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DOING JUSTICE IN POST-COVID WORLD

A Cyril Amarchand Mangaldas Thought Leadership Publication

Doing Justice in Post - COVID World

FOREWORD

We live in uncertain times. The world and the legal profession have never experienced anything like the challenges presented by the Covid-19 pandemic. The 20th Century witnessed two World Wars fought at the forefront of enemy lines, facing the enemy. Humanity's battle against this pandemic is being fought by doctors, healthcare and essential services workers against an invisible enemy that is challenging our notion of normal. There is no status quo - we must reinvent ourselves and the institutions that keep our society together.

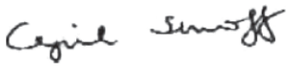
COVID-19 has posed an existential challenge not only to our judicial and enforcement agencies, but also to our sense of justice. The efficacy of the justice system hangs in balance with several functions severely disrupted and only the most pressing cases being addressed by the judiciary. Access to justice and our judicial systems are temporarily constrained but permanently altered. There is a recognition that Justice must adapt and adopt technology. As the pandemic escalates, there are a wide range of technological solutions that businesses can adopt to assist them in overcoming the operational, regulatory, and legal issues they currently face.

However, our main objective, even during the pandemic remains the quest for justice. Irrespective of the challenges the firm may face due to this pandemic, our creed is to remain true to our ethos of integrity and ethics and our mission to create a fair and just world. At Cyril Amarchand Mangaldas, we focus to create the solutions necessary for today's issues while keeping our sights on the future staying ahead of the curve is not just a motto, it is our religion our DNA. I am also reminded of General Eisenhower, who led the Allied Forces to a crucial victory in the Second World War, said: "Neither a wise man nor a brave man lies down on the tracks of history to wait for the train of the future to run over him". Through this e-book, we hope to bring together the practical considerations, thought leadership, and insights into concise critical questions to help businesses manage and mitigate risk now and in the future.

The e-book, "Doing Justice in a post-Covid World" is born out of our experiences of the past five months. With this e-book, our aim is to condense the lessons we have learnt, our experiences, our understanding into nine comprehensive chapters that explore a range of practice areas including taxation, real estate, white collar crimes and investigations, and financial market regulation as well as the far-reaching implications of the shift to virtual workspace.

We hope that the e-book serves as a guide to the readers, helps them understand and navigate the challenges of this brave new world. In the times of uncertainty and widespread scepticism, it is our prerogative to help our clients chart the best course out of this storm.

Every challenge has its unique opportunities; the pandemic has forced us out of the comforts of conventionality pushed us to pioneer paradigm shifts and embrace the inadvertent revolution. To quote a Japanese proverb the bamboo that bends is stronger than the oak that resists. As I am an eternal optimist, I believe that there lies an opportunity to reimagine and build a more resilient, inclusive, and just society. I am proud to say that the Firm is ready to rise to this challenge.



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ROLE OF TAXATION IN ENSURING A NEW NON-CONTROVERSIAL **POST-COVID WORLD**

Background

It is said that nothing is certain in this world, except death and taxes. Come 2020, and we have had to add lockdowns to the list. The economic fallout from Covid-19 has choked businesses across sectors and business verticals, starting with restrictions at the local level, gradually extending to national and international levels and culminating in international travel. This appears to be the severest test faced by businesses entities in this millennium. It has resulted in a worldwide slump in economic activities, abysmally low gross domestic products pushing many countries into recession, stock market crashes, etc., and ultimately resulting in a severe fall in tax collections. Thus, there is an increasing demand across multiple fora that Governments should come up with a revised tax collection strategy wherein the rich and well-to-do sections of the society bear a larger proportion of the tax burden and pay more taxes, which can be used to fund various government economic welfare schemes to protect the lowest rung in the society. This being one of the easiest options, it is widely believed that many Governments will fall into this trap and implement such a scheme.

There is absolutely no doubt that the pandemic will leave a lasting impact on all economies across the world and thus, all countries will have to come up with their respective strategies and mechanisms to

deal with this menace. With no immediate end of this uncertainty in sight, economies will have to decide on the best way to provide stimulus to the population as well as to the business entities, especially considering that the latter would have a multiplier effect on the economy as a whole. It must also be noted that most of the businesses, except a couple of exceptions like pharmaceuticals, FMCG, etc., are also fighting their own battle of survival and unless they are provided with appropriate stimuli, the possibility of their folding up cannot be ruled out.

Torturous future roadmap for Indian tax administration

It is very important to promote entrepreneurship and reward the risk-taking ability of businesses. While the difficulties and uncertainties during these demanding times may provide tax administrators a number of opportunities to raise additional tax demands, it is important that rather than being vindictive, the Indian tax administration acts reasonably. It would be in public interest that the authorities refrain from adding additional burden on to the already suffering business entities. Instead of focusing on boosting their tax collections, the tax administration could take this time to restructure its internal systems, implement various government measures like e-assessments, the plan to implement faceless assessments to eliminate personal interface between the department and the taxpayer, etc. While some of these recent proposals have already been implemented, the operation of new ideas can be expedited and soon made mandatory, so that grievances of taxpayers are reduced to a large extent. In addition to this, efforts can be made to set up the necessary apparatus for digitisation of tax justice, which will enable the system to function uninterruptedly even in a situation like Covid-19.

It may be pertinent to note that the tax authorities may still chase after troubled businesses and we have analysed in this chapter a few of the instances that the tax department may pounce upon. We have also made some proposals that we believe would mitigate the strain on Indian business entities.

Impact on individual tax residence

Most people cannot remember the last time 62% of the world's planes were grounded. A Lithuanian airport has converted its terminal into a drive-in cinema! Besides keeping themselves safe during these stressful times, Covid-19 has our frequent fliers worrying about something else – the issue of residential status for taxation purposes, both for themselves as well as their employing entities. They were forced to overstay their intended welcome owing to travel restrictions all over the world thus, involuntarily increasing the time spent in their current country of residence.

To provide some reprieve to such entities, the Organisation for Economic Cooperation and Development (OECD) issued certain guidelines in April 2020 on this matter, advising that temporary dislocations due to Covid-19 should not lead to change of tax residency statuses for individuals. In India also, the Central Board of Direct Taxes (CBDT), after intense pressure from affected taxpayers and developments across the globe, including in the United States, the United Kingdom and Australia, addressed the issue of residence of stranded individuals. As per the CBDT notification, the time an individual spent in India between March 22, 2020 and March 31, 2020 (or quarantined in India from March 1, 2020) will not be taken into account when determining their tax residence.

While this is a hugely welcome gesture from the CBDT's end, there may still be other individuals not covered under the notification's scope, left in the lurch. As example, many visitors had to cancel their travel plans prior to March 22, not because they were quarantined, but simply because it was declared unsafe to travel abroad. Considering that Covid-19 had begun ravaging mainland China in December 2019 and the outbreak was declared a Public Health Emergency of International Concern by the World Health Organisation on January 30, any visitor may have been hesitant, if not unable, to fly abroad. Relief to stranded individuals would have been more profound had the CBDT taken cognizance of the severity of the global pandemic situation since January instead of just grounding of flights in India from March 22. The CBDT's notification only deals with days of quarantine or lockdown in Financial year 2019-20. Since overseas travel is banned even today, more clarity is awaited on the extension of relief period by the CBDT. The CBDT should consider providing complete waiver of the period from January till September or December, depending on how the situation evolves, for all stranded taxpayers.

Impact on corporate tax residence

The above referred travel difficulties of individuals may also create significant tax concerns on their employing entities. The Indian tax laws provide that a foreign entity could be determined to be a resident of India if its place of effective management (POEM) is based in India. Thus, even temporary dislocations of board members and key decision-making personnel owing to Covid-19 may affect the POEM (and consequently the tax residency) of global businesses. In addition to this, the physical stay of employees of foreign entities in India could create a service permanent establishment, as per many double taxation avoidance agreements that India has signed with many countries.

The OECD's guidance as well as the CBDT notification had provided the requisite clarity to the concerned business entities on the issue of POEM creation and hence, business entities need not fear that flexibility afforded to employees to work from home / other countries could create adverse tax situations for the employer.

However, companies which risk creating permanent establishments in India may still be sailing close to the wind. Although the OECD guidance cautioned that force majeure events such as Covid-19 should not trigger creation of permanent establishment, and urged tax administrations across the world to minimise unduly burdensome requirements from taxpayers, response in this regard is still awaited from the CBDT's end.

Business decisions? Watch out for the GAAR

Amidst economic recession, CXOs are planning ways to ensure business continuity, including through liquidity management, revamping short and long-term top line, re-directing exposure to affected sectors and counter parties, re-adjusting business and sectoral targets, re-pricing rates and re-ordering day-to-day operating models to suit the new reality. Economic landscape for businesses is constantly evolving, calling for dynamic responses from businesses to stay afloat. These re-strategising measures may involve temporary or permanent re-organisation of operations and investments across sectors and geographies, and revised deployment models for cash and resources, purchase and sale of businesses, etc. which in turn would need to be evaluated on the touchstones of efficiency, tax-neutrality, and above all, legality. From a tax perspective, particularly, such re-organisation should be safe from the taxman's lens, especially where the General Anti-Avoidance Rules may be invoked. These rules require that all arrangements / transactions must have commercial substance rather than be based on tax avoidance.

Navigating transfer pricing during Covid-19

Distressed businesses would face low net profits or even losses during the economic slowdown, and possibly over the near future, all over the world. As profitability of businesses is bound to suffer, it is natural that arm's length price is also bound to endure fluctuations. Moreover, the entire transfer pricing model may need to change to incorporate disruptions in supply chains, re-organisation of businesses, re-allocation of functions, assets and risks, etc., made in consonance with the economic recession. The travel restrictions currently in place may cause unintended variations in service arrangements and functional profiles of personnel, thereby affecting the relevant transfer pricing models. Helpful sister companies bailing out struggling ones, intergroup financial arrangements, etc., may affect the arms' length price of a transfer pricing analysis dependent on one of such companies. Such affected businesses may revisit their transfer pricing policies to build commercial rationale that justifies their losses in a manner which cannot be related to tax planning. Advance Pricing Agreements may also need to be renegotiated in light of the new normal.

