinet has liberalized the Policy to permit FDI in the space sector, by a press release dated 21 February 2024, which is summarized below:

Sr. No.	Activity/Sub Sector	Earlier position under the Policy	New Position
1.	Satellites Manufacturing & Operation, Satellite Data Products, and Ground Segment & User Segment	100% Government route for satellite establishment and operation	Upto 74% Automatic route
2.	Launch Vehicles and associated systems or subsystems, as well as the Creation of Spaceports for launching and receiving Spacecraft.	-	Upto 49% Automatic route
3.	Manufacturing of components and systems/sub-systems for Satellites, Ground Segment, and User Segment.	-	Upto 100% Automatic route

Further, on 16 April 2024, the Finance Ministry introduced the Foreign Exchange Management (Non-debt Instruments) (Third Amendment) Rules, 2024. The amendment specifically focuses on liberalizing the entry routes for foreign investment in designated space sector-related activities, as mentioned above.

On 19 April, 2024, the RBI has notified amendments to the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 (**Principal Regulations**), by way of the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) (Amendment) Regulations, 2024.

Regulation 3.1 of the Principal Regulations has been amended to insert schedule XI having the following 2 (two) aspects:

- (a) **Mode of Payment:** The amount of consideration for purchase / subscription of equity shares of an Indian company listed on an international exchange will be paid either through banking channels to a foreign currency account of the Indian company, or as inward remittance from abroad through banking channels.
- (b) **Remittance of Sale Proceeds:** The sale proceeds (net of taxes) of the equity shares may be remitted outside India or may be credited to the bank account of the permissible holder.

**CLARITY ON THE ASPECTS OF MODE OF PAYMENT,
REMITTANCE OF SALE PROCEEDS AND REPORTING
REQUIREMENTS REGARDING THE INVESTMENT IN
THE EQUITY SHARES OF THE PUBLIC INDIAN
COMPANY LISTED ON AN INTERNATIONAL
EXCHANGE**

SEGMENT SEVEN

Artificial Intelligence (AI)

AI

MEITY ISSUES ADVISORIES FOR AI

The Ministry of Electronics and Information Technology (**Meity**), on 1 March 2024, issued an advisory mandating all the intermediaries and platforms to, inter alia:

seek explicit permission of the government of India before use of under-testing / unreliable AI large language model/generative AI, software(s) or algorithm(s) available to the users on Indian internet (**Consent Requirement**);

In response to the advisory, various AI startups raised concerns arguing that the advisory is anti-innovation and not forward looking. Taking note of these concerns, Mr. Rajeev Chandrashekhar, Minister of State for Electronics and Information Technology clarified, on social media platform, Twitter, that the Consent Requirement was aimed only at large platforms and not startups and the same is only to act as an insurance policy to platforms who can otherwise be sued by consumers.

However, with the aim to provide some clarity and comfort to the stakeholders Meity, on 15 March 2024, issued a revised advisory doing away with the Consent Requirement, thereby withdrawing and superseding the erstwhile advisory issued on 1 March 2024.

The European Parliament, on 13 March 2024, adopted the Artificial Intelligence Act, 2024 (**AI Act**), a first comprehensive legislation in relation to regulation of AI, intended to regulate AI in the European Union (**EU**).

The AI Act, inter alia, lays down: (i) harmonised rules for the placing on the market, the putting into service, and the use of AI systems in the EU; (ii) prohibitions of certain AI practices; (iii) specific requirements for high-risk AI systems and obligations for operators of such systems; (iv) harmonised transparency rules for certain AI systems; (v) harmonised rules for the placing on the market of general-purpose AI models; (vi) rules on market monitoring, market surveillance governance and enforcement; (vii) measures to support innovation, with a particular focus on SMEs, including startups by, inter alia, promoting regulatory sandboxes and real-world testing, established by national authorities to develop and train innovative AI before placement on the market.

Risk Based Approach: The AI Act adopts a risk-based approach on the AI systems to determine the level of compliances to be followed, such as high risk (that have an adverse impact on the health, safety and fundamental rights of persons), limited risk (that do not lead to significant risk of harm to the legal interests protected under those areas because they do not materially influence the decision-making or do not harm those interests substantially) or minimal/no-risk.

Regulatory Infrastructure: The AI Act also provides for various regulatory bodies, such as; AI office, (inter alia, tasked with overseeing the most advanced AI models and enforcing the common rules in all EU member states); a scientific panel of independent experts (which will advise the AI office); an AI board, (coordination platform and an advisory body to the commission while contributing to the implementation of the AI Act); an advisory forum for stakeholders (to provide technical expertise to the AI board).

Penalties: Non-compliance with the rules will lead to fines ranging from €7.5 million or 1.5% of global turnover to €35 million or 7% of global turnover, depending on the infringement and size of the company.

