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Welcome to this issue of ***Insight***.

As we stand today, we are all battling the pandemic caused by the novel Coronavirus ("**COVID-19**"). The present crisis, which started as a humanitarian crisis, has transformed into a seismic black swan event which has a significant impact on the economy and the related legal framework.

Accordingly, as the lead article in this issue of *Insight* we have covered the impact that the current crisis has on M&A transactions in India and what we see as the potential risks and opportunities. In view of the impact that the pandemic has had on various aspects of doing business in India, our various teams have covered the impact that it will have on various areas and sectors, the functioning of the courts, anti-trust matters and succession planning, as well as the relaxations granted in relation to corporate compliances.

We have also captured certain additional notifications and orders issued by the Reserve Bank of India ("**RBI**"), Securities Exchange Board of India ("**SEBI**") and the Ministry of Corporate Affairs ("**MCA**")(including in response to the COVID-19 pandemic), for the period under review.

Apart from the above, in light of the recent trends in M&A negotiations, we have analysed the framework in relation to 'avoidable transactions' under the Insolvency and Bankruptcy Code, 2016 (the "**Code**") and the manner in which parties to M&A transactions can mitigate the risk of a transaction being categorised as an avoidable transaction under the Code.

Any feedback and suggestions would be valuable in our pursuit to constantly improve *Insight* and ensure its continued success amongst readers. Please feel free to send any feedback, suggestions or comments to cam.publications@cyrilshroff.com.

While we send you this issue, we acknowledge the havoc and pain caused by COVID-19 in nations, homes and families across the world, including in India. Yet, it is in times like this that we must come together to support each other (while staying physically apart), remain optimistic and keep on going. Our best wishes are with you.

Regards,

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COVID-19 AND M&A IN INDIA: NAVIGATING RISKS AND UNDERSTANDING OPPORTUNITIES

As the COVID-19 crisis deepens, and the number of positive cases and casualties continue to mount rapidly, governments across the world are enforcing stringent lockdown and social distancing measures. With the engines of economic growth grinding to a halt, the pandemic has mutated into an economic crisis, plunging the global economy into an unparalleled recession. India is no exception[1], and mergers and acquisitions ("**M&A**") in India are sure to sniffle, snuffle and sneeze, at least in the short-term. From a legal standpoint, we believe that there will be consequent changes and fundamental shifts in the M&A landscape.

COVID-19 and on-going transactions – what to expect?

The impact of COVID-19 has already started to affect M&A activity in India. Corporates are facing a tough strategic choice between jamming the brakes or stepping on the gas, with respect to ongoing deals. The key drivers of decision making range from change in business outlook, concerns regarding valuation, liquidity crunch due to reduced lending by banks and consequent reallocation of surplus funds. Cross-border transactions have been severely impacted due to the lockdown and closure of international borders.

In sectors such as aviation, hospitality and tourism, where there has been a direct business impact, parties may look to walk away from the transactions, amidst long-term uncertainties. In other sectors such as consumer goods, manufacturing, etc., where the impact is less severe, buyers may reconsider valuations or seek downward price adjustments. This becomes particularly relevant, given that January, 2020 saw the Indian stock markets at an all-time high and buyers may wish to re-consider valuations.

In this context, we are likely to see the invocation of the 'Material Adverse Effect / Change' ("**MAE**") clauses in the investment / acquisition agreements, which could allow purchasers the right to walk away from transactions. Whether or not the COVID-19 crisis has actually resulted in an MAE will have to be assessed on a case by case basis, based upon the scope of the MAE clause in the respective contracts, the industry / sector and geography in which the target company / business operates, as also specific exclusions to the MAE clause. Even where an epidemic, pandemic or health emergency are not specifically excluded, other exclusions (e.g. events having industry-wide impact, general economic conditions, change in law or *force majeure*) could potentially exclude the application of the MAE clause to the present crisis.

Where parties intend for the transaction to proceed to completion, the parties' ability (particularly the seller's) to fulfil the pre-closing covenants and conditions precedent will be significantly impeded on account of the lockdown. Significant delays can be expected in obtaining governmental, regulatory and third-party approvals (including from lenders and contractual counterparties), as offices, banks and government departments are either closed or are operating with limited staff. Courts (including the National Company Law Tribunal ("**NCLT**")) are either shut or are only hearing urgent cases. M&A and group re-structuring through court-based schemes are also likely to be delayed, particularly given the existing backlog of cases. From a practical standpoint, physical verification of inventory for consideration adjustments for working capital may not be feasible and stamping and registration of documents would be an issue in the near-term, given the current restrictions. In view of these, parties would need to consider extending the 'long stop date' for closing under the agreements.

Additionally, parties may need to re-look at certain covenants, to be able to respond to the present challenges. Sellers may want to reconsider the standstill obligations and the various actions that require the purchaser's consent, to enable a dynamic response to the crisis. Purchasers would need to bolster their right to seek information relating to the target business from the seller (including specifying detailed formats and negotiating specific warranties and indemnities), given that site access / audit may not be feasible. Purchasers are also likely to carefully re-consider the terms and conditions of employment, appraisal cycles, employee commitments, new hires etc.

In the event that the COVID-19 crisis and the lockdown conditions were to continue for a significant duration so as to make closing impossible, parties could consider flexible alternative interim structures to give effect to their commercial understanding, and proceed to close the transactions once the crisis abates.

1 Among others, Moody's, S&P and CRISIL have dramatically reduced India's GDP projections for FY 2020-21.

Deals in the time of Corona

The lockdown period and the period immediately thereafter are most likely to see a downward trend in M&A activity in India. In our crystal ball gazing, we see the following indicative outcomes:

- *Delays and Dropouts*: Any M&A deals, which were at the structuring stages or on the anvil will most likely be deferred to a later date, to be activated once the crisis abates. Seller driven bid processes are likely to see bidders drop-out.

- *De-Globalisation*: Cross-border investments may be hit since Multinational Corporations ("**MNCs**") and Private Equity ("**PE**") funds are likely to conserve cash in this uncertain market and become increasingly inward looking.

- *Opportunities*: Despite the grim outlook, the crisis may open up some buy-side opportunities, leveraging on the lower valuations in the short term to seek higher return on capital in the long term. A similar trend was observed post the 2008 recession where PE funds and MNCs with sufficient "dry powder" deployed their funds to pick up stressed assets on the cheap in the aftermath of the crisis.

- *Stimulants & Catalysts*: Financial stimulus packages and measures such as tax relaxations announced under the Union Budget 2020 (including rationalisation of provisions pertaining to dividend distribution tax (DDT)[2] and exemptions on investments by sovereign wealth funds[3]), and relaxation of compliance norms by regulatory bodies such as the SEBI, the RBI and the MCA could be the catalyst required to ease the M&A process.

- *Limitations*: With respect to any M&A transactions that are entered into during this period, the approach to deal making will need to factor in the limitations posed by the present crisis, and will need to be recalibrated to address the prevailing risks.

- *Due Diligence*: The due diligence process will likely undergo a change - rely less on physical meetings and site visits, and more on virtual data rooms, and focus on, *inter alia,* consequences of the target's failure to perform its obligations under crucial contracts (including indemnities, take-or-pay, *force majeure* and termination rights), its ability to pay off its debts and insolvency risk, liabilities towards the health and medical care of employees (including availability of insurance), compliance with the governments' directives relating to COVID-19 and compliance with data protection laws (as any information collected by companies regarding the medical condition of their employees would be 'Sensitive Personal Data').

- *Preferred Structures*: Given the potential delays in obtaining regulatory approvals, parties may prefer structures involving the least regulatory interface. A share acquisition may, thus, be preferred over a court approved scheme or slump sale under a business transfer agreement. In view of the impact on business operations and consequent fluctuation in valuation, purchasers may consider acquisition in multiple tranches; or a structure involving acquisition in part by equity shares and in part by compulsorily convertible instruments; and / or other deferred consideration structures, with the back-ended component / conversion price / escrows linked to the target's performance. Further, the consideration adjustment provisions linked to key business parameters may need to be hard coded in the transaction documents, so as to provide deal certainty as well as value certainty.

The Devil is in the Details

Several clauses in the transaction documents (*viz.* warranties, conditions precedent, MAE and consideration adjustment) are likely to be heavily negotiated and the focus is likely to be on the following provisions:

- *MAE*: The parties would need to specifically agree on how the impact arising on account of the COVID-19 crisis would affect the transaction – buyers are likely to insist on enlisting events such as pandemics, lockdowns, closure of international and domestic boundaries as MAE events, whereas the seller will push for a narrower MAE.

- *Change in Law*: New measures are being announced by the government almost on a weekly basis. As such,

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[2] In order to increase the attractiveness of the Indian equity market, Finance Act, 2020 has amended the Income-tax Act, 1961 to allow dividend or income from units to be taxable in the hands of shareholders or unit holders and inter alia domestic company or mutual funds are not required to pay any DDT. To remove the cascading effect, the amendment has allowed deduction for the dividend received by holding company from its subsidiary.

[3] Section 7 of the Finance Act, 2020 amending Section 10(23FE) of the Income-tax Act, 1961.

the allocation of risks on account of a 'change in law' are likely to be keenly contested. Given the limitations on due diligence on account of the crisis, purchasers are likely to ask for inclusion of a satisfactory bring-down due diligence (including an on-site inspection and title due diligence for real property), as a condition precedent to closing.

- *Warranties*: Purchasers would need to assess the risks emanating for the target from the COVID-19 crisis and seek detailed warranties. Not only would the sellers appropriately qualify these warranties using knowledge and materiality qualifiers, they would also appropriately consider disclosing any specific facts, which are relevant to the COVID-19 crisis in the disclosure letter. There may also be a greater reliance on warranties and indemnity insurance, and the policy coverage would need to be negotiated.
- *E-Signing*: In terms of the deal execution, parties will place increasing reliance on e-execution and e-signing of the agreements, however, stamping and registration of the agreements will remain a concern during this period.
- *Corporate Approvals*: We are likely to see board and audit committee approvals being obtained through videoconferencing or audio-visual means,[4] and shareholders' approval, where required, by way of remote e-voting.
- *Regulatory Approvals*: While the SEBI and the RBI have permitted filing of applications electronically, the Competition Commission of India ("**CCI**") in March, 2020 permitted parties to file combination applications electronically[5] and has also permitted pre-filing consultations in relation to *inter alia* combinations under the green channel route, through video conference.[6] While these are welcome moves, approvals / consents required from state / local / municipal authorities may continue to pose a challenge.

Post-COVID world - What does the Future Hold?

While the short-term effect of the COVID-19 crisis on the M&A landscape will be drastic, it is expected that this crisis would also precipitate a change in the outlook of consumers and a realignment of priorities at the level of the government towards sectors such as healthcare and pharmaceuticals, as well as allied fields such as medical research, medical devices, etc. Not only would this spawn opportunities for increased localisation, but it is also likely to result in further consolidation.

Several measures being undertaken by the government as a response to the COVID-19 crisis, such as permitting the practice of telemedicine, through video, phone, internet based platforms, and facilitating retail sale of drugs to the doorstep of the consumers,[7] together with the innovations in technology and artificial intelligence, would result in newer business opportunities within the 'health-tech' space.

In addition, considering that a large proportion of India's population is without any insurance of any kind,[8] a crisis of this scale and nature is likely to underline the gravity of the need for obtaining insurance, including health insurance, thus potentially resulting in significant uptick in the insurance sector and consequently, increased M&A activity. Further, essential sectors such as healthcare, pharma, Fast-Moving Consumer Goods (FMCG), Information Technology (IT), etc., are also likely to see a boom, and M&A activity is sure to follow.