Our proposals to ensure fair justice of tax administration in a post-Covid world

All eyes are on the tax department to come out with beneficial measures and rescue struggling corporates. Here are our two cents on possible actions that the tax administration may take:

Proposal to incentivise pro-employee initiatives

Many industries and essential service businesses, besides healthcare workers, have remained

functional despite all odds during the lockdown, such as banking, telecom, insurance, courier and delivery, ed-tech, etc. Organisations are creating wellness programmes, relief funds, increasing compensation and launching a host of other initiatives to support employees of such sectors during the pandemic. In order to incentivise such pro-employee schemes, Indian tax administration could consider providing enhanced tax benefits, such as 125% or 150% deductibility of all expenses incurred in relation to such schemes during this period. Along with employment opportunities for the people who have lost their jobs or have been dislocated due to Covid-19, tax incentives for new employment generating sectors / businesses could play a very important role in bringing the country back to its earlier growth mode.

undergo. Several industry representatives and associations have submitted their proposals to the Government.

This may be an important decision for the Indian tax administration, since acceptance of the proposals would mean lesser corporate tax burden on the distressed companies, which would then have the financial strength to tap more funding sources and that in turn would aid and hasten their recovery. Further, tax holidays and concurrent investment mean job creation and economic growth, the benefits of which will far outweigh the possible repercussions of revenue losses for the exchequer.

Across the globe, countries have moved towards providing at least partial tax holidays. For instance,

A possible tax holiday for affected industries

The pandemic has had some industries scurrying for safety, while others have had the opportunity to capitalise on the situation. The best instance of this dichotomy is seen in most manufacturing companies, the aviation and automobile sectors having to shut shop and head home owing to the huge loss of human capital and logistical restrictions. On the other hand, the pharma and healthcare / critical infrastructure industry has had the chance to grow, experiment and produce much-needed solutions.

Affected businesses and micro, small and medium enterprises have been afforded small incentives and bailout packages to allow for recuperation amidst crashing markets. However, what would really be a shot in the arm for such small business owners and affected enterprises is a year-long tax holiday to offset the losses that these businesses have had to

the German government has relaxed tax norms for enterprises hit by the pandemic. UK government has announced £20 billion of tax cuts and New Zealand has allocated USD 1.8 billion to business tax relief.

Takeaways

In essence, if organisations build resilience, respond with dexterity, and strategise with prescience, while remaining cautious of their tax incidence, businesses will be in a position to not only tide over the pandemic, but also unlock opportunities amid the Covid-19 chaos. A developing country like India will be well advised to come up with its own tax policies and procedures so that the country can achieve its potential.

02

EMPLOYMENT IN POST-COVID INDIA: LEGAL AND PRACTICAL CONSIDERATIONS

It has been eight months since the first cases of Covid-19 emerged in Wuhan, China. Since then, no part of the globe has been spared from its effect. Though it started as a health emergency, Covid-19 soon evolved into a catastrophic economic crisis across the world. It has now become critical to mitigate this dual crisis by cushioning the impact on employees and businesses and focusing on health infrastructure and strategies to curb the virus. The ability of nations to balance the two parameters will determine whether all its citizens tide over this pandemic or if it will be survival of the fittest. As a developing economy grappling with more than 1.4 million Covid-19 infections, challenges abound for policy makers in India to stabilise the economic impact of this pandemic. Since March 24, 2020, when the first national lockdown was declared, restrictions on work/industry have continued in varying degrees across India. This has disrupted the supply chain, production capabilities and consumer interest for businesses. Considering this impact, the Central and the State Governments have attempted various measures to support the employers and workforce alike.

Regulatory Considerations

The Central Government restricted employers from reducing wages of employees (including contractual/ outsourced employees) through an order dated March 29, 2020 (**MHA Order**) which remained in force till May 17, 2020. Employers were also advised against employment terminations through different Central and State Government advisories (**Advisories**). The MHA Order and Advisories were aimed at shielding the working class from immediate consequences of unemployment and reduced income during the pandemic. It has been argued that these measures provide for the right to wages that are pre-existing rights that flow from the broader tenets of the Indian Constitution under Article 14 (Right to equality) and Article 21 (Right to life). Undoubtedly, these measures were well-intentioned and aimed at social justice for the employees/workers. However, these measures caused hardship for the employers since they were restricted from taking business decisions regarding their workforce, within the realm of existing labour laws. While a challenge to these measures by various employer associations is currently sub-judice, the Supreme Court in an interim order has barred any coercive action against employers that have flouted the MHA Order. Further, the Supreme Court has urged employers to attempt a negotiated settlement with the employees/trade unions on the issue of wages for the period that the MHA Order was in force. Given the complexity of the circumstances, this interim order indicates that the Supreme Court is also sympathetic towards the employers' plight and is trying to strike a balance between both sides.

In May 2020, when the effects of more than a month-long lockdown started showing, various states such as Uttar Pradesh (**UP**), Gujarat and Madhya Pradesh (**MP**) proposed sweeping changes to the applicability of various labour laws in the hope of attracting foreign investment and giving a boost to the economy. In UP, an ordinance[1] was passed that suspended the operation of all labour laws in the State for existing and new factories for a period of three years, with a few exceptions such as laws on workplace safety, timely payment of wages and those regulating employment of women and children, etc. However, presidential assent has not been granted to this ordinance as yet[2]. States such as Karnataka, UP, MP, Rajasthan etc. also issued notifications, *inter alia*, to increase the working hour limits to make up for production loss during the lockdown under the Factories Act, 1948 (**Factories Act**). Further, the Karnataka Government has allowed employers to defer the payment of variable dearness allowance (which formed part of minimum wages) to employees by 1 (one) year despite largescale trade union protests.

These policy reactions could be attributed to the realisation that economic recession is inevitable and businesses must be supported by easing labour-related regulatory constraints. However, UP withdrew its working hour extension notification after the Allahabad High Court issued a notice to the State based on a public interest litigation. Similarly, Karnataka has also withdrawn its notification in this respect when questioned to justify the '*public emergency*'[3] based on which it had issued the extension notification under the powers granted in Section 5 of the Factories Act. While reforms in labour laws can be undertaken, it is important for states to do so within the constitutional framework and statutory boundaries. Further, irrespective of whether certain labour reforms pass the test of judicial scrutiny, it is a pragmatic expectation that the reforms do not corrode either stakeholders unreasonably. Dilution of labour laws under the garb of attracting foreign capital may also turn counter-productive if such dilution is actually deemed as violation of human rights of the employees and results in a flight of good capital.

The government has also taken various encouraging steps to provide relief to employers as well as employees. Through its '*Atmanirbhar Bharat*' campaign, the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (**EPF Act**) was amended to reduce the statutory rate of provident fund (**PF**) contributions under the EPF Act, for both employers and employees, from 12% to 10% for the months of May, June and July, 2020. This measure, aimed at keeping both stakeholders solvent, has benefited more than 40 million employees along with half a million establishments infusing liquidity of an estimated amount of INR 6,750 crore. Further, eligible employees have been permitted (employed in areas declared as affected by the pandemic) to withdraw a non-refundable advance of 75 percent of their PF accumulation or three-months wages, whichever is

1 Uttar Pradesh Temporary Exemption from Certain Labour Laws Ordinance, 2020
2 Since labour laws fall within the concurrent list of the Indian Constitution, both the Central and the State Government are empowered to legislate on such matters. Hence, prior approval of the President of India (in effect the Central Government) would be needed to supersede or suspend any central labour statutes.
3 Public emergency' refers to "*a grave emergency whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance*" and does not expressly cover an epidemic or a lockdown.

lower. In addition, the Employees' Provident Fund Organisation has decided to not impose penal damages against employers for delay in filing of PF contributions during the lockdown.

As seen from the MHA Order and other policy measures during the pandemic, it is tricky to ameliorate the economic situation for both stakeholders i.e. employers and employees/workers, simultaneously. A significant tilt in either direction could have unintended consequences like an increase in unionisation, possible closure of factories which can no longer sustain, more job losses etc. It is critical that policy makers attain a balanced approach towards aiding both stakeholders and not favour one at the cost of the other.

Practical Considerations

The Government of India has issued mandatory standard operating procedures and other directives for Covid-19 management to ensure health and safety at workplaces. Compliance with these directives is critical for the operation of workplaces through the pandemic. Also, it is important that employers are sympathetic towards the day-to-day difficulties faced by their employees/worker during the pandemic. For instance, employers that compel employees to work from a physical workspace despite the same not being necessary may lead to largescale employee discontent. Considering the pandemic, organisations can also consider providing health insurance for all its employees, if not provided already (though not mandatory under Indian laws). In Karnataka and UP, employers are required to grant 28 (twenty-eight) days of paid sick leave to an employee who has been infected with Covid-19. Taking a cue from this, employers (at least the larger organisations) can consider granting similar concessions, irrespective of any legal obligation for the same at their location. Notwithstanding the financial burden caused to businesses, such measures can prove pragmatic in ensuring long-standing employee goodwill and loyalty. Further, while collecting personal and sensitive personal information from employees/workers on account of the pandemic, employers must take adequate care to comply with the existing privacy and data protection laws.

Many organisations are also considering increasing their deployment of contract workers, fixed-term employees and trainees such as under the NEEM Scheme[4] bearing the risk associated with full-time employees. Such organisational trends are bound to rile-up discontent amongst regular employees. Many employers have also been re-examining their compensation structures to have a higher variable component, contingent upon the individual's performance. Consequently, the take-home salary for employees may reduce further. At this juncture, popular discontent amongst employees can prove counterproductive given the charged atmosphere at hand and may lead to union related issues. Businesses looking for injection of foreign/domestic capital will want to avoid any situation that may lead to negative publicity or further disruption of their workflow through trade union interventions.