EU AI ACT, 2024 - FIRST REGULATION ON AI



**CRYPTOCURRENCY EXCHANGES RECEIVE
REGISTRATION BY FIU AS VIRTUAL ASSET
SERVICE PROVIDERS**

Recently, in May 2024 the FIU lifted the ban on Binance and KuCoin and granted them registration as Virtual Digital Asset Service Providers (**VDA SPs**) after imposing penalties for past non-compliance.

Background: In the month of December 2023, the Financial Intelligence Unit (**FIU**) sent show cause notices and banned the URLs of a few cryptocurrency exchanges, including Binance Holdings Limited, (operating as **Binance**) and Peken Global Limited (operating as **KuCoin**) for operating illegally in India without complying with the provisions of the Prevention of Money Laundering Act, 2002 (**PMLA**). As per the press release that imposed the ban, Virtual Digital Asset Service Providers (**VDA SPs**) operating in India (both offshore and onshore) and engaged in activities like exchange between virtual digital assets and fiat currencies, transfer of virtual digital assets, safekeeping or administration of virtual digital assets or instruments enabling control over virtual digital assets etc.

SEGMENT EIGHT

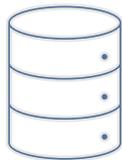
DATA AND PRIVACY

SUMMARY OF THE PROTECTION OF TRADE SECRETS BILL 2024



The Law Commission of India released its 22nd report on 5 March 2024 (**Report**) for recommending a new legislation in relation to disclosure of trade secrets and its associated legal framework titled 'The Protection of Trade Secrets Bill 2024' (Bill). Trade secrets are categorized as intellectual property containing commercially valuable data, information or other information that is extremely critical to the business and is not known to the public. The recipe for Coca-Cola, is one of the famous examples of a trade secrets. While there is no specific law in India in relation to trade secrets, it will be interesting to see how this Report and its recommendations in relation to legislating laws for trade secrets, pans out in India.

DATA BREACH BY THE AUDIO AND HEADPHONE COMPANY 'BOAT'



Imagine Marketing Limited (**Company**), popularly known as 'Boat' suffered a massive data breach, where personal data belonging to almost 7.5 million customers was leaked and details of customer personal information were available on the dark web.

The Company addressed the concerns and released a statement stating that 'it is aware of the recent claims regarding a potential data leak involving customer information and will launch a comprehensive investigation in this regard'. Considering the growing concerns around privacy laws, it is imperative for the Company to take necessary steps to mitigate the risks associated with such security breach and enhances its security systems and technical infrastructure.

SEGMENT NINE



OTHER UPDATES

The Department of Pharmaceuticals has notified a new Uniform Code for Pharmaceutical Marketing Practices, 2024 (**New Code**) on 12 March, 2024, as a replacement to the Uniform Code for Pharmaceutical Marketing Practices, 2014 (**Earlier Code**) bringing changes to the regulatory framework on pharmaceutical marketing practices.

Key Changes:

- (1) The term promotion was not defined in the Earlier Code. The New Code, on the other hand, defines it as all informational and persuasive activities by manufacturers and distributors, the effect of which is to induce the prescription, supply, purchase and/or use of medical drugs.
- (2) Brand reminders: The New Code defines brand reminders on the basis of the following 2 (two) categories, namely (a) Informational and education items; and (b) Free samples provided by the companies to medical professionals.

A company may supply doctors with informational and educational materials provided that the total worth of each item does not exceed INR 1000. Further, with respect to free samples, the New Code, inter alia, sets forth the following:

- (a) Free samples of drugs shall not be supplied to any person who is not qualified to prescribe such a product;
- (b) The monetary value of the samples should not exceed 2% (two percent) of the domestic sales of the company per year.

Instead of using the word voluntary, the New Code obligates pharmaceutical companies to form an ethics committee. The language of the New Code brings in increased accountability for the pharma companies.

The Confederation of Indian Industry (**CII**) has introduced a corporate governance charter tailored for startups. The charter provides optional guidelines for startup corporate governance, taking into account the different phases of a startup's life cycle. As per the charter, startups are required to adopt a sense of custodianship and fiduciary duty similar to that of a publicly traded company once external equity is obtained. Moreover, the charter requires startup firms to define and establish the organization's vision, mission, code of conduct, ethics, values, and culture.

**GOVERNMENT'S NEW CODE BARS UNETHICAL
MARKETING OF DRUGS**

**CII INTRODUCES CHARTER FOR CORPORATE
GOVERNANCE OF STARTUPS**

**ANALYZING THE
AMBIGUITY IN SHARE
ISSUANCE THROUGH
PRIVATE PLACEMENT:
PLANIFY CAPITAL
LIMITED'S VIOLATIONS
UNDER COMPANIES
ACT, 2013**

The Registrar of Companies has been actively scrutinizing companies for compliance with section 42 of the Companies Act, 2013 (**Act**) and has consistently fined violators. A recent order on 03 April, 2024 (**Order**), imposed significant fine on Planify Capital Limited and its key personnel for violating private placement regulations.