The present crisis is a humanitarian one, but it has significant business and economic impact. One hopes that the crisis abates quickly with the discovery and delivery of a vaccine so that normalcy can return none too soon.

(Also available on the Cyril Amarchand Mangaldas blog at https://corporate.cyrilamarchandblogs.com/2020/04/covid-19-and-ma-in-india-navigating-risks-and-understanding-opportunities.)

4 Rule 2 of the Companies (Meetings of the Board and its Powers) Amendment Rules, 2020 available at http://www.mca.gov.in/Ministry/pdf/Rules_19032020.pdf.
5 CCI Notice dated March 30, 2020 available at https://www.cci.gov.in/sites/default/files/whats_newdocument/30thcircular.pdf.
6 CCI Press Release No. 48/2019-20 dated March 19, 2020 available at https://www.cci.gov.in/sites/default/files/press_release/PR482019-20.pdf.
7 Ministry of Health and Family Welfare notification dated March 26, 2020 available at https://www.mohfw.gov.in/pdf/Doorstepdelivery26B.pd.
8 Press Release by Press Information Bureau dated May 8, 2015 available at https://pib.gov.in/newsite/PrintRelease.aspx?relid=121445.

COVID-19 – TEMPORARY RELAXATIONS FOR CORPORATE COMPLIANCES

The global outbreak of COVID-19 is an unprecedented event that has led to lockdowns and unexpected restrictions on the public as well as the corporate sector across the world. In order to control its spread, the Government of India ("**GoI**") has *inter alia* ordered all establishments, except organisations providing essential goods and services, to temporarily close their physical offices. Employees are working remotely, but due to difficulties faced in coordination and lack of office facilities, companies are likely to face difficulties in undertaking timely compliances of various applicable laws. Keeping in mind the aforesaid, the GoI has temporarily relaxed a number of compliance requirements for the corporate sector. We have analysed below some of the major relaxations from securities and companies law perspective.

Relaxations introduced by SEBI

In order to reduce compliance burden on listed entities, SEBI has, *inter alia*, issued three circulars on March 19, 2020[1], March 23, 2020[2] and March 26, 2020[3], respectively. These state that various compliances have been relaxed, including periodic filing requirements for listed entities under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**LODR**"). The major relaxations are as below:

- *Extension of time for compliances/ filings*: SEBI has extended the last date for conduct of meetings and various quarterly, half yearly, and annual submissions to be made to the stock exchanges, as mentioned below:

S. No.	Required Actions	Applicable Regulations	Original Due Date	Revised Due Date
Conduct of Meetings				
1.	Nomination and Remunerations Committee Meeting / Stakeholders Relationship Committee Meeting / Risk Management Committee Meeting (*Once in FY 2019-20*)	Regulations 19(3A) / 20(3A) / 21(3A) of the LODR	March 31, 2020	June 30, 2020
2.	Annual General Meeting by top 100 Listed Entities by Market Capitalization	Regulation 44(5) of the LODR	August 31, 2020	September 30, 2020

1 SEBI Circular on relaxation from compliance with certain provisions of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 due to the Covid-19 virus pandemic, 2 SEBI/HO/CFD/CMD1/CIR/P/2020/38 dated March 19, 2020.

2 SEBI Circular on relaxation from compliance with certain provisions of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and certain SEBI Circulars due to the Covid -19 virus pandemic – continuation, SEBI/HO/DDHS/ON/P/2020/41 dated March 23, 2020.

3 SEBI Circular on further relaxation from compliance with certain provisions of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and the SEBI circular dated January 22, 2020 relating to Standard Operating Procedure due to the Covid -19 virus pandemic, SEBI/HO/CFD/CMD1/CIR/P/2020/48 dated March 26, 2020.

S. No.	Required Actions	Applicable Regulations	Original Due Date	Revised Due Date
Periodic Filings/Disclosures				
3.	Compliance Certificate (*Half Yearly*)	Regulation 7(3) of the LODR	April 30, 2020	May 31, 2020
4.	Statement of Investor Complaints (*Quarterly*)	Regulation 13(3) of the LODR	April 21, 2020	May 15, 2020
5.	Secretarial Compliance Report (*Yearly*)	Regulation 24A of the LODR read with circular No. CIR/CFD/CMD1/27/2019 dated February 08, 2019	May 30, 2020	June 30, 2020
6.	Corporate Governance Report (*Quarterly*)	Regulation 27(2) of the LODR	April 15, 2020	May 15, 2020
7.	Shareholding Pattern (*Quarterly*)	Regulation 31 of the LODR	April 21, 2020	May 15, 2020
8.	Financial Results (*Quarterly*)	Regulation 33 of the LODR	May 15, 2020	June 30, 2020
9.	Financial Results (*Annual*)	Regulation 33 of the LODR	May 30, 2020	June 30, 2020
10.	Certificate from Practising Company Secretary (*Half Yearly*)	Regulation 40(9) of the LODR	April 30, 2020	May 31, 2020
11.	Initial Disclosure by Large Corporate	SEBI Circular HO/DDHS/CIR/P/2018/144 dated November 28, 2018	April 30, 2020	June 30, 2020
12.	Annual Disclosure by Large Corporate	SEBI Circular HO/DDHS/CIR/P/2018/144 dated November 28, 2018	May 15, 2020	June 30, 2020

S. No.	Required Actions	Applicable Regulations	Original Due Date	Revised Due Date
13.	Financial results of entities having listed non-convertible debentures ("***NCDs***") / non-convertible redeemable preference shares ("***NCRPS***") (*Half Yearly*)	Regulations 52(1) and (2) of the LODR	May 15, 2020	June 30, 2020
14.	Financial results of entities having listed NCDs/NCRPS *(Annually)*	Regulations 52(1) and (2) of the LODR	May 30, 2020	June 30, 2020
15.	Financial results of entities having listed Commercial Papers ("***CPs***") *(Half Yearly)*	SEBI Circulars SEBI/HO/DDHS/CIR/P/2019/115 dated October 22, 2019 and SEBI/HO/DDHS/CIR/P/2019/167 dated December 24, 2019	May 15, 2020	June 30, 2020
16.	Financial results of entities having listed CPs (*Annually*)		May 30, 2020	June 30, 2020

- *Board/ Audit Committee Meetings:* The board of directors and audit committee of listed entities are exempt from observing the maximum stipulated time gap of 120 days between two meetings as required under Regulations 17(2) and 18(2)(a) of the LODR, respectively, in respect of meetings between the period from December 01, 2019 to June 30, 2020. However, the board of directors/ audit committee are required to ensure that they meet at least four times a year, as stipulated under Regulations 17(2) and 18(2)(a) of the LODR;

- *Issuance of NCDs/NCRPS/CPs:* Listed entities can use the audited financial statement as on September 30, 2019 in order to make public issue of the NCDs, NCRPS and/or CPs until May 31, 2020 instead of March 31, 2020;

- SEBI has also clarified that the relaxations *vide* circular dated March 19, 2020 in the common obligations under Chapter III of the LODR shall apply to both listed companies with listed specified securities as well as listed companies with listed NCDs / NCRPS;

- *Delayed applicability of the Standard Operating Procedure:* The Standard Operating Procedure[4] on imposition of fines and other enforcement actions for non-compliance with provisions of the LODR, the effective date of operation of which was "compliance periods ending on or after March 31, 2020", will now come into force with effect from "compliance periods ending on or after June 30, 2020". The Standard Operating Procedure circular dated May 3, 2018[5] will continue to be applicable till June 30, 2020;

- *Exemption from Newspaper Advertisement*: SEBI has exempted the requirement for publication of advertisements in newspapers as required under Regulation 47 of the LODR for all events mentioned thereunder until May 15, 2020; and

- *Exemptions under Takeover Regulations*: Along with the aforementioned relaxations made by SEBI for listed entities, it has also provided relaxations to holders of 25% or more shares or voting rights and to promoters of listed entities, from filing disclosure of their aggregate shareholding and voting rights as on March 31, 2020. It has also provided relaxation to promoters along with the persons acting in concert from filing the declaration on a yearly basis, on creation of encumbrance on shares in the company. Both such disclosures were required to be made within 7 working from the end of the financial year. SEBI has issued a circular on March 27, 2020[6], by virtue of which the due date of filing such disclosures under Regulations 30(1), 30(2) and 31(4) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 for the financial year ending March 31, 2020, has been extended upto June 01, 2020.

Relaxations introduced by the MCA

The MCA has issued a notice on March 18, 2020, followed by the Companies (Meetings of Board and its Powers) Amendment Rules, 2020 dated March 19, 2020, whereby it has inserted a new sub-rule under Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014 for providing relaxation in holding board meetings with physical presence of directors under Section 173 (2) read with Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014 for approval of *inter alia* the annual financial statements, board's report, etc. Consequently, such meetings may be held through video conferencing or other audio-visual means from March 19, 2020 until 30th June, 2020.[7]

Subsequent to the announcement made by the Union Finance & Corporate Affairs Minister, Niramla Sitharaman on March 24, 2020, the MCA has issued a circular dated March 24, 2020, wherein several important relief measures, have been taken to address the threat imposed by COVID-19 and to reduce the compliance burden as mentioned below[8]:

- No additional fees shall be charged for late filing during a moratorium period from April 01, 2020 to September 30, 2020, in respect of any document, return, statement etc., required to be filed in MCA-21 registry, irrespective of its due date;

- The prescribed interval period for holding meetings of the board under Section 173 of the Companies Act, 2013 ("**Act**") has been extended by a period of 60 days, i.e. from the existing 120 days to 180 days until the next two quarters, i.e. till September 30, 2020. Therefore, the gap between two consecutive meeting of the board may extend up to 180 days (instead of 120 days) till the next two quarters. For listed companies, the meetings of the board will have to be scheduled in accordance with the exemption provided by SEBI, as discussed above;

- Companies (Auditor's Report) Order, 2020 shall be made applicable from the financial year 2020-21 instead of being applicable from the financial year 2019-20 as notified earlier;

- If in case the independent directors of a company fail to hold at least one meeting without the attendance of non-independent directors and members of management in the year 2019-20, as required under Schedule IV of the Act, the same shall not be viewed as a violation under the Act;

4 SEBI circular no. SEBI/HO/CFD/CMD/CIR/P/2020/12 dated January 22, 2020.
5 SEBI circular no. SEBI/HO/CFD/CMD/CIR/P/2018/77 dated May 3, 2018.
6 SEBI Circular on Relaxation from compliance with certain provisions of the SEBI (Substantial Acquisitions of Shares and Takeovers) Regulations, 2011 due to the CoVID-19 pandemic, SEBI/HO/CFD/DCR1/CIR/P/2020/49 dated March 27, 2020.
7 MCA Notice dated March 18, 2020, available on http://www.mca.gov.in/Ministry/pdf/Meeting_18032020.pdf and Companies (Meetings of Board and its Powers) Amendment Rules, 2020 dated March 19, 2020, available on http://www.mca.gov.in/Ministry/pdf/Rules_19032020.pdf.
8 MCA General Circular 11/2020 dated March 24, 2020, available on http://www.mca.gov.in/Ministry/pdf/Circular_25032020.pdf.