Challenges with home as workplace

Given the contagious nature of the virus, the immediate fallout has been the inability of masses to

4 National Employability Enhancement (NEEM) Scheme is an initiative by All India Council for Technical Education and the Government of India to provide on-the-job training to candidates. These trainees are engaged through an external NEEM facilitator, and the organization does not have an employment relationship with the trainees. Further, there is no requirement to absorb these trainees upon completion of their tenure.

interact. Generally, employment laws and practices were framed considering a physical workspace. However, with work from home (**WFH**) arrangements becoming prevalent, various compliance challenges have emerged that can only be resolved through revamping of certain employment laws and practices. Many employers are already considering and have announced that they will shift entirely to a WFH model. However, the existing labour framework such as on applicable minimum wages, obtaining registrations, maintaining registers etc. are premised on the assumption of a fixed geography of the workplace. There will also be situations whereby employees may want to take recourse to the WFH policy to relocate to other States (to be with their family or for any other reason) while being affiliated to an office in another State. Given that labour laws especially in connection with working conditions of employees (like leave, holiday, working hours) are State specific, this could lead to challenges in implementing laws of either or both States. Therefore, remote working may necessitate a complete overhaul of the various procedures under existing labour laws.

In addition, employers will also have to reexamine their internal employment policies. Under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (**POSH Act**), the definition of '*workplace*' is wide enough to cover situations of sexual harassment (**POSH**) that happen on a WFH arrangement. However, it will be advisable to modify the policy under the POSH Act to incorporate WFH arrangements and the Internal Committee's ability to conduct virtual inquiries and be sensitive to the rise of newer forms of misconduct (including unforeseen forms of sexual harassment). Employers may also update their disciplinary policies to include new categories of misconduct for WFH scenarios such as refusal to come to work and sensitising employees on professional conduct while working remotely.

Confidentiality concerns are topmost on employers' mind when implementing a WFH arrangement and a re-examination of security systems/monitoring is the need of the hour. Compensation structures may also need to be restructured in case of WFH, by substituting redundant allowances towards travel, conveyance or fuel with allowances for home offices, equipment such as laptop or towards furniture, childcare etc.

Conclusion

On the whole, Covid-19 has significantly changed the role of employers in the society. It is expected that they re-orient their focus from the traditional model, towards a new form of stakeholder capitalism, which includes employees and the local community. In this pandemic, stakeholder capitalism would at-least include shouldering responsibility to facilitate curbing the virus. Employers are expected to approach emerging economic, policy and employee related issues holistically, with an eye on long-term sustainability as opposed to short-term gains. Only businesses that can find this balance may be able to tide over this pandemic with minimum consequences.

03

UNDER-STANDING CROSS BORDER LEGAL ASSISTANCE

The increasingly globalised and liberated world economy has created opportunities for economic growth as well as transnationalisation of crimes.

Economic liberalisation aided by technological advancements has contributed significantly to complex cross-border offences, with actors and offences and its implications occurring in multiple jurisdictions as well as the offenders seeking refuge in foreign jurisdictions. Especially with increase in organised crime, trafficking of humans and drugs, smuggling, mutual legal assistance is an invaluable resource in investigating crimes and bringing criminals to justice.

As offences are no longer a mere domestic governance issue, it is imperative for governments to aid domestic law enforcement agencies through proper channels for ensuring inter-jurisdictional assistance among nation states by entering into agreements providing for legal assistance or a Mutual Legal Assistance Treaty (**MLAT**). Mutual legal assistance may also be given informally through bilateral cooperation and sharing of information between policing or judicial officials in different states.

Most international and regional crime conventions incorporate provisions on mutual legal assistance

relevant to their specific subject matter. The principal mutual legal assistance is based upon Article 18(1) of the United Nations Convention Against Transnational Organized Crime, which states that states will provide each other with the widest degree of assistance.

At present, India has MLA treaties with around 40 countries, including the United States of America, the United Kingdom, United Arab Emirates, Canada and France, for assistance in criminal matters and has entered into a Memorandum of Understanding in relation to seeking assistance in civil and commercial matters with 13 countries. The Ministry of External Affairs acts as the nodal ministry and central authority in terms of providing mutual legal assistance in criminal law matters.

Letters Rogatory

Letters rogatory or 'letters of request' are a customary means of obtaining judicial assistance from overseas in the absence of a treaty or other agreement. Letters rogatory are requests from courts in one country to the courts of another country, requesting the performance of an act which, if done without the sanction of the foreign court, could constitute a violation of that country's sovereignty.

Letters rogatory may be used to effect service of process or to obtain evidence, where permitted by the laws of the foreign country in civil or commercial matters.[1] It is commonly used for serving summons, subpoena, legal notices, taking evidence, or enforcement of a civil judgement.

Previously, letters rogatory had to be transmitted via consular or diplomatic channels, thereby prolonging the process. Subsequent to the ratification of Hague Service Convention in 1965, designated authorities in the signatory states could transmit documents for service to each other, bypassing the diplomatic or consular channels. Furthermore, the ratification of Hague Evidence Convention in 1970 formalised the procedure of taking evidence between the member states.

Letters rogatory may be used regardless of whether multi-lateral or bilateral treaties on judicial assistance are in force. Where countries are not a party to a treaty, letters rogatory on the collection of evidence must be submitted and delivered through diplomatic channels.

Mutual Legal Assistance Treaty (MLAT)

MLAT is an agreement between two or more countries for the purpose of gathering and exchanging information, a mechanism for requesting and obtaining evidence and other forms of legal assistance for criminal investigations and prosecutions. There are bilateral agreements that effectively allow prosecutors to enlist the investigatory authority of another nation to secure evidence — physical, documentary and testimonial — for use in criminal proceedings by requesting mutual legal assistance. Under an MLA framework, law enforcement in one country (such as India) requests evidence held in another country (such as the United States) for criminal prosecution, frequently pursuant to an MLAT. In this example, the Indian law enforcement entity investigating the proceedings would file an MLAT request for review by the Indian Ministry of Home Affairs (MHA). The MHA would then relay the approved request to the Office of International Affairs in the US Department of Justice (DOJ). The US DOJ would then review the request and once approved, forward the request to a prosecuting attorney. After review, this prosecuting attorney would bring the request from the Indian law enforcement entity before a US federal judge. If the judge determined that the Indian request met the relevant US legal requirements, the judge would then issue an order, requiring the production of the documents by the US entity. The US entity would then produce the specified content, which would then be reviewed by the DOJ to ensure compliance with US laws. The DOJ would then release the permitted content to MHA in India.

Advantage of MLATs as a mechanism to provide Mutual Legal Assistance (MLA)

Corruption cases often – and increasingly – involve a transnational element as well; in the case of foreign bribery, for example, or when corrupt officials conceal evidence and embezzled funds abroad. For prosecutors, in a world that is increasingly connected across international boundaries, MLA requests are

1 Under the Sections 166 A and 166B of the Code of Criminal Procedure.

steadily becoming more and more important as the number of international criminal prosecutions increase. In this context, MLA is recognised as critical for effective prosecution and deterrence of corrupt practices and a variety of instruments have been developed in recent years to facilitate international cooperation in this area. MLAT creates an unambiguous and binding obligation to provide assistance at the international level, making the MLA process both reliable and predictable. As such, obligations are imposed on both parties, it gives the requested state a better guarantee of reciprocity.

Furthermore, MLAT's create a privileged relation between two States. When the judicial capacity of the requested State is overloaded by MLA requests, priority is generally given to requests emanating from countries where there is a MLAT. Bilateral MLA treaties speed up the MLA process by authorising direct correspondence between judicial authorities instead of channelling the request through the intermediary of central offices or diplomatic channels.

Obstacles to effective Mutual Legal Assistance (MLA) in Corruption and Money-Laundering Matters

Such an approach is, however, challenged by the various legal, practical and political obstacles that generally hamper the effective provision of legal assistance. The absence of uniform procedures for granting MLA results in lengthy and cumbersome procedures with no guarantee of timely and successful provision of the requested assistance. Perhaps because MLATs are unabashedly one-sided, offering no assistance to defendants involved in cross-border investigations, many attorneys are unfamiliar with the MLAT process. Execution of requests for legal assistance can also be hampered by a series of procedural impediments, such as the principle of reciprocity as a precondition for granting MLA or the principle of speciality, whereby the information obtained can only be used for the requested purpose.

The decision to grant MLA depends on the requested State's legal framework as well as its willingness to cooperate. In principle, international standards establish that grounds upon which a request may be denied should be kept minimal and exercised sparingly. In practice, there are varying principles that provide grounds for refusal and make it difficult to obtain speedy assistance. Some States require dual criminality for all requests, meaning that they will only execute a request for assistance from another country when the crime under investigation is also an offence under domestic law. This can constitute a serious impediment in corruption cases. For example, all countries have not criminalised private-to-private corruption or even bribery of foreign public officials and use different definitions of corruption. Legislation on money laundering also remains deficient in many countries and differs across countries, which further challenges the provision of MLA.

Furthermore, other procedural impediments such as failure to identify or designate a responsible central authority to facilitate the implementation of MLA is likely to seriously hinder the effectiveness of the process. In many countries, the person targeted by the request for mutual assistance is allowed to appeal against the sharing of evidence with the requesting country, which may ultimately cause considerable delays in the provision of required evidence.

The need for MLAT Reforms

There is little doubt that MLATs have the potential to facilitate and ease the provision of legal assistance in corruption and money laundering-related offences, by creating binding obligations to cooperate. However, despite the potential of MLATs, successful execution of assistance requests remains a case-by-case matter, depending on a series of legal, political and practical factors. A standard format for MLAT request would prima facie make the process easier to initiate and comply with for law enforcement agencies.