Facts of the Case:

Planify Capital Limited (**Company**), a fund-raising platform for start-ups, received a show-cause letter from the Ministry of Corporate Affairs (**MCA**) outlining several violations, including using public ads to alert the public at large about securities announcements and exceeding the 200-person cap for private placement offerings. In response, the Company stated that it had issued and allotted 453,530 equity shares to Planify Enterprises Private Limited (**Transferor**), which subsequently transferred the shares held by it to 76 investors, claiming it falls under secondary market transactions under section 58(2) of the Act and not under section 42. However, subsequent investigations revealed a more complex transaction structure implicating the Company in violating the law, involving the Transferor purchasing and selling shares from the Company to individuals.

Issues:

- (1) Determining if the transaction falls under section 42 or section 58(2) of the Act.
- (2) Assessing whether the Company acted as a distribution channel for issuance of shares to the public.

Analysis:

The Order outlines that the transactions involving the purchase and resale of shares by the Company were initially argued as falling under section 58(2) of the Act, which provides for free transferability of securities of a public company and the enforceability of contracts regarding the transfer of securities. However, it was established that the purpose of the selling the shares to the transferor was to only find the potential investors for the subject company through the Platform. Moreover, the use of the Platform for raising securities, putting pitch information, and raising money from the general public through Platform constituted the issuance of public advertisements or utilization of media, marketing or distribution channels or agents to inform the public at large about an issue. This resulted in the creation of a distribution channel, contravening section 42(7) of the Act. Therefore, the transaction in which the transferor received shares of the Company was only a smokescreen, resulting in a violation of section 42(7) of the Act.

The Order highlights that the sale of shares of the subject company, which were purchased by the Transferor through a private placement, did not align with the definition of a transaction simpliciter under section 58(2), but rather resulted from a private placement that established a distribution channel i.e., a prohibited act for selling securities to the public at large. It was established that the structure, which involved the purchase of shares from the Company and their subsequent resale, did not exempt the Company from section 42.

The Federal Trade Commission (**FTC**), which is an independent organization of the United States (**US**), responsible for enforcement of antitrust laws in US, announced on 23 April 2024 its final Non-Compete Clause Rule (Final NC Rule), which bans post-employment non-compete clauses between employers and their workers. The Final NC Rule becomes effective 120 days after being published in the Federal Register (created by FTC for rule making and updates).

Non-compete clauses are generally present in employment agreement, where the employee agrees not to start a new business, or to take up employment or engage with any other competitor of the employee's current competitor. FTC held that the non-compete provisions are unfair method of competition to enforce or attempt to enforce non-compete clauses.

A brief summary of the Final NC Rule as published by FTC is as follows:

1. The Final NC Rule prohibits an employer from entering into, or attempting to enter into, a non-compete clause with a worker, which includes employees and independent contractors or representing that a worker is subject to a non-compete clause.
2. The Final NC Rule allows employers to maintain existing non-compete agreements with 'senior executives' but bars employers from executing agreements with non-compete provisions with senior executives post the effective date of the Final NC Rules. The exemption to 'senior executives' will be applicable only where the 'senior executive': (a) has signed their non-compete agreement before the Final NC Rule becomes effective; (b) makes more than USD 151,164 annually; (c) must be in a policy making position in order to have final authority on decisions that control significant business aspects; and (d) must be an officer of the company (president, chief executive officer, vice president etc.)
3. The Final NC Rule do not apply to non-competes entered into by a person pursuant to a bona fide sale of a business entity.
4. The Final NC Rule requires an employer to provide clear notice to employees subject to a prohibited non-compete, that such non-compete clauses will not be legally enforced against them.

RULING ON NON-COMPETE PROVISIONS IN AGREEMENTS BY US FEDERAL AGENCIES

Disclaimer For private circulation to the addressees only and not for re-circulation. Any form of reproduction, dissemination, copying, disclosure, modification, distribution and/or publication of this Newsletter is strictly prohibited. This Newsletter is not intended to be an advertisement or solicitation. The contents of this Newsletter are solely meant to inform and is not a substitute for professional advice. Legal advice should be obtained based on the specific circumstances of each case, before relying on the contents of this Newsletter or prior to taking any decision based on the information contained in this Newsletter. Lex Consult disclaims all responsibility and accept no liability for the consequences of any person acting, or refraining from acting, on such information. If you have received this Newsletter in error, please notify us immediately by email newsletter@lexconsult.co.in.

Copyright © Lex Consult. All rights reserved. Replication or redistribution of content, including by caching, framing or similar means, is expressly prohibited without the prior written consent of Lex Consult. Any queries on this Newsletter may be addressed to: newsletter@lexconsult.co.in