- The date for transferring at least 20% of the amount of deposits (received from members) which are due to mature during the financial year 2020-2021 into the deposit repayment reserve account, as required under Section 73(2)© of the Act, has been extended by 60 days, i.e. from April 30, 2020 to June 30, 2020;
- The date for complying with the requirement to invest or deposit at least 15% of the amount of debentures maturing during a particular year as per Rule 18 of the Companies (Share Capital and Debentures) Rules, 2014 has been extended up to June 30, 2020 (instead of April 30, 2020);
- Additional time of 6 months has been granted to newly incorporated companies to file a declaration for commencement of business, in addition to the existing period of 6 months; and
- For the financial year 2019-20, non-compliance of minimum residency in India for a period of at least 182 days by at least one director of every company, under Section 149 of the Act, shall not be treated as a violation.

*Corporate Social Responsibility (“**CSR**”)*: The MCA has clarified that the spending of CSR funds for COVID-19 and making contributions to the PM-CARES Fund is an eligible CSR activity.[9] The fund may be spent for various activities related to COVID-19 under item nos. (i) and (xii) of Schedule VII of the Act, relating to promotion of health care, including preventive health care and sanitation, and disaster management.

Further, a voluntary FORM CAR (Companies Affirmation of Readiness Towards COVID-19) has been introduced to access the companies' compliance with COVID-19 related measures, such as, implementation of work from home policy.[10]

Conclusion

In the current scenario of the lockdown and restrictions imposed, the above temporary relaxations will enable companies to avoid penalties on account of unavoidable delay in meeting their regulatory compliances. However, companies ought to comply with any other regulatory requirement, that has not been specifically relaxed such as the disclosures under Regulation 30 of the LODR.

(*Also available on the Cyril Amarchand Mangaldas blog at* https://corporate.cyrilamarchandblogs.com/2020/04/covid-19-temporary-relaxations-for-corporate-compliances/)

9 MCA General Circular 10/2020 dated March 23, 2020, available at http://www.mca.gov.in/Ministry/pdf/Covid_23032020.pdf and MCA Office Memorandum CSR-05/1/2020-CSR-MCA dated March 28, 2020.

10 The details regarding the form are available at http://www.mca.gov.in/Ministry/pdf/Car_22032020.pdf.

FROM THE GAVEL TO THE CLICK: COVID-19 POISED TO BE THE INFLECTION POINT FOR ONLINE COURTS IN INDIA

Work from home for a litigating lawyer in India currently looks like endless hours of reading, chores and on-demand video. In this article, we argue that this will be a short-lived state of affairs. Remote working for litigation will be operationalised soon and will become the new normal for litigating lawyers in the not too distant future.

Courts are an essential service for civil society. In the wake of the COVID-19 pandemic, courts across the country have gone into an urgent-only, online-only mode with electronic filings, email mentions and, in exceptional cases, online hearings *via* video conferencing/ video calling facilities. This urgent only model of restricted judicial access is not sustainable past the initial lockdown. Courts will have to resume a full-time case load in the near future, albeit in a form that will be quite different from the way as we knew it. The urgent-only format will come to pass, with courts adopting the online-only format for its regular functioning. As a first step, the Supreme Court of India issued a *suo-motu* order setting out guidelines for courts to function through video conferencing during the COVID-19 pandemic. All estimates expect that the need for social distancing to address the COVID-19 pandemic will continue well into the third quarter of 2020. This will inhibit the resurrection of a packed court room. The new normal that we must prepare for, therefore, will be one where social distancing, remote working and electronic communication becomes the basic fabric of all engagement with the courts.

Industries and services across the world are reviewing their immediate and rapid migration from offline frameworks to completely online systems. We expect that the justice delivery mechanisms will also catch-up and become a digital offering by sovereign countries across the world in short order. In his 2019 book Online Courts and the Future of Justice, Professor Richard Susskind argues that the global access to justice problem will be solved by adoption of modern technology and envisages that online courts facilitate courts to function as a 'service', and not a 'place'. He presents what he believes is glaringly obvious – "that in a digital society it makes sense for much of the work of the courts to be conducted online".

"***Remote working is a tried and tested model for arbitrations, and courts can adopt it very easily. Hiccups are only a mindset problem. Article 141/ 142 can be used for this to be effected in a timely manner.***

– Justice.(Retd.) B. N. Srikrishna, Supreme Court of India"

In fact, several countries have already enabled online courts, and we can reasonably expect that India will not be far behind. Triggered by the COVID-19 pandemic, the United Kingdom ("**UK**") passed the Coronavirus Act, 2020 and amended the provisions of various statutes to facilitate the regular operation of its courts by participating through video or audio conference through a combination of Skype for Business, Justice Video Service and BT Meet Me. It has also provided for public participation through live links. Specifically the background to the bill states that "The measures will enable a wider range of proceedings to be carried out by video, so that courts can continue to function and remain open to the public, without the need for participants to attend in person. This will give judges more options for avoiding adjournments and keeping business moving through the courts to help reduce delays in the administration of justice and alleviate the impact on families, victims, witnesses and defendants." The pilot project for remote courts in the UK was operationalised in 2018 through the Traffic Penalty Tribunal with the heartening statistics that parties requested a review of only 3 % of the decisions.

Similarly, the Singapore Supreme Court, High Court and Family Courts have adopted video conferencing or telephone conferencing through the Zoom platform for hearings, counselling and mediation. Courts in the United States of America, Canada and Australia too are bracing themselves to conduct matters in a similar manner.

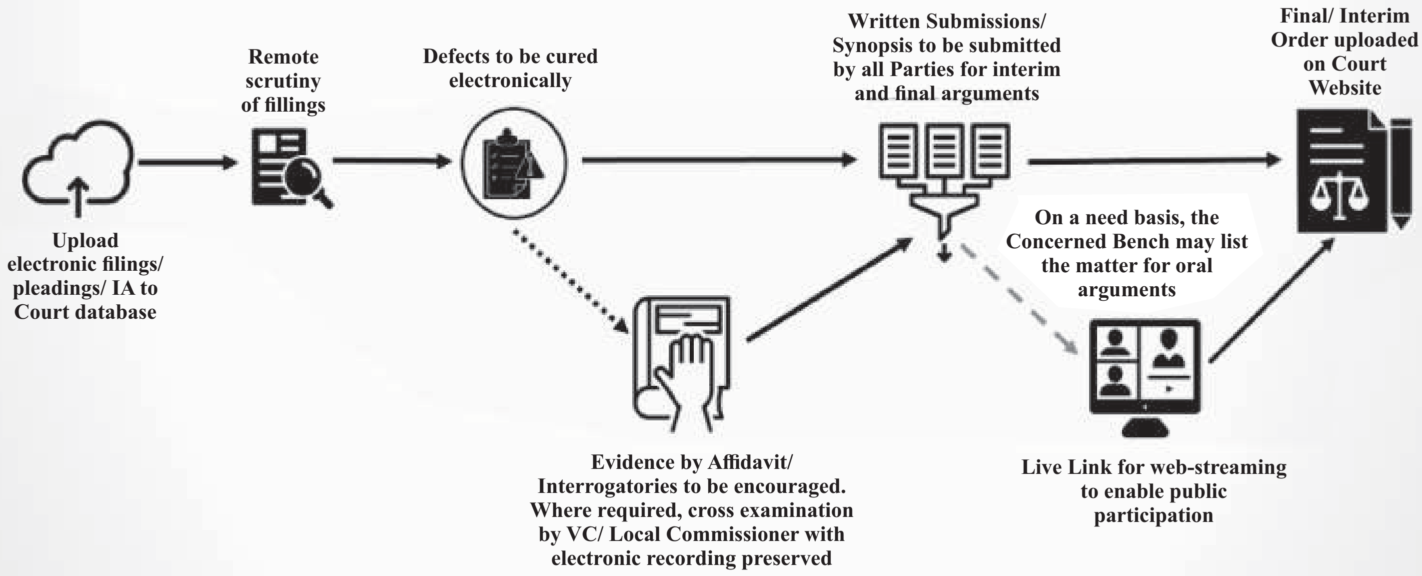
India has been preparing for this leap for over 15 years now. The Indian Government established the e-Committee of the Judiciary in December 2004, which has overseen the steady adoption of electronic infrastructure by courts across the country. The Policy and Action Plan Document for Phase-II of the e-Courts Project of January 2014, already contemplated video conferencing and recording facility for courts and jails for more than just remand matters. It was expected to be used for recording evidence in sensitive cases and to be gradually extended to cover as many kinds of cases as viable. The Objectives Accomplishment Report (2019) of Phase II of the e-Courts Project states that as many as 3,388 court complexes and 16,755 court rooms across India have already been computerised. Video-conferencing equipment has been provided to 3,240 court complexes and 1,272 jails. Way back in 2015, evidence of Dera Sacha Sauda sect chief Gurmeet Ram Rahim Singh was recorded via video conferencing by the Special Court, Panchkula.

The overnight notifications issued across the various courts during COVID-19 pandemic is demonstrative of the fact that our courts are well equipped to act fast and act decisively. Even more heartening is the open-minded adoption of existing technology like Zoom, WhatsApp and Vidyo – without being held back by the limitations of having to reinvent the wheel with internally developed infrastructure. We have sat in our home offices watching the urgent hearings being held by the High Courts of Kerala and Gujarat and marvelled at the quantum leap the legal profession has already made in a span of two weeks in India.

"***This is an inflection point for the legal profession in India. Till now, the mindset was one of resistance to change, or at best, incremental change. The disruption occasioned by COVID-19 has put forward challenges that can be best countered with wholesome and wholesale changes – by the adoption of online courts with limited or no oral hearing but based on brief written submissions.***

– C.S. Vaidyanathan, Senior Advocate, Supreme Court of India"

A close review of the facilities that have become available overnight shows that rapid migration to online-only can become a new normal for the regular functioning of the courts. Courts can mandate compulsory electronic filings and registering of pleadings/ applications with synopsis of the arguments and law relied upon. In the ordinary course, based on the pleadings, synopsis and written submissions filed, the Judge can pass speaking orders that are published (or issue notices that can be communicated electronically to all parties). Even trials, in most cases, can be conducted remotely where evidence by way of affidavits is filed electronically, documents are marked and cross examination undertaken, not in person, but through video conferencing or by local commissioners conducting the same from remote locations. While it can be expected that written submissions can be the primary mode for case presentation, the concerned bench may require oral hearings in certain cases where the assistance from the lawyers presenting arguments in a time bound manner over video conference would meet the ends of justice. A live link web-streaming of the oral arguments would adequately preserve the 'public forum' foundation of our Indian court system.



In this manner, the Courts in India can resume full functionality through remote working formats quickly while the health advisory mandating social distancing and avoiding crowded court rooms continues. The lower courts where electronic infrastructure is not yet available can adopt written submission as the basis for arguments in certain categories of matters, and a shift system for oral hearings/ trials to ease the crowding of courts pending electronic enablement.

The biggest winner in this tectonic shift may be the pendency problem in the Indian courts. A conservative estimate will cover approximately 40% of all pending cases that may be disposed on the basis of written arguments. Illustratively, of the 3.2 crore cases that are pending before the Indian District Courts, around 38 lakh cases pertain to cheque bouncing (The Negotiable Instruments Act, 1881) and 8.5 lakh cases pertain to motor vehicle accident claims alone. The Supreme Court and the High Courts can do an audit of the nature of matters pending before them and their subordinate courts which can be decided based on written submissions and pleadings without the necessity of oral hearings. Further, while trust in the new system of restricted oral hearings is being built, the remedy of review may need to be more liberal to enable proper assistance to the Judges while deciding cases.