One important aspect would be adequate training of law enforcement officials to understand and use the MLAT system more effectively. Often, many requests do not satisfy legal obligations, and as communication both locally and between foreign states is poor, development and implementation of an electronic system for sending and receiving MLAT would help with reducing the time involved. The 2015 Report commissioned by the Global Network Initiative, ***Data Beyond Borders: Mutual Legal Assistance in the Internet Age*** recommends that international organisations such as Interpol and the UN Office of Drugs and Crime should implement publicly available training codes. Companies will then

have access to suggestions of international organisations when advising local law enforcement. Internet and communications companies produce transparency reports, outlining the frequency and management of data requests they receive. Governments responding to requests need to inform these companies, which country the request has come from.

Furthermore, Indian law enforcement has been facing challenges with regard to legitimate cross-border access to data for years. For example, under the existing law, Indian law enforcement relies on a bilateral mechanism through the India-US Mutual Legal Assistance Treaty (MLAT) to transmit requests for user data. This process of MLA under MLAT has often been criticised for being outdated and time consuming, and by some estimates from Indian sources takes as long as three years and four months on an average to complete. For instance, the Law enforcement in India, when requesting user data from online intermediaries or social media companies, relies on the longstanding framework under the Code of Criminal Procedure, 1973 (CrPC), which does not mandate judicial authorisation for data requests. Several reforms are deeply necessary in law enforcement - access to data to ease extant conflicts of laws, institute privacy-protecting safeguards, and discourage further fragmented policy approaches through data localisation.

Data and Law Enforcement

A substantial number of criminal investigations in the present century necessitate law enforcement agencies to access electronic evidence stored extra-territorially. The conventional routes of obtaining and compelling presentation of evidence often fails when the said electronic evidence is not stored within the territory of the state where the crime has occurred. Few countries, including the US, have explicit statutory provisions that do not permit disclosure of data to foreign jurisdiction. It becomes important to note that US headquarters a major share of technology companies such as Google, Apple, Microsoft and Facebook.

CLOUD Act

The recently passed US Cloud Act (Clarifying Lawful Overseas Use of Data Act) enables foreign law enforcement to request electronic content directly from US service providers, for the first time, under an Executive Agreement with the US government. As part of the Executive Agreement, the foreign country must ensure adequate levels of procedural protections for crimes covered under the Agreement.

The Cloud Act provides a much-needed framework to ease cross-border access to data, not only speeding up any future processes, but safeguarding user privacy and alleviating existing concerns around lacking capacity. Such a direct-data sharing regime, under an Executive Agreement, will, therefore, not only address law enforcement concerns, but also strengthen the overall case against mandatory data localisation. The Cloud Act presents an opportunity to not only resolve conflicts of law, but also harmonise enforcement regimes across jurisdictions, not limited to India and the United States alone. A data sharing agreement under the US Cloud Act will shift the locus to the domestic law of the requesting country, and compliance with the Executive Agreement, thereby ensuring that US companies respond to legally valid requests for content.

Finally, for any law enforcement request to be eligible under the Cloud Act Executive Agreement, they will need to adhere to privacy protecting safeguards – such as being specific about the information sought, being based on “articulatable and credible facts,” and being subject to independent oversight. This model will ensure that requests are bound by a higher threshold of privacy and due process than they currently are.

04

BEST PRACTICES FOR INTERNAL INVESTIGATION DURING COVID-19

The Covid-19 pandemic has brought about several challenges to corporates such as the increasing risk of cyber-crime and growing cases of employee misconduct. Regulators across the globe have voiced concerns that issues associated with the lockdown, triggered by the Covid-19 pandemic, will fuel white collar offences and other criminal activities. Enforcement agencies globally have emphasised on their objective to prosecute fraudulent and corrupt practices, particularly in the pandemic-era.

The Pandora's Box

The Council of Europe's Group of States against Corruption (**GRECO**) in its guidelines highlighted that money being infused into the economy in the pandemic-era fuels the risk of financial crimes. GRECO recommends implementation of anti-corruption and governance tools while laying emphasis on accountability and transparency.[1]

Current health crisis, the Organisation for Economic Cooperation and Development (**OECD**) too has

1 Marin Mrčela, GRECO President, *Corruption Risks and Useful Legal References in the Context of Covid-19* (April 15, 2020),https://rm.coe.int/corruption-risks-and-useful-legal-references-in-the-context-of-covid-1/16809e33e1.

emphasised that the pandemic and associated economic disruption is a fertile ground for corruption and, therefore, is it imperative that counties engage in global anti-corruption practice. In terms of enforcement, issues of bribery and corruption continue to be the focus;[2] the US Securities and Exchange Commission (**SEC**) and the US Department of Justice (**DoJ**) have issued statements that they will be actively investigating Covid-19 related frauds.[3]

In the healthcare sector, amidst the scarcity of ventilators, safety kits and medical equipment, it is likely that reduced scrutiny of bidders for government contracts may enhance the risk of medical fraud, right from the procurement stage to production and dissemination.[4]

The FCA[5], the United Kingdom's National Crime Agency[6], and the US Treasury Department[7] have issued warnings to retail investors on possible Covid-19 related scams and threats such as investment fraud and sale of counterfeit medical supplies.

Besides financial frauds, regulators believe that there is a real threat of insider trading during the current lockdown, which is likely to persist as economies try to revive. Given the unusual nature of the pandemic and associated corporate governance issues, company insiders and consultants may have access to non-public information about the company's growth. This may create an elbow room for incidents of insider trading by those looking to reap profits by trading information in times of economic hardship. Regulators such as the FCA[8] and the European Securities and Markets Authority[9] have issued insider trading warnings while continuing to investigate such issues during the pandemic.

Impact on White-Collar Crimes

A spike in cyber-crime is being witnessed across all geographies. In January 2020 alone, Google registered 149 thousand active phishing websites. In March, that number rose to 522 thousand - a 350% increase since January.[10] Moreover, criminal actions that were fuelled by the financial crisis are expected to resurface in the current crisis.

Another pressing concern is workplace investigations triggered by an increased risk of employee misconduct. Due to the Work from Home (**WFH**) policies, the menace of data leakage looms large as employees use unauthorised data-sharing and video-calling apps. As the threat of furloughs and layoffs persist, employees may face pressure to retain jobs which may lead to increasing risk of employee misconduct.

Best Practices for Internal Investigations

Due to the worldwide lockdown and shift to a virtual workspace, white collar and regulatory investigations have faced considerable number of speedbumps. The ongoing investigations are being carried out remotely, with relatively substantial delays in response to subpoenas and regulatory compliance requests. As corporations continue to suffer losses due to business shutdown, it is likely that corporations may rethink expenditure and allocation of resources in terms of internal investigations.

2 OECD Statement, *The Global Response to the Coronavirus Pandemic Must Not Be Undermined by Bribery* (April 22, 2020), https://www.oecd.org/corruption/the-global-response-to-the-coronavirus-pandemic-must-not-be-undermined-by-bribery.htm; OECD, *Policy measures to avoid corruption and bribery in the Covid-19 response and recovery* (May 26, 2020), https://read.oecd-ilibrary.org/view/?ref=133_133216-hn3bqtlvkw&title=Policy-measures-to-avoid-corruption-and-bribery-in-the-Covid-19-response-and-recovery.

3 Attorney General William P. Barr, *Covid-19 – Department of Justice Priorities* (March 16, 2020), https://www.justice.gov/ag/page/file/1258676/download; U.S. Securities and Exchange Commission, *Statement from Stephanie Avakian and Steven Peikin, Co-Directors of the SEC's Division of Enforcement, Regarding Market Integrity* (March 23, 2020), https://www.sec.gov/news/public-statement/statement-enforcement-co-directors-market-integrity.

4 Luke Baker, *Virus Response Opens Way for Corruption: EU Chief Prosecutor*, Reuters (May 12, 2020), https://www.reuters.com/article/us-health-coronavirus-eu-corruption-inte/virus-response-opens-way-for-corruption-eu-chief-prosecutor-idUSKBN22O1SG.

5 Financial Conduct Authority, *Avoid Coronavirus Scams* (May 1, 2020), https://www.fca.org.uk/news/news-stories/avoid-coronavirus-scams?wb48617274=YWNvd2VsbDtERUJFVk9JU0UuTkVUOzEwLjcuNDAuMjAzOzE1ODgyNjExNDY7BPMj6FhtMhT1uu15wNLicXI1vCPPlJmvf/gOxEOfFEq6/AxZ8nVn48w2TJR2xF8liuHUaZQuoxDCwQmkxqlVHruaAgPXauc/sW6o9+bvEktnKC0U/mGpxvO6OWujrofzG+kpPjnV9n1NO+Fr2FYyL7TvFun3jaPcNokZFLD1VNg=.

6 National Crime Agency, *Beware Fraud and Scams During Covid-19 Pandemic Fraud* (March 26, 2020), https://nationalcrimeagency.gov.uk/news/fraud-scams-covid19.

7 U.S. Department of the Treasury, Treasury Inspector General for Tax Administration, *IRS-Related Coronavirus Scam* (April 24, 2020), https://www.treasury.gov/tigta/coronavirus.shtml; U.S. Department of Justice, *Combatting Covid-19 Fraud: Fraud Alert* (April 30, 2020), https://www.justice.gov/coronavirus/combattingfraud.

8 Lucy McNulty, *FCA's Stark Warning: Insider Traders Will Be Caught During Covid-19 Crisis*, Financial News London (May 4, 2020), https://www.fnlondon.com/articles/fcas-stark-warning-insider-traders-will-be-caught-during-covid-19-crisis-20200504.

9 European Securities and Markets Authority, Covid-19, https://www.esma.europa.eu/about-esma/covid-19.

10 Adil Radoini, United Nations Interrogation Crime and Justice Research Institute, *Cyber-crime during the Covid-19 Pandemic* (May 11, 2020), http://www.unicri.it/news/article/covid19_cyber_crime.

To effectively tackle the challenges in conducting remote internal investigations, it is important for lawyers and other stakeholders to employ certain practices to efficiently carry out such investigations.