Listed below are the other positives aided by a speedy move to online courtrooms:

- Litigants will benefit from the remote and more holistic participation (including avoiding the cost of making the long treks to District Courts, High Courts and Supreme Court and the consequent loss of productivity);
- Purity of legal discourse in litigation will be enhanced;
- Increased predictability and transparency in costs, timelines and outcomes;
- Streamlining and quick and effective disposal of urgent mentions/ adjournments and other applications seeking court directions;
- Effective case management systems in a predictable timeline and uniform format;
- Enhanced public participation through live links, especially in matters of national interest and importance;
- Remote and technology driven filing, case management and written arguments would mean fewer grounds for adjournments and speedier disposal of cases;
- Reduced demand on physical infrastructure and optimal utilisation of resources;
- Increased access to justice by litigants, with the AOR system becoming localised;
- Increased outreach of litigants to various courts in the country through their local lawyers.

"***We will have to come through, withstand and outlast this pandemic with a solution - oriented outlook. Infrastructure and technology will need to be rapidly ramped up, but that is presently the best way forward. In my experience across jurisdictions, a process of precise written arguments and oral hearings that are limited in time, bring quality and focus to the hearing. I believe virtual courts will have the potential to streamline the court process. While this transformation may start as technologically enabled court process, it will need to also simultaneously evolve other judicial advancements. It would be a welcome change.***

– Bhaskar Chandran, Group General Counsel, GMR Group"

There will also be big, bold and fundamental changes to the profession. The art of the oral argument being the most impactful part of a litigation will now be substituted by structured and precise pleadings, supported by strategically crafted written submissions. The judiciary may also need to fundamentally reinvent itself with a different skill set to discharge judicial functions in a technology driven world with limited face-to-face assistance from the Bar. All things considered, the balance of convenience will lie in the immediate adoption of electronic functioning by the court system. In the short run, this may be an effective answer to the extended COVID-19 challenges. In the long term, we are hopeful that this would be the right answer for many a malaise of the Indian legal system.

"***This tragedy will teach us that Less is More***

– Mr. Sanjay Jain (Additional Solicitor General)."

Never before (and hopefully never again) has there been a moment in time for a tectonic shift in the functioning of our legal system. Given the relative trade-offs in the current pandemic, it is likely that all stakeholders will be appropriately incentivized to adopt and adapt to the new normal. This is the perfect storm and we cannot waste a crisis.

(*Also available on the Cyril Amarchand Mangaldas blog at* https://corporate.cyrilamarchandblogs.com/2020/04/gavel-to-click-covid-19-online-courts-in-india/)

COVID-19 AND COMPETITION LAW CONCERNS

The outbreak of the COVID-19 pandemic has disrupted business globally including, in some cases, the disrupters themselves. As companies around the world prepare to respond to the effects of this pandemic on their businesses, they must become aware of the challenges and opportunities that competition law presents. Businesses that are expecting significant losses due to reduced revenue may look at cooperation with their competitors as the one way of overcoming these tough times. On the other hand, companies selling essential/scarce products such as medical supplies, may attempt to capitalise on this situation by increasing prices or bundling non-essential products with the essential ones. Whilst coordination between competitors (either by way of collaboration or through concerted practices) or imposition of unfair and/or discriminatory prices or conditions may seem to be an obvious and efficient way to respond to or benefit from the current challenges, companies need to be mindful of the fact that the provisions of the Competition Act, 2002 (the "**Competition Act**") continue to apply even during the tough times, perhaps even more so.

In light of the behavioural tactics that companies may adopt to overcome the negative impact on their businesses, which could have an adverse effect on competitive conditions in the market for the supply chain and resultantly, on the end consumers, the role of competition regulators has become even more critical. In fact, competition regulators of several jurisdictions such as the European Union ("**EU**"), the UK[1], the United States of America ("**US**"), Spain, France and South Africa have already announced that they are keeping a close eye on the behaviour of companies during these challenging times so as to maintain competition in the market and protect the interests of consumers. At home, it is expected that the CCI would also follow this lead once it has prepared itself to deal with the immediate fallout of suspended operations.

CCI suspends all filings until March 31, 2020

In an effort to prevent the spread of COVID-19 and considering the resource constraints being faced amid a complete lockdown of all establishments/offices (except Government offices involved in essential functions such as defence, police and basic utilities) across India, the CCI has announced that it would not accept any filings/submissions until March 31, 2020 including: (a) any fresh merger filing (including 'green channel' filings) and/or submissions in respect of any existing filing that is in the process of being reviewed; (b) any pre-filing consultation request; (c) any fresh complaint in respect of anti-competitive (such as cartel and bid rigging) and/or abusive practices; and (d) any filings/submissions in respect of existing antitrust proceedings. Even the investigative wing of the CCI i.e., the Office of the Director General, would not accept any filings/submissions in respect of ongoing investigations until March 31, 2020.

In view of the complete lockdown for 21 days announced by the Prime Minister on March 24, it appears that the above suspension may be extended until the middle of April unless the CCI finds a way to dispose some of its more urgent obligations electronically.

Companies operating in India need to be mindful that the suspensory measures do not imply a suspension of the substantive provisions of the Competition Act. Anti-competitive practices such as cartels, bid rigging and abusive conduct of dominant companies continue to amount to violations of the Competition Act. The Indian merger control regime also continues to be mandatory and transactions which trigger a notification with the CCI cannot be consummated without obtaining the CCI's approval.

In addition to the above, the oral hearings in respect of any competition matter have also been adjourned by the CCI to a date that would be notified subsequently.

Impact on the merger control regime

The temporary suspension of the CCI's functioning coupled with the inability of its staff to keep business going in the short term have impacted closing of those transactions for which merger clearances were pending. This would especially be detrimental for transactions where parties are looking to close the transaction before the end of the Indian financial year (i.e., 31 March). It is likely that until the CCI becomes at least partly functional, it would keep the clock for the so-called 'Phase I' approval timeline (i.e., 30 working days) frozen. Whilst the Government has issued guidelines for working from home to be followed by its officers, we anticipate that this will take some time to play out for the CCI officers, and when it

[1] The Competition and Market Authority, the UK, has announced the launch of a taskforce to handle businesses that exploit the COVID-19 outbreak. Available at: https://www.gov.uk/government/news/cma-launches-covid-19-taskforce.

happens, we think that the first priority will likely be combinations.

As regards making new filings, if the situation persists for long, hopefully the CCI would take a cue from its counterparts in other jurisdictions[2] and temporarily shift towards *only* e-filings for mergers. The CCI already has the facility of e-filing in place for merger filings, however, given that an e-filing had to be followed by a physical set of the filing, it could never become popular amongst stakeholders. All that the CCI needs to do now is to streamline its existing e-filing system and do away with the requirement of submitting a physical set of the filing for the time being. If this works, the CCI could think of continuing with the online merger filing system in the future and possibly even extend this facility for antitrust filings. The CCI will of course need to work on the back-end access to the case teams of these e-filings from remote locations while protecting confidentiality and this may take some time.

Collaboration between competitors

In order to fight the negative impact on businesses, there could be legitimate reasons for which competitors may have to collaborate in respect of production, distribution and service network to facilitate uninterrupted production and distribution of essential commodities, medicines, medical supplies/equipment, etc. However, it is important to note that any form of cooperation or collaboration amongst competitors (except efficiency enhancing joint ventures) continues to be an anti-competitive agreement under the Competition Act unless such collaborations are specifically exempted by the Central Government on the grounds of public interest.[3] Looking at the need of the hour, in order to ensure continued supply of necessary commodities, the UK government has temporarily relaxed competition laws to enable supermarket retailers to collaborate (i.e., by sharing data with each other on stock levels, pooling staff, cooperating to keep shops open, sharing distribution depots and delivery vans, etc.) for the purposes of meeting the rise in food demand.[4] Following the UK, the competition regulators of 27 countries in the EU and the EU Competition Commission have also temporarily allowed suppliers to coordinate distribution of scarce products to cope up with the COVID-19 outbreak without apprehensions of breaching cartel rules.[5] The Federal Trade Commission and the U.S. Department of Justice Antitrust Division have also issued guidelines detailing an expedited antitrust procedure and providing guidance for collaborations of businesses working to protect the health and safety of American citizens.[6]

In India, the press has already started reporting widespread supply chain disruptions in both online as well as offline retail channels due to the lockdown and the general public is already facing difficulty in procuring their daily necessities. Whilst the Indian Government has not exempted the application of competition law so far, it remains to be seen whether the Government would take a cue from other jurisdictions/competition regulators and suspend the application of Competition Act for a temporary period (similar to the indication it has given in respect of the possibility of suspending the application of insolvency and bankruptcy provisions). This would enable companies to collaborate with their competitors for the purpose of meeting the demand of essential commodities, medicines, medical supplies/equipment, research and development activities to develop vaccines for COVID-19, etc. during these challenging times without any apprehension of breaching the Competition Act.

Exploitative practices

It is possible that the businesses which are witnessing a spike in their demand may seek to benefit from the COVID-19 crisis by either (a) forming a cartel and indulging in practices such as price fixing, allocation of customers, limiting or controlling the supply of products etc., or (b) abusing their dominant position by over-charging or by refusing to deal with any person in respect of essential commodities.[7] These practices are prohibited under the Competition Act and may not be justified even during the times of pandemic.

[2] For instance, the United States of America has temporarily shifted to e-filing only. Further, the Chinese competition regulator has moved to an electronic and post-based notification system.
[3] In terms of Section 54(a) of the Competition Act, the Central Government through a notification may exempt the application of any provisions of the Competition Act on the ground of public interest. Given the present health emergency situation, a potential interpretation of public interest may include collaboration of R&D for development of vaccines, coordination for solving logistics and supply chain issues, etc.
[4] Available at: https://www.gov.uk/governm ent/news/supermarkets-to-join-forces-to-feed-the-nation.
[5] Available at: https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf.
[6] Available at: https://www.ftc.gov/news-events/press-releases/2020/03/ftc-doj-announce-expedited-antitrust-procedure.
[7] The Department of Consumer Affairs, Ministry of Consumer Affairs, Food and Public Distribution, Government of India have issued a notification controlling the prices of "essential commodities" like masks, sanitisers etc. under the Essential Commodities Act, 1955. Available at: https://pib.gov.in/newsite/PrintRelease.aspx?relid=200239.

Notably, competition authorities of several countries have taken a note of price hikes in respect of face masks, medical supplies and other goods that are in high demand and have warned retailers against price gouging. For instance, the Italian competition authority last month began an investigation into rocketing online prices for hygienic masks and sanitizing gels following the COVID-19 outbreak, the South African Competition authority is currently investigating 11 firms that sell sanitisers, face masks and gloves who were suspected of hiking prices.

In India, one must also appreciate the vast powers of the state to cap maximum prices for goods and services – considering that the Ministry of Consumer Affairs, Food and Public Distribution has already declared masks and hand sanitisers to be `essential commodities' and have fixed the maximum retails prices of these items, it would be interesting to see whether the CCI also takes cognizance of any anti-competitive/abuse practice including any unfair price gouging activities in India and keeps the market players in check. The maximum retail price protects the ultimate consumer and the question still remains whether the business-to-business functioning of companies leave little for the supply chain to gripe about.

Concluding remarks

Before collaborating with competitors (even to meet public health objectives), it is advisable to take appropriate legal advice and check the competition law position, including your competition compliance programme. Competitors should not exchange (directly and/or indirectly) any 'competitively sensitive information', use any common platform to set prices, restrict output of essential facilities/commodities, allocate customers/divide markets or coordinate on commercial strategy. An irresponsible and ill-informed action during this crisis could result in an investigation by the CCI sooner or later. At risk of stating the obvious, a negative outcome would not only be financially draining but also impact the company's reputation more severely than usual.

(*Also available on the Cyril Amarchand Mangaldas blog at* https://competition.cyrilamarchandblogs.com/2020/03/covid-19-and-competition-law-concerns/*)*

[8] Available at: https://www.iol.co.za/news/politics/covid-19-fines-will-be-issued-for-price-hiking-citizens-should-not-panic-buy-say-ministers-45455256.

WILLS IN THE TIME OF CORONA: CHALLENGES AND SOLUTIONS

In these uncertain times of a global pandemic, there is an increased interest in succession planning, including through Wills, and understandably so. Yet, there are considerable practical and legal challenges involved in making a Will during social distancing, isolation or quarantine. In this article, we discuss these challenges in the Indian context and suggest potential solutions. While it may not be possible to find fool proof solutions, and unfortunately technology is not yet an ally, there are some measures that may help to overcome prevalent complications in creation of Wills.

Law is not pandemic proof

The law relating to Wills in India is set out in the Indian Succession Act, which was enacted in 1925. Although introduced only a few years after one of the last major pandemics to affect India – the Spanish flu pandemic of 1918-1919 in which millions of Indians died, the Indian Succession Act, 1925 ("**ISA**") does not ease the rules for making Wills in times of such crises.

This lacuna was recognised by the Law Commission of India in its 110th Report on the ISA (1985). Upon analysing the laws of other countries (mainly civil law countries, unlike India, which is a common law country), the Law Commission recommended relaxing strict rules of formality for execution of a Will by a person affected by a calamity when he has reasonable apprehension of immediate death. Such a calamity would cover instances of an 'epidemic' or 'pestilence', as noted in the Report.

Unfortunately, this recommendation was not given effect to, and the law as it stands today, does not provide for easing of legal formalities amid an outbreak such as COVID-19.

Making a Will

As per the ISA, any person of sound mind and being of the age of majority can execute a Will. The ISA mandates two key formalities for execution of a Will:

- *Signing*: The Will must be a written document which is signed by the person making the Will (known as testator).
- *Attestation*: The Will must be attested by two or more witnesses by signing the Will in the presence of the testator. Such witnesses must have seen the testator sign the Will or must have received from the testator a personal acknowledgment of his signature.

The requirements of signing and attestation as above are only relaxed in the case of a Will by a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or any mariner at sea.

Contrary to popular belief, no stamp duty is payable on a Will. A Will also does not need to be notarised or registered.

Challenges and solutions

While the said formalities for execution of a Will are not rigorous and can easily be complied with during 'normal' times, during extraordinary situations such as these, testators are likely to face certain challenges in completing them:

- Accessing a lawyer to assist in preparing a Will;
- Printing a typed draft of a Will to sign it, in the absence of ready access to a printer;
- Finding two witnesses to be present to witness the signing of the Will by the testator.

Some potential solutions to overcome these challenges are:

- *Issue 1*: Lack of access to a lawyer – While many lawyers are 'working from home' and would be available to prepare a Will, in case the testator does not have access to a lawyer, or in the interest of time, the testator can prepare his own Will.

  It is not necessary that a Will must be drafted by a lawyer. While a lawyer should be engaged to prepare a sophisticated Will, a simple Will can be prepared by anyone. A person who does not have a Will could execute a simple interim Will right now and expand that to a more thorough Will after normality has resumed.

  Notably, there is no particular format to be followed for making a Will. A short Will identifying (i) the recipient of the property of the testator after their demise; and (ii) one or more executors to give effect to the terms of the Will, will suffice.

The Will need not be in English.

- *Issue 2*: Printing a Will – The law does not require a typed and printed Will. A testator may write his Will on any regular paper by hand. Such a handwritten Will is recognised by law (named a holograph Will). Care should, of course, be taken to ensure that the handwriting is legible and spelling errors are avoided.

- *Issue 3*: Finding witnesses – This might be the most difficult formality to satisfy. For testators residing with family members, it is tempting to make such family members witnesses as they are easiest to access. However, ideally, the testator should avoid making a person who is receiving benefit under the Will (called legatee) a witness. For Hindus, Jains, Sikhs and Buddhists, there is no legal prohibition in doing so, but it is good practice not to. If the testator makes a Will with legatees as witnesses due to unavailability of others, then he could consider replacing this Will with another once a different set of witnesses becomes accessible. For Christians and Parsis, however, there is legal disqualification on witnesses being legatees.

  A family member who has not received any bequest under a Will may be a witness. For instance, if a testator has given his entire estate to his wife under the Will, then his children may be witnesses as they are not legatees.

  Alternatively, two trusted neighbours may be invited to attest the Will. This can be achieved by maintaining recommended hygiene guidance and social distancing norms, with the testator and witnesses being in line of sight but keeping safe distance. If the testator has been admitted to a medical facility, then the healthcare practitioners attending to him may be requested to attest the Will, provided that the testator is of sound mind to prepare a Will.

Digital Wills? Not yet

Technology is helping support and reshape our daily lives in unparalleled ways as the world adjusts to working remotely. By adopting innovative approaches such as digitalisation of Will making, barriers to Will creation may be overcome in two ways: (i) allowing Wills to be made by email; or (ii) signing and witnessing of Wills by way of video conference. However, there is no legal support in India for either of the two steps.

The Information Technology Act, 2000, permits formation of contracts through electronic means, but excludes Wills. Hence, preparing Wills through the medium of emails or documents with digital signatures affixed is not permitted. Further, the ISA requires witnesses to be present personally to see the signing of the Will by the testator. Therefore, attestation by video conferencing is inadequate.

In other jurisdictions, dialogue has commenced on modernising the law to facilitate digitalisation of Will creation in the immediate circumstances. The Law Society in the UK has approached the government and the Solicitors Regulation Authority ("**SRA**") to address the legislative and regulatory barriers to executing wills in the current context, including requirements for witnessing wills, and the use of video conferencing facilities.[1]

Interestingly, in India last year, the Report of the Steering Committee on Fintech Related Issues (constituted by the Department of Economic Affairs, Ministry of Finance) recommended that the Department of Legal Affairs review and consider amendments to laws to permit digital alternatives in case of Wills. However, no amendments have been enacted as yet.

Although technological tools are not yet available for assisting with the execution of Wills in situations of emergency, we are hopeful that the current difficulties will accelerate the law's march towards that direction. Until such time as the law is expressly updated to permit digital Wills, testators should continue to prepare Wills traditionally in paper format, in the presence of witnesses.

(*Also available on the Cyril Amarchand Mangaldas blog at https://privateclient.cyrilamarchandblogs.com/2020/04/wills-in-the-time-of-corona-challenges-and-solutions/*)

1 https://www.lawsociety.org.uk/support-services/advice/articles/coronavirus-advice-and-updates/.

AVOIDABLE TRANSACTIONS UNDER THE IBC AND ITS IMPACT ON M&A TRANSACTIONS

The Code was enacted with the objetive of maximization of the value of stressed assets and to ensure the survival as well as revival of the corporate debtor as a going concern. By redesigning the entire resolution mechanism and introducing a timebound process under one unified legislation, the Code aims to achieve maximum recovery for the creditors of the corporate debtor as also to enhance viability of credit in the hands of banks and financial institutions.

In view of such objectives, the resolution professional ("**RP**") or the liquidator is empowered to prevent dissipation of assets of the corporate debtor at the onset of insolvency. The Code has provided for avoidance of the following transactions (i.e. rendering such transactions void and their reversal) undertaken prior to the insolvency commencement date ("**look back period**") by the RP:

- Preferential transactions
- Undervalued transactions
- Extortionate credit transactions

Since related parties may have superior information of the corporate debtor's deteriorating financial position, the Code provides for a longer look back period of two years for transactions with such persons.[1] For third parties, the look back period is one year.

Preferential transactions (Section 43)

Preferential transactions involve the transfer of property or interest for the benefit of a creditor/ surety/ guarantor on account of an antecedent debt and which has the effect of putting such person in a better position in case of distribution of the corporate debtor's assets. Such transactions, if not avoided, would be detrimental to the *pari passu* distribution as well as maximization of the corporate debtor's assets during insolvency. The Code contemplates two exceptions, *viz*. (i) transfer made in the ordinary course of business or financial affairs, and (ii) transfer creating a security interest in the property acquired by the corporate debtor in favour of lenders providing new financing.[2]

In order to remove the imbalance created by preferential transactions and to reverse their effect, the Code allows the NCLT to pass *inter alia* the following orders, unless the transaction was entered into in good faith (*Section 44*):

- Vesting of the property, which has been transferred or which represents the sale proceeds or money transferred, in the corporate debtor;
- Releasing any security interest created by the corporate debtor;
- Requiring any person to pay amounts it has received as benefits;
- Directing a guarantor to be under a new or revived debt in relation to a person who had been given a preference and whose debt had been released;
- Directing the corporate debtor to provide security, which would have the same priority as the one released earlier in view of a preferential transaction; or
- Providing the extent to which, the debts of a person are to be proved in the liquidation or resolution process.

Undervalued transactions and transactions defrauding creditors (Sections 45 and 49)

The Code envisages two kinds of transactions, unless carried out in the ordinary course of business, which are to be considered as undervalued transactions, *viz*. (i) a gift, and (ii) transfers of asset(s) for a consideration, the value of which is significantly less than the value of consideration provided by the corporate debtor, and aims to prevent the siphoning away of the corporate debtor's assets through these provisions. A creditor, member or a partner of the corporate debtor is also permitted to challenge such transactions under Section 47 of the Code if the resolution professional or the liquidator fails to do so.

The orders that may be passed by the NCLT are similar to those as in the case of preferential transactions pertaining

1 Anuj Jain, IRP for Jaypee Infratech Limited v. Axis Bank Limited, 2020 SCC Online SC 237.
2 This exception is subject to the following conditions: (i) the security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest and was used by corporate debtor to acquire such property; and (ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property.

to vesting of property, release of security interest and payment of amounts received as benefits. The NCLT may also require the payment of such consideration for the transaction as would be determined by an independent expert (*Section 48*).

In the event the undervalued transaction was undertaken deliberately and without any good faith, for putting the assets beyond the reach of, or for prejudicing the interests of a person who may have a claim against the corporate debtor, the NCLT may pass certain specific reliefs. This includes an order to restore the position as was before the transaction and to protect the interests of the victims (*Section 49*).

It is also apposite to make a mention of Section 66(1) of the Code, which lays down the consequences of the business of the corporate debtor being conducted with the intent to defraud the creditors or for a fraudulent purpose. In such an event, the NCLT may *inter alia* order any persons who were knowingly parties to the carrying on of the business in such manner, to make certain contributions to the assets of the corporate debtor. For transactions falling within Section 49 and Section 66, both of which deal with transactions involving an element of fraud, the Code has not provided for a look-back period.

Extortionate credit transactions (Section 50)

The Code provides for a longer look back period of two years for transactions involving extortionate payments for any credit received by the corporate debtor. A transaction would fall within the ambit of this provision if (i) it requires the corporate debtor to make exorbitant payments in respect of the credit provided; or (ii) it is unconscionable under the principles of law relating to contracts.[3] If a transaction is found to be an extortionate credit transaction, the NCLT may *inter alia* set aside the transaction, modify its terms, direct that any amounts received by a person be repaid, direct that the position prior to the transaction be restored or pass an order relinquishing any security interest created in view of the transaction (*Section 50*).