Steps to be taken by Corporates

- **Pre-investigation phase:** In-house lawyers and grievance officers ought to monitor potential ethics violation and employee misconduct and report the same to regulators or third parties such as law firms, that are assisting corporations with the internal investigation. For instance, it is recommended to raise red flags in situations when sales are found to be unusually high in a certain sector of their business, or when accounting records show unusual cash receipts.

- **During investigation:** Internal investigations often require the involvement of several departments like legal, compliance, finance and audit as the allegations often implicate more than one corporate function. The investigators may also require data and cooperation from several different teams within a corporation. Therefore, corporates must ensure that their departments are coordinating and working closely during the investigation.

Pressing pause on Investigations

Some investigations may have been halted because of stay-at-home orders or because companies under investigations have been preserving their financial resources and reducing expenditure on internal investigations. With the challenge of conducting interviews for internal investigations via videoconferencing as well as collecting hard copy material from the custodians, stakeholders conducting internal investigations must assess if they have the option to press pause on the investigation. It is important that while making this decision, they must consider certain important questions, including the regulator's agreeability in this respect.

Furthermore, it is important to consider the implications of delaying the investigation and its impact on potential legal, financial or reputational risks of a company, i.e. failing to stop misconduct by employees, including harassment. In terms of internal investigations, involving personnel interviews, factors such as retirements and layoffs must be kept in mind before suspending an internal investigation. It is worth contemplating whether the network and infrastructure are adequately equipped to preserve the data on its servers and transfer it on third-party review platforms as well as secured to prevent data thefts.

Remote Investigations

Whether stakeholders resume halted internal investigations or carry out new internal investigations, they will be compelled to modify their approach while implementing different stages in their investigation plan, keeping in mind issues such as collection and review of data, conducting personnel interviews and reporting to regulators. Data review can be carried out smoothly while

working remotely via web-based platforms and e-discovery analytical tools. In order to stick to the investigation timeline and get faster results, investigators may need to forego certain traditional steps such as drafting a formal report and instead provide recommendations to the management via video conferencing.

The ongoing travel restrictions and the resultant lack of access to physical offices and storage facilities affect a company's ability to collect all relevant documents and data. In such cases, it is important to start with the most crucial step – data mapping; given the complexities around accessing documents, it is important to create a comprehensive list of custodians and corresponding data map, outlining the location and optimising the recoverability of physical and electronic documents and data with the assistance IT forensics specialists.

Wherever possible it is recommended that data be imaged or digitised for providing remote access to the stakeholders. As collecting physical documents cannot be done safely, companies should carefully consider how to preserve and secure them so that they can be recovered at a later date.

Maintaining privilege during Internal Investigations

The objective of an internal investigation is to understand the scope of the issue, remediate the problem, and formulate a suitable response to regulators, government authorities or investigative agencies in one's own or a foreign jurisdiction, as the case may be. In terms of investigation, maintaining privilege is crucial and it is important to structure and conduct the internal investigation in a manner that maximises the legal privilege available in a particular jurisdiction.

It is advisable for corporations or clients in the process of commencing an internal investigation to engage an attorney at the outset and ensure that the investigation is carried out at the direction of the attorney. It is recommended to create and preserve written records demonstrating the purpose of the investigation and the legal advice sought in connection with anticipated litigation, if any. The records must reflect that key decision-makers at the company are within the client group so that there is no ambiguity in relation to applicability of privilege to the communication between the client and the attorney.

While creating written reports of the investigation or witness interviews, the distinction between ordinary work product and opinion work product must be made. It would be wise to consider whether the written reports should be protected under the privilege laws in each jurisdiction where the company can face potential litigation or enforcement actions. Furthermore, it is prudent to ensure that all non-legal advisers are retained or supervised by counsel overseeing the investigation.

The company as well as the attorney must take steps to avoid inadvertent waiver by ensuring the investigation and any related documents or reports are treated as confidential and not disclosed outside the investigation team.

Preserving and Protecting Privilege: Best Practices

As attorney client privilege applies only to communications, where an attorney's role is primarily for the purpose of rendering legal advice or assistance. While determining applicability of privilege, the following factors are deemed relevant:

(a) the context of the communication and the content of the document.

(b) whether the legal purpose permeates the document and can be separated from the rest of the document; and

(c) whether legal advice is specifically requested and the scope of the communication recipient list.

Furthermore, to determine legal professional privilege between in-house counsel and corporate employees, courts have adopted two methods: one, the control group test, and two, the subject matter test. Under the first approach, communication from individuals outside the control group (i.e. the officers authorised to seek legal advice or control the legal affairs of a company) is not protected. Under the subject matter test, privilege is limited to communication from corporate employees for the specific purpose of securing legal advice for the corporation. Communication with an in-house counsel in relation to business as opposed to legal advice may not be protected by privilege.

In a recent decision, the UK Court of Appeal confirmed that legal advice privilege is also subject to a 'dominant purpose' test. In doing so, the Court

has confirmed that legal advice and litigation privilege are two limbs of the same privilege, and similar considerations apply.[11] Simply put, the dominant purpose of a communication must be to obtain, or give, legal advice for legal advice privilege to apply.

Many communications are presumed privileged, such as those where attorneys are examining and commenting upon a legal instrument, for instance a contract or a patent application, or the retention of experts or consultants. In view of this, it is recommended that:

a. While seeking legal advice, it must be clarified at the outset that the communication is for the dominant purpose of 'seeking legal advice' or 'for the purpose of providing legal advice;' such statements assist in substantiating claims of legal professional privilege.

b. Irrespective of the platform or mode, while providing legal advice to a client, attorneys must document the communication as 'legal privileged' and provide legal support for any advice provided.

c. It is advisable to clarify that any non-legal business issues or documents are provided or discussed separately, and purpose of the said communication is to seek or provide legal advice.

d. Where the client is a large organisation or company with legal and non-legal staff, the presence of non-legal staff or those outside the control group on attorney communications may undermine the privilege. Therefore, it is advisable to limit access of such communication only to those legal and non-legal team members with a direct connection to the legal matter at issue.

e. In addition to this, labelling the communication with 'do not forward' and instructing the team involved to limit circulation of a communication is recommended.

It is highly recommended that companies while conducting internal investigations should strive to protect the privilege at the outset to retain the flexibility to decide later whether and to what extent a privilege waiver is advisable. An internal investigation structured to maximise legal privilege will allow the company greater control over how and when to disclose the relevant information.

Data Protection during Internal Investigations

Internal investigations inevitably deal with personal data, particularly employees' data, and given the increasingly globalised nature of internal investigations i.e. a situation where the Indian subsidiary of a UK-based corporation is under investigation, involves a complex interplay of data protection and privacy laws across multiple jurisdictions including the GDPR and DPA 2018, besides Indian laws.

Before commencing an investigation, it is recommended that investigators keep in mind certain practical considerations and communicate to regulators the practical expectations for the scope and timing of data requests.

It is recommended that data controllers and other relevant partakers come at the earliest possible stage. It is important to identify relevant documents to be transferred that may contain personal data or sensitive personal data and document the specific conditions on which such data will be used. It is advisable to document all data that leads to decision-making and can be potentially transferred outside the territorial jurisdiction. It is prudent to consider all options for the transfer of data outside territorial jurisdiction including domestic review, MLATs and the use of domestic authorities.

For those conducting internal investigations, the key considerations are:

a. Transparency in the process: The obligation to inform the data principal/ individuals about how their personal data may be processed.

b. Data minimisation: Obligation to ensure a proportionate usage of personal data for the investigation.

c. It is imperative to establish and provide a legal basis for the processing of personal data.

d. To obtain express consent for collecting, processing, and reviewing the data being collected.

e. Wherever relevant, it is imperative to inform the data principal of the conditions under which any 'special category' of personal data may be processed.

11 The Civil Aviation Authority v Jet2.Com Ltd, R. (on the Application of) [2020] EWCA Civ 35.

f. Wherever personal data is transferred to or accessed from outside the relevant applicable jurisdiction of the data principal, it is necessary to establish a legal basis for that data transfer or to follow the prescribed applicable laws of the relevant jurisdiction.

When looking at internal investigations or when sharing the findings with a regulator in a foreign jurisdiction, investigators must consider the effect of other countries' data privacy laws, which may potentially restrict the ability to collect, transfer, and review data. The laws generally impose restrictions on 'data processing' (e.g., collection and review) and 'transfer' (e.g. transportation of documents outside the country or region of origin) of personal data – which would be subject to the statutory view of what constitutes personal data.'

Conclusion

The crisis calls for creativity and caution to enhance safeguards and potential threats that seek to undermine data safety or confidentiality. It is important to maintain as many internal controls and protective procedures as possible even when a business or a corporation is unable to operate as usual. Covid-19 will slow down the timeline to carry out investigations. The challenges posed by the pandemic also offer an opportunity to innovate and create better, more flexible processes for conducting investigations. Learning from our experience of past financial crises financial crimes and associated investigations will increase. The increase in demand for investigations presents an opportunity for third party investigators like law firms and forensic experts to earn goodwill and prove that by employing best practices, corporations can rise to the occasion and can seamlessly carry out remote investigations even in trying times. Investigators think of creative solutions and deploy all available tools to access data for the foreseeable future.

05

REAL ESTATE: RIDE THROUGH THE PANDEMIC

The Real Estate Sector plays a significant role in contributing to the economy of India. It is a commonly known fact that the sector contributes nearly 7% to the nation's GDP and is considered to be the second largest employer in the country.

During the 2008 global recession, the sector was able to effectively counter the crisis with minimal damage. However, noticing the irregularities in the sector, particularly home buyers suffering on account of monopolistic approach by developers, the Government undertook various regulatory reforms such as RERA and IBC in and around 2016, which slowed down the sector. In addition, the introduction of GST and the liquidity crisis in mid-2018 further hit the sector. This resulted in delays in completion of projects due to increase in administrative cost and lack of finance, thereby leaving home buyers, investor and lenders in a lurch, with no option but to initiate proceedings against developers under RERA and IBC.