Indian experience since the inception of the Code

Since the notification of the Code, various NCLTs and courts have had the opportunity to consider various instances of transactions where the RP has applied for avoidance of transactions. The rationale, principles evolved and remedies granted in these cases are summarized below:

- *Anuj Jain, IRP for Jaypee Infratech Limited ("**JIL**") v. Axis Bank Limited* (2020, Supreme Court) ("***Jaypee Infratech case***") involved the challenge by the RP against certain mortgages of JIL's (corporate debtor) assets, for loans advanced to its parent, Jaiprakash Associates Limited ("**JAL**"), on the grounds that they were undervalued and preferential. Such lenders of JAL sought to be recognised as the financial creditors of JIL. The Supreme Court only ruled on the issue of preferential transactions. The Court laid down the principles to be applied to determine if a particular transaction falls within the ambit of Section 43, including the beneficiary of the transfer, the nature of the debt, the more beneficial position in which the creditor is put, the rationale for the transfer, benefit gained by a related party and whether such transaction is an excluded transaction.

  The following principles emanate from this ruling: (a) **Intent**: So long as the transaction falls within the tenets of Section 43 of the Code (*Preferential Transactions*), the intent of the corporate debtor to not give a preference, is not a defence, and the corporate debtor is deemed to have given a preference; (b) **Creditor-debtor relationship**: Since an argument was advanced that the requirements under Section 43 were not met due to absence of a creditor-debtor relationship between the lenders and JIL, the Court considered various factors including that the transactions were for the benefit of JAL, who was an operational creditor of JIL, on account of an antecedent operational debt. The Court held that the transactions were indeed preferential transactions and the requirements under Section 43 had been met; (c) **Ordinary Course of Business**: For a transaction to be excluded it must be in the ordinary course of business of the corporate debtor <u>and</u> the creditor. Since JIL was a special purpose vehicle incorporated *inter alia* for developing certain land parcels, the transaction involving mortgage of its assets for the benefit of JAL was not in the ordinary course of business. The fact that the other creditors of JIL did not raise any objections against these transactions does not remove these transactions from the purview of Section 43.

[3] Regulation 5 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016.

As a **remedy**, the Court held that the transactions were preferential, and directed the security interest to be discharged, the property to be vested in the corporate debtor and release of encumbrances.

- *Manoj Kumar Mishra & Ors. v. Monotona Tyres Limited*[4] (2019, NCLT Mumbai) involved a challenge by the RP of a slump sale as being a preferential, undervalued and extortionate credit transaction, based on a forensic audit. The NCLT held that the transaction was an extortionate transaction for the following reasons: (a) **Undervalued**: The transaction was for 50% of the actual value of the assets; and (b) **Preferential**: The funds arising therefrom were repaid to only a few creditors. As a **remedy**, the NCLT set aside the transaction and directed that all benefits be restored to the corporate debtor and the financial position of the corporate debtor as on the date of insolvency commencement to be deemed as if there was no transaction executed at all, thereby, effectively reversing the transaction and rendering it null and void.

- *Sunil Kumar Jain & Ors. v. Sundaresh Bhatt & Ors*[5] (2019, NCLT Ahmedabad) involved the transfer of charged assets of the corporate debtor and advancement of *ad-hoc* loans, as being preferential, undervalued and fraudulent transactions, based on a determination of the market value of the assets and absence of proper records setting out the clear reason for giving the loan. The NCLT held that the transaction was (a) **Undervalued**: The assets were transferred at a value significantly less than the market value; and (b) **Preferential**: The corporate debtor did not obtain a no-objection certificate from the secured creditors who had first charge on the assets. Further the corporate debtor advanced various loans *inter alia* a loan of approximately INR 15 crores to an entity who had a negative net worth and earned revenues worth approximately INR 5 crores only. Accordingly, the NCLT allowed the applications of the RP.

- *Biodiversity Conservation India Private Limited v. Easy Access Financial Services Limited & Ors.*[6] (2019, NCLT Bengaluru) involved a challenge by the RP of certain payments made by the corporate debtor for video conferencing services and repayment of loans, as being preferential, undervalued, extortionate and fraudulent, based on a forensic audit and discrepancies in the books of the corporate debtor. The NCLT held that the transactions were *inter alia* (a) **Preferential**: The loans were repaid in priority over other financial creditors; and (b) **Fraudulent**: An amount of INR 1.6 crores was collected by the corporate debtor but had not been accounted for, and there were significant number of related party transactions without any underlying documents. The NCLT directed the matter to be further investigated by the Serious Fraud Investigation Officer.

Implications on and key takeaways for M&A transactions

A typical M&A transaction may involve *inter alia* transfer of shares, assets, liabilities, undertaking as also creation or discharge of securities and charges on assets. Such transactions may be subject to pre-conditions such as discharge of certain loans or liabilities.

If these transactions fulfil the conditions of an avoidable transaction under the Code, it can lead to the risk of *inter alia* the transaction being entirely set aside in the event of an insolvency commencement against one of the parties. The NCLT may require restoration of benefits received by a person, payment of amounts involved in the transaction and other such orders as have been mentioned above. The risk of the transaction being avoidable under the Code is even greater in the wake of the ongoing financial and economic crisis, since in the over-leveraged and recessionary economy, certain transactions may be primarily entered into with the objective of reducing debt and repaying creditors of the seller.

From the acquirer's standpoint, and in order to protect against and mitigate such risks, certain measures may be taken, and protections may be sought by the party concerned. Some of them are specified below:

- *Independent valuation* – The parties must ensure that the valuation is done by an independent party and the consideration ascertained thereafter, is based on the market value and standards. This would reduce the risk of the transaction from being held as undervalued. In the event the target company is financially distressed, the parties may consider seeking valuation from two independent valuers.

[4] MA 1061, 2265 and 2469/2019 in CP No. 286/IBC/NCLT/MB/MAH/2018.
[5] I.A. Nos. 348 of 2017, 139, 141, 204, 303, 321 of 2018 and 113 of 2019 in CP(IB) No. 53 of 2017.
[6] I.A. No. 257 of 2019 in C.P. (IB) No. 14/BB/2018

- *Due diligence* – The parties must undertake the requisite legal and financial due diligence. This is essential to assess the viability of the proposed transaction and to ensure that that transaction is being entered into in good faith. A financial due diligence would underscore the valuation if the concerned party is financially distressed. Parties must also consider undertaking a due diligence of the ongoing and threatened litigation against the target and the sellers (including creditor-debtor disputes) and the potential impact of such disputes on the debtor's assets to identify red flags and also highlight any imminent insolvency proceedings, which may put the transaction under scrutiny.

- *Consent of lenders and creditors* – The parties must ensure that the requisite consents, no-due certificates and no-objection certificates are obtained from the creditors prior to consummation of a transaction. Any objections raised by any creditor would serve as a red flag to the possible issues that may arise. In certain sectors and for certain types of transactions, public notice is given regarding the transaction (for instance in Non-Banking Financial Companies and Housing Finance Companies). The fact that such public notice was given and no objections were received is also a positive factor that can be relied upon by prospective acquirers. Having said that, any objections received to such a notice is a key red flag that needs to be factored in by the acquirer pre-closing.

- *Corporate and regulatory approvals and filings* – The parties must obtain the requisite approvals from the board, the audit committee and the shareholders for execution and implementation of the transaction. The notice containing the resolution must disclose the relevant details. The shareholders must be provided with adequate reasons for the transaction. The parties must ensure that all statutory filings are made in a timely manner. Favourable votes by the independent directors in relation to the transaction and the valuation reports, and approvals given by the concerned regulators (if required) further add credibility to the assessment of the valuation and genuineness of the transaction.

- *Bid process* – If the acquisition was done following a competitive bid process, then the Seller should record in its corporate authorizations approving the transaction details regarding the bid process, i.e. the bids received and evaluated and selection criteria which has resulted in the acquirer being selected as the winning bidder. This goes to show that the transaction which was finally approved by the board was neither undervalued nor preferential and was objectively determined as being in the best interest of the sellers and its various stakeholders (shareholders & creditors). In addition to the bid process, a fairness opinion issued by an independent merchant banker, which is tabled before the board may also be relied upon to refute claims of the transaction being an avoidable transaction.

- *Maintenance of proper and adequate records* – The parties must maintain proper and sufficient records, notes, vouchers, as also make proper entries in their books, evidencing the details of the transaction. Such records are key pieces of evidence which may be scrutinized by the RP in case of insolvency proceedings against one of the parties.

- *Intergroup Restructurings* – Given that the look back period for transactions with related parties is longer, parties must be wary of the financial health of the companies involved and the manner in which the restructuring is undertaken.

- *Representations* – The following representations may be added to the transaction documents:

    - The company/ seller is not insolvent or threatened to be insolvent or unable to pay its debts or has stopped paying its debts. The company/ seller has not received any notice of demand pursuant to its failure to repay any debt.

    - No steps have been taken by the company/ seller and no notice has been received or sent in relation to insolvency or winding up proceedings of any character affecting the company/ seller. The company/ seller has not appointed or received or sent any notice for the appointment of an insolvency professional or liquidator.

    - The transaction and end use of proceeds by the company/ seller is not being entered into for or will not result in the benefit of one or few creditors of the company/ seller over the other creditors of the company/ seller.

While the above measures may not conclusively protect a transaction from being set aside, the measures would serve to ensure that the risks of adverse orders against a transaction or a party in case of insolvency proceedings, are minimised.

The requirement of undertaking these measures will become more pressing, if based on the recommendations of the Insolvency Law Committee as stated in its report of February 2020, the Code is amended to allow creditors (individual or in groups) and the committee of creditors to make such applications. Currently, except in the case of undervalued transactions, only the RP or the liquidator can make this application. Upon extension of this right to the creditors, there is a possibility of an increase in the number of transactions coming under scrutiny during the insolvency process thereby increasing the criticality of the abovementioned protections which a prudent acquirer should be mindful of.

UPDATES IN RESPONSE TO COVID-19

RBI UPDATES

1. RBI releases COVID-19 operational and business continuity measures

The RBI has released certain guidelines on business continuity measures for commercial banks, financial institutions, co-operative banks and non-banking financial companies (collectively, "**Lending Institutions**") in light of the COVID-19 pandemic, which are broadly set out below:

➢ *Rescheduling Payments of Term Loans and Working Capital Facilities*:

- For term loans, Lending Institutions are permitted to grant a moratorium of a period of 3 months on installments falling between March 1, 2020 and May 31, 2020. The repayment schedule and tenure of such facilities will be shifted by 3 months, with the interest accruing on the outstanding amounts during the moratorium period.

- For working capital facilities, Lending Institutions are permitted to defer recovery of interest between March 1, 2020 and May 31, 2020, the accumulated interest being immediately recoverable at the end of such period. For working capital facilities in the form of cash credit/overdraft extended to borrowers facing financial strains due to the COVID-19 pandemic, the Lending Institution may recalculate the drawing power.

➢ *Classification as Special Mention Account ("**SMA**") or Non-Performing Asset*: The rescheduling of payments (term loans) or interests (working capital facilities) will not be considered as defaults for reporting purposes. However, asset classification of term loans for which moratorium has been declared should be undertaken on the basis of revised due dates /repayment schedule and working capital facilities for which deferment in payment of interest is allowed, the SMA and the out of order status should be evaluated basis the accumulated interest immediately after the completion of the deferment period and the revised terms.

➢ *Other Conditions:* Lending Institutions are required to frame policies for providing such relief in relation to the term loan and working capital facilities, which are approved by their respective boards.

If the exposure of a Lending Institution equals or exceeds INR 5 crores as on March 1, 2020, the Lending Institution will be required to prepare a management information system of reliefs provided to borrowers.

(*Notification No. DOR.No. BP.BC.47/21.04.048/ 2019-20 dated March 27, 2020*)

SEBI UPDATES

1. SEBI relaxes compliance requirements for InvITs and REITs due to the COVID-19 pandemic

In light of the developments arising due to the spread of the COVID-19, SEBI has issued a circular extending the due date for regulatory filings to be made and compliances to be observed for Infrastructure Investment Trusts ("**InvITs"**) and Real Estate Investment Trusts ("**REITs**) for the period ending March 31, 2020, by one month over and above the timelines prescribed under the SEBI (InvIT) Regulations, 2014 and the SEBI (REIT) Regulations, 2014, respectively.

(SEBI Circular No. SEBI/HO/DDHS/CIR/P/2020/42 dated March 23, 2020)

2. SEBI allows continuation of phase II of unified payments interface UPI with ASBA due to COVID-19 pandemic

On November 8, 2019, SEBI had issued a circular bearing reference number SEBI / HO/ CFD /DIL2 /CIR /P/2019/133, whereby it had extended the timeline for implementation of Phase II of unified payments interface **("UPI")** with application supported by blocked amount ("**ASBA**") till March 31, 2020. Considering that introducing any new changes under the prevailing circumstances due to COVID-19 pandemic may not be workable and other factors, SEBI has decided to continue with the current Phase II of the UPI ASBA till further notice. The modalities for the implementation of the Phase III of the UPI ASBA are to be notified later after deliberations with the stakeholders.

(SEBI Circular No. SEBI/HO/CFD/DIL2/CIR/P/2020/50 dated March 30, 2020)

3. Relaxation from compliance with certain provisions of the circulars issued under SEBI (Credit Rating Agencies) Regulations, 1999

SEBI has permitted a differentiation in treatment of default, on a case to case basis, by credit rating agencies ("**CRA**") on the basis of whether such default occurred solely due to the lockdown or loan moratorium. Accordingly, based on its assessment, if the CRAs attribute the delay in payment of interest/principle to the lockdown conditions, CRAs may not consider the same as a default event and/or recognize default. The same is also applicable on any rescheduling in payment of debt obligation done by the issuer, prior to the due date, with the approval of the investors/lenders. The said relaxations have been extended till the period of moratorium by the RBI, i.e., 3 months. Separately, an extension in timelines for press release and disclosures on website by the CRAs has also been granted by SEBI.

(SEBI Circular NO. SEBI/ HO/ MIRSD/ CRADT/ CIR/ P/ 2020/ 53 dated March 30, 2020)

4. **Temporary relaxation in processing of documents pertaining to FPIs**

In light of the recent events pursuant to COVID-19, SEBI has provided the following relaxations till June 30, 2020 in a situation where foreign portfolio investors ("**FPIs**") are not in a position to send original and/or certified documents as specified in operational guidelines for FPIs and Designated Depository Participants ("**DDPs**") issued under the SEBI (FPI) Regulations, 2019:

- DDPs and custodians may consider and process the requests for registration/ continuance/ KYC / KYC review and any other material change on the basis of scanned version of signed documents (instead of originals) and copies of documents which are not certified, if received from specified modes.
- These documents may be uploaded on KYC registrations agencies and the same may be relied upon by the other intermediaries.

DDPs and custodians shall ensure to obtain the original and/or certified documents (as applicable normally) within 30 days from the aforesaid deadline. In case the required documents are not received within the said deadline, the accounts of such FPIs shall be blocked for any fresh purchase and if not received within 3 months, DDPs and custodians shall report these cases to SEBI for appropriate action.

(*SEBI Circular no. SEBI / HO / FPI&C / CIR / P / 2020 / 056 dated March 30, 2020*)

5. **Relaxation in compliance with requirements pertaining to Portfolio Managers**

In light of the recent events pursuant to COVID-19, SEBI has extended the timelines by 2 months for (a) compliance with monthly reporting requirement by portfolio managers for the periods ending March 31, 2020 and April 30, 2020, and (b) applicability of the SEBI Circular dated February 13, 2020 on 'Guidelines for Portfolio Managers'.

(*SEBI Circular No. SEBI/HO/IMD/DF1/CIR/P/2020/57 dated March 30, 2020*)

6. **Relaxation in compliance with requirements pertaining to AIFs and VCFs**

In light of the recent events pursuant to COVID-19, SEBI has extended the due date for regulatory filings by Alternative Investment Funds ("**AIFs**") and Venture Capitalist Funds ("**VCFs**") for the periods ending March 31, 2020 and April 30, 2020 by 2 months, over and above the timelines prescribed under SEBI (AIF) Regulations, 2012 and circulars issued thereunder

(*SEBI Circular No. SEBI/HO/IMD/DF1/CIR/P/2020/58 dated March 30, 2020*)

OTHER KEY UPDATES

MCA UPDATES

1. Commencement of sub-sections (11) and (12) of Section 230 of the Act

The MCA has appointed February 3, 2020 as the date on which the provisions of sub-sections (11) and (12) of Section 230 of the Act shall come into force.

- Section 230(11) provides that any compromise or arrangement may include takeover offer made in the prescribed manner while in case of listed companies, takeover offer shall be as per the regulations framed by the SEBI.
- Section 230(12) provides that an aggrieved party may make an application to the NCLT in the event of any grievances with respect to the takeover offer of companies other than listed companies, in the prescribed manner and the NCLT shall pass such order as it deems fit.
- Pursuant to the commencement of the above sections, the MCA has amended the following Rules:
  - **Companies (Compromises, Arrangements and Amalgamations) Rules, 2016**, wherein the following sub-rules (5) and (6) to Rule 3 (*Application for order of a meeting*) have been introduced:
    - Sub-rule (5) provides that a member of the company shall make an application for arrangement, for the purpose of takeover offer in terms of sub-section (11) of Section 230, when such member along with any other member holds not less than three-fourths of the shares in the company, and such application shall be filed for acquiring any part of the remaining shares of the company.

      Explanation I to sub-rule (5) defines "shares" to mean the equity shares of the company carrying voting rights, and includes any securities, such as depository receipts, which entitles the holder thereof to exercise voting rights.

      Explanation II to sub-rule (5) provides that the afore-mentioned provision shall not apply to any transfer or transmission of shares through a contract, arrangement or succession, as the case may be, or any transfer made in pursuance of any statutory or regulatory requirement.
    - Sub-rule (6) provides that an application of arrangement for takeover offer shall contain the following:

      (i) the report of a registered valuer disclosing the details of the valuation of the shares proposed to be acquired by the member after taking into account (1) the highest price paid

by any person or group of persons for acquisition of shares during last 12 months, and (2) the fair price of shares of the company to be determined by the registered valuer after taking into account valuation parameters including return on net worth, book value of shares, earning per share, price earning multiple vis-à-vis the industry average, and such other parameters as are customary for valuation of shares of such companies.

(ii) details of a bank account, to be opened separately, by the member wherein a sum of amount not less than one-half of total consideration of the takeover offer is deposited.

- **National Company Law Tribunal Rules, 2016**, wherein a new rule 80A regarding application under Section 230 of the Act has been added which provides that an application under sub-section (12) of Section 230 may be made in Form NCLT-1 and shall be accompanied with such documents as are mentioned in Annexure B. Accordingly, the schedule of fees and Annexure B has been amended.

(MCA Notification F. No. 2/31/CAA-2013-CL-V (Part) dated February 3,2020, MCA Notification No. G.S.R. 79 (E) dated February 3, 2020) and MCA Notification No. G.S.R. 80 (E) dated February 3, 2020)

2. Companies (Amendment) Bill, 2020 introduced in Lok Sabha

The government has introduced the Companies (Amendment) Bill, 2020 in Lok Sabha to amend the Act. Some of the key amendments proposed are:

➢ A *proviso* to be added to the definition of listed companies in Section 2(52) of the Act stating that such class of companies, which have listed or intend to list such class of securities, as may be prescribed in consultation with SEBI, shall not be considered as listed companies.

➢ Certain offences under the Act to be decriminalised, such as, Section 8(11) (*Formation of companies with charitable objects*), Section 26(9) (*Matters to be stated in prospectus*), Section 40(5) (*Securities to be dealt with in stock exchanges*), Section 56(6) (*Transfer and transmission of securities*), Section 48 (5) (*Variation of Shareholders rights*) and Section 59 (5) (*Rectification of register of members*).

➢ Section 16(3) (*Rectification of name of company*) to be substituted to provide that if a company is in default in complying with any direction given under sub-section (1) (*direction of the Central Government to change the name in case it is identical to/ too nearly resembles an existing trade mark*), the Central Government shall allot a new name to the company and the Registrar of Companies ("**ROC**") shall enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation with the new name, which the company shall use thereafter. However, nothing in this sub-section shall prevent a company from subsequently changing its name in accordance with the provisions of Section 13 (*Alteration of memorandum*). The period within which the proprietor of a trademark can apply to the Central Government is proposed to be reduced from 3 years to 6 months.

➢ Section 23 (*Public offer and private placement*) to be amended to provide that a prescribed class of public companies may issue the prescribed class of securities for the purposes of listing on permitted stock exchanges in permissible foreign jurisdictions or such other prescribed jurisdictions. In addition, the Central Government to be empowered to exempt any class or classes of public companies referred above from any of the provisions of this Chapter III (*Prospectus and Allotment of Securities*), IV (*Share Capital and Debentures*), Section 89 (*Declaration in respect of beneficial interest in any share*), Section 90 (*Register of significant beneficial owners in a company*) or Section 127 (*Punishment for failure to distribute dividends*).

➢ Timelines for applying for rights issues to be reduced so as to speed up such issues under Section 62 (*Further issue of share capital*).

➢ A *proviso* to be added to sub-section(3)(g) of Section 117 (*Resolutions and agreements to be filed*) stating that nothing contained in this clause shall apply in respect of a resolution passed to grant loans, or give guarantee or provide security in respect of loans under Section 179(3)(f) in the ordinary course of its business by a banking company; any class of non-banking financial company registered under Chapter III B of the RBI Act, 1934; and any class of housing finance company registered under the National Housing Bank Act, 1987.

- A new Section 129A to provide for specified classes of unlisted companies to prepare and file with the ROC their periodical financial results.

- Section 135 to be amended (a) to provide that the companies which have Corporate Social Responsibility spending obligation up to INR 50 lakhs shall not be required to constitute the CSR committee and such functions shall be discharged by the board of directors of the company, and (b) to allow eligible companies under Section 135 to set off any amount spent in excess of their CSR spending obligation in a particular financial year towards such obligation in subsequent financial years.

- Third proviso to Section 403(1) to be substituted to provide that where there is default on two or more occasions in submitting, filing, registering or recording any document, fact or information, such information can be filed, submitted on payment of such higher additional fees that may be prescribed.