Prior to the outbreak of novel Coronavirus, the office leasing, logistic, co-working and co-living sectors had shown remarkable growth in terms of development and strategic investment. The residential sector, which was the most affected, was also expected to come out from the abyss and recover in light of

increasing demand. At a time when the sector was seeing some light at the end of the tunnel, Covid-19 struck at the roots of the Indian economy. To guard its population against a severe health crisis, the Government imposed lockdowns, which in turn had an effect of rubbing salt to the wounds of the sector.

Over and above the existing issues, the industry is now having to deal with disruption in supply chain owing to production in China taking a hit. The lockdowns and movement of migrant workers have affected sales of the inventory resulting in grave financial constraints to developers. Not only are the developers servicing their project loans, but they also have to pay salaries to their employees. All of this at a time when they are facing delay in completion of projects.

The leasing sector across the country (commercial offices, retail malls, shopping centres and multiplexes) have been one of the biggest victims of Covid-19.

In the wake of the present crisis, following measures have been implemented by the Government:

- The monetary threshold of default in respect of MSMEs for filing an application for initiation of CIRP under IBC has been increased from INR1,00,000 to INR.1,00,00,000;
- The Government has suspended the operation of Sections 7, 9 and 10 of IBC with respect to defaults arising on or after March 25, 2020 for a period of 6 (six) months, expandable upto a maximum of 1 (one) year from such date as may be notified;
- The RBI has reduced the repo rate and cash reserve ratio requirement, so that additional cash flow becomes available to banks to lend further;
- The Government has provided rent waiver for 4 (four) months from March 1, 2020 till June 30, 2020 to small IT units operating out of about 60 STPI centres of the Ministry of Electronic & Information Technology across the country;
- Similarly, the Government has allowed deferment of rent for units in State-owned SEZ upto July 31 2020, without any interest, and have also stated that lease rent will not be increased in 2020-21 due to Covid-19 Pandemic;
- Validity of RERA-registered projects, registrations of which were expiring on or after March 25, 2020, were suo moto extended by 6 (six) months and for further period of upto 3 (three) months if the situation in a particular state or any part thereof needed special consideration in view of Covid-19;
- The Government of India also issued an advisory on May 28, 2020, advising states to extend the validity of development approvals. Timelines for subsequent compliances by building proponents as per the pre-condition of permissions granted, has been advised to be automatically extended for a period of 9 (nine) months. Based thereon, the Maharashtra Government has extended the validity of construction approvals expiring on or after March 24, 2020, for a further period of 9 (nine) months without having to pay any extra charges;
- The Government is considering to allow 100% FDI in completed real estate projects. If implemented, this will allow developers to monetise their completed projects, repay their existing debts and bring in more liquidity to enable them to deploy such funds in circulation and complete their other pending projects;

Even the Judiciary, being considerate and mindful about the situation and difficulty faced by various stakeholders in the sector, has adopted the following measures or provided the following relief to litigants:

- The Hon'ble Supreme Court of India has extended the limitation period in all proceedings, w.e.f March 15, 2020 till further orders/s;
- The period of limitation prescribed under the Arbitration and Conciliation Act, 1996 and under Section 138 of the Negotiable Instruments Act, 1881 has been extended with effect from March 15, 2020 till further orders to be passed by Supreme Court;
- The Delhi High Court, in Anant Raj Limited vs Yes Bank Limited *(W.P. (C) URGENT 5 / 2020)* observed that the RBI Covid-19 Relief Package is also applicable to loan accounts of developers classified as SMA-2 as on February 19, 2020 and that such SMA-2 cannot be classified as an NPA in case they fail to pay instalments during the moratorium period (i.e. from March 1, 2020 to May 31, 2020);
- In another matter regarding invocation of bank guarantees by a lender, the Delhi High Court held that till the expiry of period of one week from lifting of lockdown imposed by the Central Government (which was till May 3, 2020), the petitioner / lender shall remain injuncted from

encashing/invoking bank guarantees of the borrower;

- In a matter where the petitioner had *inter alia* prayed for suspension of rent payment on account of Covid, the Delhi High Court held that, based upon the facts of the case, suspension of rent is not permissible, but directed postponement or relaxation in the schedule of payment of rent by the lessee to the lessor, owing to lockdown.

It is interesting to know that despite the Covid crisis, there are some who have found opportunity in this adversity and have been instrumental in keeping the sentiments in the sector positive. With the reasonable success of WFH and social distancing policy, people resumed work as usual and there was a sudden surge in transactions. We understand from market sources that a few large transactions have been concluded in the past 3 (three) months, few of them are mentioned below:

- Singapore-based real estate development firm Mapletree has entered into an agreement with KSH Infra Industrial Park to acquire over 7 lakh square feet space in its logistic park in Pune;
- Metlife has leased 2,90,000 square feet office space in Embassy Oxygen, Noida;
- Sunteck Realty has entered into an agreement with the land owners to jointly develop around 50 acres of sea facing land parcel in Vasai near Mumbai;
- Mindspace Business Parks REIT has raised about INR 2,644 crore from anchor and strategic investors ahead of its public issue; and
- Yotta Infrastructure, a subsidiary of Hiranandani Group, announced the opening of its largest Data Centre at Panvel.

While the sector is reeling under unprecedented crisis, this pandemic has been a blessing in disguise for a few ancillary sectors such as warehousing and IT/ITES. Warehousing sector is the strongest asset class across real estate and has been doing well due to demand from e-commerce companies and the necessity to store and supply essential goods and commodities. The IT/ ITES sector is also demonstrating promise owing to work- from-home policy for which companies are required to provide state-of-the-art backend support.

Some big-ticket investments are also around the corner:

- Welspun One Logistics Park intends to invest INR 900 crore to develop warehousing park in Bhiwandi;
- Kotal Realty Fund has substantial funds to be deployed in stressed real estate. HDFC is also looking to invest in real estate funds to finance such projects;
- Google intends to invest in commercial space of upto 20 lakh square feet;
- Several large and domestic funds are looking to invest in the sector through their own distress or special opportunities funds.

In the foreseeable future, the sector will continue to face challenges as business may not be as seamless as it was earlier. Therefore, in addition to the above reliefs and measures, the stakeholders have been looking forward to the Government to provide certain additional reliefs, which in their view would enable them to sustain in the business and at the same time, bail out the sector out of this slump. It would be worthwhile to understand some of the demands from the industry:

- Fast track approval and single window clearance;
- Applying a uniform reduced rate of GST (1%) across all segment, such as affordable housing, residential and commercial real estate. Input tax credit benefit should be provided to the sector for at least one or two years;
- Concession in statutory/development charges, premiums and stamp duty for at least 1 (one) to 2 (two) years;
- Tax holiday available to promoters of affordable housing projects under Section 80-IBA of the Income Tax Act, 1961 (Income Tax Act) should be extended till 31st March 2022;
- The definition of affordable housing in the Income Tax Act has been aligned with GST Act as a result of which area of flats in metropolitan cities has been increased from 30 square meters carpet area to 60 square meters carpet area, with the cost of the flat capped at INR 45 lakhs. The imposition of this cap on the value of flat *vis a vis* the size of such flats, could be counter-productive since flats of this size (i.e. 60 square meters) in metropolitan cities like Mumbai, Delhi and NCR would not be available within the specified threshold INR 45 lakhs, as a result of which, flat buyers would not be able to avail tax incentive as provided under

the Income Tax Act for affordable housing. Additionally, due to such cap on value of the flat, flat buyers would not be able to avail the benefit of GST rate of 1% prescribed for flats in an affordable housing project. Hence, Government should consider to increase such threshold to a realistic value;

- The Union Budget 19-20, allowed an additional deduction of upto INR 1,50,000 (over and above the existing cap of INR 2,00,000) for interest paid on loans borrowed upto March 31, 2020 for purchase of an affordable house valued up to INR 45 lakh. In order to incentivise purchase of units in affordable housing, the Hon'ble Finance Minister extended the date of sanction of loan upto March 31, 2021. The Government should consider further extending such date and also provide additional deduction over and above INR 3,50,000.

- Immediate deployment of the stress asset fund of INR 25000 crore announced by the Government;

- Granting 'infrastructure' status to the sector;

- Roll over/restructuring of existing loans for more than one year shall be permitted on a case-to-case basis;

- Re-introducing subvention schemes with necessary safeguards;

- Lifting the restriction on FDI in real estate business;

- Notify the National Urban Rental Housing Policy (**NURHP**) proposed in the year 2015, which aims to promote various types of public-private partnerships for promotion of rental housing in the country;

- Adoption of Model Tenancy Act, 2019 (MTA) by the State Governments, which aims to amend the existing archaic state tenancy laws and regulate renting of premises in an efficient and transparent manner;

- Implementation of the Land Titling Bill, 2011.

As far as RERA is concerned, following amendments/relaxations may help create a positive sentiment amongst home buyers and lenders:

- Introduction and notification of land title insurance by Government in respect of ongoing projects. This would not only secure a developer from unknown defects or issues in the title of land, but also develop a sense of confidence and security amongst home buyers and lenders;

- Redevelopment projects should be included within the ambit of RERA. There is an uncertainty whether existing members/occupants (who are on the same footing as an allottee of the free sale portion of a delayed redevelopment project) can file a complaint before RERA. We understand from media sources that Maharashtra RERA authority has approached the State Government to allow amendment to Maharashtra RERA Rules to bring both the rehab and sale portion of a redevelopment project under the ambit of RERA;

- The Government should provide a clarification to Section 15 of RERA to the effect that lenders of the project would not be required to seek prior consent of RERA authority or 2/3rd allottees (and only provide a prior intimation) before taking over the project through an enforcement action and nominating a reputed developer to complete balance construction, provided such enforcement action is subject to the right of allottees of such project. Certain RERA authorities such as Maha RERA has already issued a circular to this effect;

Over and above the steps already taken by the government, implementation of these suggestions will go a long way in providing the much needed impetus to the sector and will also help the government in achieving its target of 'Housing for All by 2022'.

The upcoming quarter will be a crucial period for the sector. Even though the demand from the consumers is expected to be sluggish, there is a possibility that developers and private equity funds may try to evaluate good projects at competitive prices.