(The Companies Amendment Bill, 2020, introduced in the Lok Sabha on March 17,2020)

RBI UPDATES

1. RBI Guidelines on regulation of Payment Aggregators and Payment Gateways

The RBI has released guidelines for the regulation of payment aggregators (“**PAs**”) and payment gateways (“**PGs**”) and baseline technology related recommendations for PGs. Set out below are the key highlights:

<u>Guidelines on Regulation</u>

- *Definitions*: A PA has been described as an entity facilitating e-commerce sites and merchants to accept payment instruments from customers for completing their payment obligations, without the need for such merchants or sites to create a separate payment integration system of their own. PAs receive payments from customers and pool and transfer them on to the merchants after a period of time. A PA is required to be a company incorporated under the Companies Act, 1956 or the Act and its memorandum of association must cover the proposed activity of operation as a PA.

  PGs have been described as entities providing technology infrastructure to route and facilitate processing of online payment transactions, without handling the funds.

- *Applicability*: The RBI has clarified that the domestic legs of import or export related payments will be governed by these regulations. However, these guidelines are not applicable to 'Cash on Delivery' e-commerce models.

- *Authorization*: Non-bank PAs will be required to apply for authorization from the RBI under the Payment and Settlement Systems Act, 2007 on or before June 30, 2021. PAs regulated by financial sector regulators shall make an application to the RBI within 45 days of obtaining a no objection certificate from the relevant financial regulator.

- *Capital Requirements*: Existing PAs are required to achieve a net worth of INR 15 crore by March 31, 2021 or have a net worth of INR 15 crore at the time of application. Thereafter, PAs are required to achieve a net worth of INR 25 crore by the third year of authorization and maintain the same.

- *Governance:* PAs are required to:
  - maintain the amount collected by them in an escrow account with any scheduled commercial bank.
  - notify the RBI of any takeover, acquisition of control or change in management. Further, the directors of the PAs are required to submit a declaration in relation to their 'fit and proper' status.
  - comply with the provisions of the Prevention of Money Laundering Act, 2002 and the guidelines on Know Your Customer / Anti-Money Laundering / Combating Financing of Terrorism issued by the RBI.
  - have in place a board approved policy for merchant on-boarding and run background checks on the merchants. Further, agreements between PAs and other stakeholders (merchants etc.) should clearly demarcate responsibilities and have provisions in relation to security / privacy of customer data.
  - have in place a formal customer grievance redressal and dispute management framework.
  - have in place a strong risk management system and data security infrastructure for the detection of fraud.

<u>Baseline Technology Related Recommendations</u>

- These recommendations (mandatory to be adopted by PAs and recommended for PGs) broadly lay down guidelines for information security of the customers and storage of data.

(*Notification No. RBI/DPSS/2019-20/174 dated March 17, 2020*)

2. Modification to the Guidelines for Licensing of Small Finance Banks in Private Sector

In order to harmonise instructions for existing Small Finance Banks ("**SFBs**") which were issued licenses under the Guidelines for Licensing of Small Finance Banks in Private Sector dated November 27, 2014 ("**SFB Guidelines**") and SFBs issued licenses under the Guidelines for 'on-tap' Licensing of Small Finance Banks in Private Sector released by the RBI on December 5, 2019, the RBI has provided the following clarifications:

- Existing SFBs will be granted general permission by the RBI to open banking outlets, subject to the 'unbanked rural centre' norms in terms of the RBI circular on '*Rationalization of Branch Authorisation Policy - Revision of Guidelines*' dated May 18, 2017 (DBR.No.BAPD.BC.69/22.01.001/2016-17).
- After 3 years of commencement of their business, all existing SFBs will be exempted from obtaining the prior approval of the RBI for undertaking non-risk sharing simple finance service activities not requiring any commitment of own fund.
- The ability of a promoter to cease to be a promoter or exit the SFB after 5 years will be subject to the regulatory and supervisory comfort of the RBI and the relevant regulations of SEBI at the time.
- The phrase 'paid-up equity capital' in the SFB Guidelines means 'paid-up voting equity capital'.

(*Notification No. DOR. NBD. No.44/16.13.218/2019-20 dated March 28, 2020*)

SEBI UPDATES

1. SEBI streamlines the process of rights issue

SEBI had previously amended the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("**SEBI ICDR Regulations**") and the LODR to simplify the process of rights issue. In continuation of the same, SEBI has now by way of a circular streamlined the process of rights issue. Following are the key changes made with respect to the rights issue process:

- Period for advance notice to stock exchange(s) under Regulation 42(2) of the LODR has been reduced from at least 7 working days to at least 3 working days (excluding the date of intimation and the record date).
- Completion of issuance of newspaper advertisement disclosing the date of completion of dispatch and intimation of the same to the stock exchanges for dissemination on their websites under Regulation 84(1) of SEBI ICDR Regulations has been reduced from at least 3 days to at least 2 days before the date of opening of the issue.
- Introduction of dematerialized rights entitlements whereby (i) the issuer is required to disclose the process of rights entitlement in the demat account and renunciation thereof in the letter of offer and the abridged letter of offer; (ii) rights entitlements is to be credited into the demat account of eligible shareholders in dematerialized form; (iii) rights entitlements with a separate ISIN is to be credited into the demat account of the shareholders before the date of opening of the issue, against the shares held by them as on the record date; and (iv) physical shareholders are required to provide their demat account details to the issuer/registrar not later than 2 working days prior to issue closing date so that credit of rights entitlements in their demat account takes places at least 1 day before the issue closing date.
- Trading of dematerialized rights entitlements on the stock exchange platform whereby (i) rights entitlements are required to be traded on the secondary market platform with T+2 rolling settlement and trading in rights entitlement should commence along with opening of the issue and should be closed at least 4 days prior to closure of the issue; and (ii) investors holding rights entitlements in dematerialized mode are able to renounce their entitlements by trading on stock exchange platform or off-market transfer.
- All application to be made only through application supported by blocked amount facility.
- No withdrawal of application by any shareholder is allowed after the issue closing date.

The circular also provides for the detailed procedure of the rights issue process including instructions on the application form, manner of credit of rights entitlements in dematerialized form, renunciation process and trading of rights entitlement on the stock exchange platform and the allotment process. This circular is applicable to all rights issues and fast track rights issue where letter of offer is filed with the stock exchanges on or after February 14, 2020.

(SEBI Circular No. SEBI/HO/CFD/DIL2/CIR/P/2020/13 dated January 22, 2020)

2. SEBI working group committee recommendations on related party transaction

SEBI has released the SEBI working group committee recommendations on related party transactions ("**RPTs**"), and set out below are the key recommendations as contained therein:

- Promoter and promoter group entities being considered related parties, irrespective of their shareholding, as opposed to extant regime where only the promoter entities holding 20% or more in the listed entity are considered as a related party.
- Additionally, any entity who, directly or indirectly, holds 20% or more in the listed entity should be considered as a related party.
- Revision of the materiality threshold for obtaining shareholder approval for an RPT to any transaction over INR 1,000 crore or 5 % of annual total revenue, total assets or net worth on a consolidated basis, whichever is lower. The existing threshold is of transactions exceeding 10 % of annual consolidated turnover.
- Tighter scrutiny of RPTs undertaken by a subsidiary with the related parties of the listed entity or its subsidiaries, to be achieved by requiring mandatory approval of the audit committee for:
    - Transaction involving the listed entity or any of its subsidiaries on the one hand and a related party of the listed entity or any of its subsidiaries on the other hand; and
    - Transaction involving listed entity or any of its subsidiaries and any entity—as long as the purpose or effect of the transaction entails benefit to a related party of the listed entity or any of its subsidiaries.
- Shareholder notice for RPT approval to contain disclosure in relation to *inter alia* (a) whether the transaction has been approved unanimously by the audit committee, (b) justification as to why the transaction benefits the listed entity, and (c) whether the transaction relates to loans, inter-corporate deposits, advances, investments by listed entity or its subsidiary.

(*SEBI Working Group Committee Recommendations on Related party Transaction dated January 27, 2020*)

3. SEBI overhauls the regulatory framework in relation to Portfolio Managers

SEBI notified the SEBI (Portfolio Managers) Regulations, 2020 ("**PM Regulations, 2020**") in supersession of the SEBI (Portfolio Managers) Regulations, 1993. The key highlights / changes under the PM Regulations, 2020 are set out below:

- The minimum investment amount per client, which can be accepted by a portfolio manager, has been increased to INR 50 lakhs from the previous limit of INR 25 lakhs.
- The capital adequacy requirement has been revised to increase the minimum net worth required for portfolio managers from the erstwhile INR 2 crores to INR 5 crores.
- Discretionary portfolio managers have been restricted to invest only in listed securities, while non-discretionary portfolio managers in addition to listed securities are also allowed to invest up to 25% of their asset under management in unlisted securities.
- Portfolio managers are required to charge an agreed fee from the client without guaranteeing any return and are proscribed from charging an upfront fee.
- Standard performance reporting has been introduced for all portfolio managers, under which a 'disclosure document' is to be filed with SEBI and made available on its website at all times and shall contain *inter alia* performance of a portfolio manager calculated using a standard 'Time Weighted Rate of Return'.
- Portfolio managers to include 'investment approach' i.e., a broad outlay of the type of securities and permissible instruments to be invested in by the portfolio manager for the customer, as part of the agreement executed between the portfolio manager and its client and also in the disclosure document required to be provided by the portfolio manager to its client.
- Portfolio managers to mandatorily appoint a compliance officer, who will be responsible for monitoring the legal/regulatory compliances and redressing investors' grievances, wherein the said role cannot be assigned to the principal officer or the employee of the portfolio manager.

- The qualification criteria for principal officer of the portfolio manager has been revamped to include a list of other qualifications not required under the erstwhile regulations and the qualification criteria for employees of portfolio manager has also been significantly enhanced.

  Further, in order to implement the PM Regulations, 2020, guidelines for portfolio managers have also been issued by SEBI. Set out below are certain key highlights:

- Services of only distributors with valid registrations with the Association of Mutual Funds in India (AMFI) or those who have cleared the NISM Series-V-A exam can be utilised by the portfolio managers. The fees / commissions paid by the portfolio managers to such distributors shall be on a trail-basis only, with such payments being made only out of the fees received and not from their own books. Prospective clients to be informed by the portfolio managers about the fees / commissions earned by distributors during the on-boarding process.

- The total operating expenses, excluding the fees charged for portfolio management services and brokerage, has been capped at a maximum of 0.50% of the clients' average daily assets under management. Separately, the brokerage paid by the portfolio managers can also be charged to clients as expense.

- The exit load charged by the portfolio manager in case of a partial / full redemption of a client's portfolio, has been capped at a maximum of 3% of the redemption amount in the first year of investment, 2% in the second year and 1% in the third year, with no exit load allowed to be charged after a period of three years from the date of investment.

- Charges for all transactions in any financial year, including broking and custody, undertaken by a portfolio manager either through self or its associates, shall be capped at 20% by value per associate (or self) for each service; and such charges cannot be more than those paid to non-associates providing the same service.

- Clients to mandatorily be given an option to be on-boarded directly by portfolio managers, without availing services of a distributor, with such option being disclosed in the disclosure document, marketing materials, and on the website of the portfolio manager. No charges except statutory charges can be levied by a portfolio manager in such direct on-boarding.

- Compliance with the SEBI circular on "Improvement in Corporate Governance" dated November 18, 2003 to be reported to SEBI on an annual basis, as opposed to the erstwhile requirement of biannual reporting.

- Format in which quarterly reports are to be submitted to the client by the portfolio manager has also been stipulated.

(*SEBI Notification No. SEBI/LAD-NRO/GN/2020/03 dated January 16, 2020 and SEBI Circular No. SEBI/HO/IMD/DF1/CIR/P/2020/26 dated February 13, 2020*)

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