It will be interesting to see the steps the government adopts to revive this ever-so flourishing and profitable sector of the economy.

06

COMPLIANCE & MARKET REGULATION IN CURRENT ENVIRONMENT

The central and the state governments in India have responded to the Covid-19 pandemic with various declarations of emergency, closure of institutions and public meeting places, and other restrictions from time to time, intended to contain the spread of the virus. On March 22, 2020, the central government decided to completely lock down 82 districts in 22 states and Union Territories of the country, where confirmed cases had been reported, till March 31, 2020, with only essential services and commodities being allowed. Eighty cities, including major cities such as Bengaluru, Chennai, Delhi, Mumbai, Pune and Kolkata, were also put under lockdown until March 31, 2020. The country then entered complete lockdown from March 25, 2020, for 21 days on account of increase in the number of Covid-19 positive cases.

The Ministry of Home Affairs (**MHA**) *vide* its order dated March 24, 2020, issued guidelines that commercial and private establishments should remain closed (save a few exceptions such as banks, insurance companies, power generation services, etc.) and that these establishments should adopt a work-from-home (**WFH**) policy.[1] The lockdown period was subsequently extended by the government with

1 https://www.mha.gov.in/sites/default/files/Guidelines_0.pdf

relaxations for activities outside containment zones.[2] The MHA via its order dated June 29, 2020, directed that activities be re-opened in a calibrated manner for areas outside of containment zones, but extended lockdown in containment zones till July 31, 2020.[3] Though the Government has introduced relaxations, many parts of the country are still under lockdown.

These factors prompted WFH to become the new normal and there has been a paradigm shift in the functioning of businesses, wherein most have been compelled to follow a work-from-home policy.

The extensive spread of the coronavirus has called for relaxations in statutory compliances by companies. In light of the same, the Ministry of Corporate Affairs (**MCA**), through its various circulars, introduced measures like allowing conducting board meetings and general meetings through video conferencing or other audio-visual means, dispensing requirements for printing and dispatching annual reports to shareholders, moratorium period up to September 30, 2020, during which, MCA will not charge additional fees for any documents, return, statement required to be filed, extension of time interval between two consecutive board meetings by additional 60 days, postponing the applicability of Companies (Auditor's Report) Order, 2020, to financial year 2020-21, extension of due date for deposit into deposit repayment reserve account, deposit of debentures, etc.

The regulator of the securities and commodity market, the Securities and Exchange Board of India (**SEBI**), also introduced various relaxations, such as extending timelines for issuance and filing for issuers who have listed/proposed to list their non-convertible debentures/ non-convertible redeemable preference shares/ commercial papers, introducing relaxed time gap between two board and committee meetings, extending timelines for submission of financial results and other reporting and filings, etc.

We are currently facing an unprecedented global crisis on account of which businesses are confronted with new challenges every day. In light of the developments of the pandemic, listed companies and intermediaries need to re-assess their existing compliance protocols insofar as securities law and market fraud related risks are concerned. Despite the challenges, the pandemic presents an opportunity to businesses to adapt and build infrastructure, which will undoubtedly benefit them in the long run.

Prohibition of Insider Trading Compliances

Recognising the detrimental effect of insider trading on the economy and investors, the SEBI promulgated the SEBI (Prohibition of Insider Trading) Regulations, 1992 (**PIT Regulations**), which has since then been replaced by SEBI (Prohibition of Insider Trading) Regulations, 2015, and it has been periodically amended. These regulations prohibit 'insiders', as defined by the regulations, from communicating 'unpublished price sensitive information' (**UPSI**) to other insiders or to any other person[4] and from trading in securities when in possession of UPSI.[5] However, the regulations allow for such communication in certain specific instances, such as in furtherance of a legitimate purpose, discharge of a legal obligation or performance of a duty.

1 https://www.mha.gov.in/sites/default/files/Guidelines_0.pdf
2 https://www.simpliance.in/files/covid_docs/1587008034Lock-downMeasuresForContainmentOfCOVID-19PandemicInTheCountryToContinueToRemainInForceUpto3rdMay2020.pdf ; https://www.simpliance.in/files/covid_docs/1588347868MHAOrderOnExtensionOfLockdownForTwoWeeksWithEffectFrom4thMay2020.pdf https://www.simpliance.in/files/covid_docs/1589734249GovernmentOfIndiaExtendsLockdownUpto31stMay2020.pdf https://www.simpliance.in/files/covid_docs/1591029351GovernmentOfIndiaOrderToExtendTheLockdownInContainmentZonesUpto30thJune2020.pdf
3 https://www.simpliance.in/files/covid_docs/1593512520OrderToExtendTheLockdownInContainmentZonesUpto31stOfJuly2020.pdf .
4 SEBI (Prohibition of Insider Trading) Regulations, 2015, Regulation 3(1)
5 SEBI (Prohibition of Insider Trading) Regulations, 2015, Regulation 4

Under the PIT Regulations[6], designated employees of a company (i.e., persons who are likely to have access to UPSI due to their functions role) can only deal with the securities of that company during a valid trading window i.e. when a trading window is open.

Another unique challenge posed by the current pandemic is the creation of new insiders - the Information Technology (**IT**) staff.[7] The concept of these new insiders was introduced in 2019, in light of the recommendations of the committee on fair market conduct (**FMCC**). The SEBI report of FMCC dated August 8, 2018, recognised temporary employees and support staff such as IT staff and secretarial staff as 'designated employees' on the basis of their ability to access UPSI.[8] This is because the function and role of IT staff in any organisation could possibly provide them access to UPSI. This has assumed more relevance in light of Covid-19. For instance, under the current circumstances, IT staff will have access to board meetings, which hitherto was restricted and perhaps conducted behind closed doors, given that these meetings are now being conducted through video conferencing and hence could involve the presence of IT and support officials for logistical purposes. Interestingly, while the notion of 'insiders' in an organisation typically conjures up the image of key managerial personnel and senior employees, it is equally important to recognise that IT personnel and support staff also possess the means to access UPSI. To address this, companies must advice such officials on what constitutes insider trading and make them sign agreements to ensure confidentiality.

The present Covid-19 crisis has raised new challenges for listed companies to preserve confidentiality of UPSI given that they have limited infrastructural control over their workforce. The timing of the lockdown, at the cusp of the financial year end, further accentuated matters since this is the period when organisations are most likely to be rife with UPSI pertaining to financial results. While typically organisations seek to insulate UPSI and strictly regulate access to unpublished financials in the lead up to the declaration of results through: (a) robust physical and informational Chinese walls, (b) trading window closure for 'designated employee' in the organisation, etc.; this exercise (and compliance) has become tough given the WFH scenario.

Consequently, the extensions granted by SEBI have resulted in insiders being in possession of UPSI for a longer period of time than usual. Insider trading occurs due to information asymmetry that exists between insiders of a company and the general public. Disclosures to public shareholders and the market are a means to bridge the information asymmetry and ensure that the general public is aware of material developments in the company. However, under current environment, insiders of a company could potentially have access to key information on how the pandemic affects their business as well as how it affects third parties such as suppliers. Such information is critical in determining how the company is going to perform in the future, which may not be available in the public domain. Second, working remotely from home allows for easier dissemination of information, whether intentional or unintentional. Currently, most employees are working from home and are living with their families. This creates a risk of private communications being overheard by family members and therefore, giving them access to UPSI. This situation also harks back to the infamous WhatsApp leak cases that SEBI investigated a few years ago, when the financial results of certain listed entities were circulated on WhatsApp prior to their publication.

Given these new risks, companies must adopt practices to reduce the possibility of insider trading. There is heightened need for companies to conduct regular training sessions to ensure that personnel are sensitised to compliance obligations. Although, regulations require companies to have a code of conduct to prevent insider trading, this must be adapted to address new challenges posed by the pandemic. Such steps, include putting systems in place to minimise the leak of UPSI and ensure maintenance of confidentiality, informing employees as to what constitutes UPSI, advising them on how to minimise insider trading risks, etc.

Market Manipulation

With increased volatility in the market on account of the current pandemic and the consequent fear of an economic lockdown, the market is highly susceptible to manipulation since the volatility can effectively disguise such manipulations as attributable to the

6 SEBI (Prohibition of Insider Trading) Regulations, 2015, Regulation 9
7 https://economictimes.indiatimes.com/tech/ites/covid-creates-new-class-of-insiders/articleshow/76271991.cms
8 https://www.sebi.gov.in/reports/reports/aug-2018/report-of-committee-on-fair-market-conduct-for-public-comments_39884.html

pandemic. For instance, the Financial Industry Regulatory Authority (**FINRA**) of the US, has witnessed a significant increase in market manipulation alerts, corresponding to the outbreak of the pandemic.[9] In recognition of this, FINRA has constituted a task force to protect the most vulnerable investors from market manipulations and fraud during the pandemic. Similarly, even the Financial Conduct Authority of the UK, has decided to increase its market monitoring activities, recognising the increased opportunities of market manipulation.[10]

In India as well, SEBI has introduced stricter surveillance measures to tackle market volatility, in light of the continued abnormally high volatility in the stock markets, owing to concerns relating to the pandemic and the resultant fear of an economic slowdown. By way of press release dated March 20, 2020, SEBI has taken measures to regulate market volatility, such as revision of market wide position limit to 50% of their existing levels for stocks in Futures and Options (**F&O**) segment meeting the prescribed criteria, increase in margin for non-F&O stocks in cash market, revising position limits in equity index derivatives (F&O) and flexing of dynamic price bands for F&O stocks.[11] These measures are expected to continue to remain in force till August 27, 2020.[12]

The Future – The New Normal?

The present times have caused an unprecedented crisis in the world. Prompt action taken by management of companies will be critical in determining whether the company is able to come out of this crisis stronger. Adapting corporate governance norms to the changing times is essential in ensuring that companies have a fighting chance in this time of crisis. There must also be a constant review of the changes in the legal environment in response to the Covid-19 crisis to ensure that the company is not in default of any compliance requirements.

9 https://www.hilderlaw.com/blog/2020/06/market-manipulation-fraud-with-finra-on-the-beat/
10 FCA Market Abuse paper
11 https://www.sebi.gov.in/media/press-releases/apr-2020/regulatory-measures-introduced-by-sebi-to-continue-in-view-of-ongoing-uncertainty_46527.html
12 https://www.sebi.gov.in/media/press-releases/jul-2020/regulatory-measures-to-continue_47108.html

07

HEALTHCARE – AN OUTLOOK FOR THE POST-COVID WORLD

The Covid-19 pandemic has wreaked havoc on the entire world. It has changed the way we look at everything. It has shown a mirror of sorts to us – how ill equipped we are to fight against an unknown pathogen and how swiftly it can spread to nearly every corner of the world. Needless to say, how it can affect entire communities and nations that once proudly professed their supremacy as leaders in healthcare. All humbled by this virus!

The pandemic has brought to light the weaknesses in our healthcare systems. Be it drug development, manufacturing or delivery, or be it in terms of the ability of our existing healthcare delivery infrastructure to cater to such an emergent needs and cater to such sheer numbers. In India, the horror stories of patients having to endure suffering, not only on account of the virus, but on account of the sheer lack of infrastructure and lack of access to proper and timely medical care, coupled with distressing visuals of such suffering, have become a daily feature. The deep cracks within the fault lines of our healthcare system have exposed the fragility of the same and the ensuing humanitarian crisis that has resulted seems like a fait accompli.

Drug development in the post Covid world will see a renewed focus. With many of the blockbuster drugs of the past few decades having outlived their utility and with newer, more drug resistant and novel pathogen strains, drug development would go into an overdrive. We are already seeing frantic efforts to find a cure and vaccine for this virus. Pharmaceutical research would be of paramount importance. This needs to be supported by establishments across the world. Our survival depends on how swiftly we can discover cures and vaccines for these pathogens. Life as they say, finds a way. Well, humanity also must find a way and survive. A key supporting factor would be accelerated regulatory approvals of groundbreaking vaccines. While most drug regulatory systems of the world have such approval pathways, a balance would need to be drawn between expedited approvals and patient safety. Approvals for the sake of approval, at the risk of jeopardising the lives of patients is not what the doctor ordered. Every drug/ vaccine/ treatment candidate/ protocol would need to be put through the rigors of clinical trials to ensure that we do not end up with a situation where the cure ends up becoming the pathogen itself.

Who can forget those frightening images of patients lined up on the floors, halls and lawns of healthcare facilities. These are images of the ravages of the virus. Our healthcare infrastructure has been exhausted to the maximum. Our brave healthcare professionals have been working nonstop to take care of patients. They have been at the frontline in this war. Many have lost their own lives in this line of duty. We salute these warriors. The post Covid world would need to learn from its mistakes – the focus should be on creating new and effective healthcare infrastructure. New hospitals, day care centers, diagnostic labs and training institutions are the need of the hour. If the population of the world is to be saved from another pathogenic attack like the present one, we will need more hospitals. We do not need just beds, but people to man these beds, people to take care of patients, people to run the wards, clinics, labs, and operation theaters. Electoral promises of job creation may be critical, but even more critical would be the promise of ensuring better healthcare for the electorate. People will now think on these lines when they vote. Healthcare though always be a topic during elections. Going forward, it would become a deciding manifesto topic.

Access to healthcare has also been one of the wants from the current crisis. In India, especially, there have been cases where patients have died because lack of proper healthcare or timely availability of the same or most importantly, the exorbitant costs associated with the same. For a country where healthcare insurance is outside the reach of most of the populace and where all healthcare costs are *out of pocket*, the need to have affordable healthcare is dire. There have been widespread reports of price gouging by healthcare establishments. A lack of effective price control measures has also contributed to this issue. The need of the hour, therefore, would be an effective and balanced mechanism of pricing and price control where healthcare can be made more affordable for the populace, whilst ensuring that healthcare institutions do not bear the brunt of it. The establishment needs to step in and support the industry in this regard. Wide ranging economic stimulus measures are, therefore, the need of the hour. That said, such measures alone are not enough. Given the expanse of our country, its populace and the need to ensure that these measures reach one and all, there is an emergent need of a consolidated plan to conceive of and more importantly implement such measures in a systematic and uniform manner. Having policies is of no help to anyone if these policies cannot be implemented in an efficient and effective manner. Planning, therefore, is paramount. The Indian government has allocated Rs 15,000 crore to strengthen the healthcare sector. Various state governments are also doing their bit. But more needs to be done. There is still a lot more that the Indian government can and must do, and it must do so NOW.

A post-Covid India should aim to be one that has reduced dependency on foreign countries in so far as pharmaceutical raw materials/ APIs are concerned. Global lockdowns have impacted supply of raw materials and APIs. The ability of our local pharmaceutical manufacturers to meet the increased demand for life saving drugs has been severely impacted as manufacturers do not have enough raw materials to continue production at normal levels, leave alone an increase in production capacity. A post-Covid India would be one where the government looks into these issues and takes proactive steps to support the domestic manufacturing of life saving drugs. Where manufacturing facilities are in short supply, the government would need to engage in expedited approval of facilities that satisfy quality standards. This will not only help in the speedy setting up of new manufacturing facilities but will also help in meeting the deficit caused due to lack of supply from abroad. Not to mention the fact that such positive measures would attract investors who would want to invest in the setting up of this infrastructure, thereby aiding the Make in India initiative.

In regards to the medical devices sector, India currently imports a majority of its life saving medical devices from abroad. The global lockdown has affected these imports. There is angst that these lifesaving devices such as ventilators may go into short supply. There is an impending need to ensure that measures are taken to ensure that supply is augmented. Such measures could be raising/ easing of import restrictions and granting speedy approvals to more and more domestic manufacturers to cater to issues caused by such reduced supply. This of course needs to be done with the basic objective of ensuring patient safety.

Most research work currently is focused on Covid-19. R&D efforts to find cures and therapies for other life-threatening diseases such as Diabetes, Heart Disease, Cancer, HIV, etc., are continuing, but are in the backburner. The government needs to step up its efforts to ensure that these R&D activities, too, are supported in every manner. As far as Covid-19 is concerned, the government needs to invoke expedited approval and abbreviated trial requirement provisions in the law to ensure speedy discovery of treatment protocols and drugs. There needs to be a focus on speedy development/ approval of new drugs whilst ensuring safety and efficacy thereof. Now is the time to cut the red tape and ensure that proper action is taken.

India's healthcare infrastructure has been stretched to its limit. With the rapid increase in cases requiring intensive medical care, there has been a depletion of available infrastructure. It is, therefore, imperative that the government focus its energies on granting speedy approvals for additional healthcare infrastructure and back up the same with governmental support. This would be an absolute priority in the post-Covid world. From a business perspective, existing healthcare institutions are facing cash flow issues. The Government needs to support this ecosystem and promote investment into the current healthcare infrastructure. Investment controls need to be eased to a greater degree.

Another aspect to bear in mind is the fact that with social distancing becoming the new norm, the practice of medicine and dispensation of medicines has had to conform to this new normal. Virtual consultations with doctors are the new norm. This will help extend the footprint of the healthcare system to the extremities of the county- where there are proper communication lines. While the Indian government has done its bit and introduced telemedicine guidelines, thereby affording contactless medical management, a lot still needs to be done in regard to contactless medicine procurement and delivery. E-pharmacies are the new

norm. Even though the Government has been directed by courts to formulate and release legislation that would regulate online sale of drugs through e-pharmacies, the legislation remains in a draft format for over a year. Action needs to be taken in this regard. Delay defeats the very purpose for which such a legislation is envisaged. Inaction is detrimental to the larger public good.

Another aspect to be considered is pricing in healthcare. It is absolutely imperative that healthcare be universally accessible and affordable. That said, this is still a myth and not a reality for many in India who cannot afford expensive healthcare. Price control measures need to be put in place. That said, it must not be forgotten that our healthcare institutions are also a key piece of the system and one-sided price controls to the detriment of these players are counterproductive. Arbitrary and one sided price controls run the risk of players pulling out of the market because of little to no business incentives. All price controls need to be well thought out, based on rationale and need to keep interests of all stakeholders alive. There has to be open dialogue- that is the way to move forward in a post Covid world.

The post-Covid world would see increased healthcare focus. There needs to be a stronger focus on developing new life saving drugs, medical devices and treatment methods and an even stronger focus on the development of a robust infrastructure to cater to the growing needs of the world's population. India would need to ramp up efforts across all these subject lines if it is to ensure that its population does not suffer another pandemic, in the manner in which it has suffered at the hands of this novel coronavirus. Our legislators need to move with a sense of urgency and a sense of purpose so that appropriate steps are taken to ensure that the demands of tomorrow are met with a sense of urgency today. Not tomorrow, but today. Survival of our populace depends on these actions. These would eventually define the post-Covid World.

Covid has changed the world. It has changed how we think. It has changed how we interact with each other. It has made us aware of our surroundings. It has exposed the fault lines in the system. Now, life always finds a way. The question is – will we learn from this experience and make tomorrow better? Or will we end up in complacency and live today...to die another day? The choice is ..well... up to us isn't it?

08

VIRTUAL HEARINGS: THE FUTURE IS NOW

The Covid-19 pandemic has posed a unique challenge for the world, and Courts in India have not remained unscathed. Since March 2020, physical access to Courts has been severely impaired due to the lockdown imposed in India. Given that physical distancing requirements are here to stay, at least for the foreseeable future, an effective and accessible virtual hearing system is all the more critical. However, in reality, the efficacy of virtual courts has not gathered enough momentum to work through an onslaught of new cases and the backlog of cases, which was staggering even before the lockdown.

In early April 2020, the Supreme Court (**SC**) recognised the need to ensure delivery of and access to justice to those who seek it, while addressing the challenges occasioned by the pandemic, and issuing directions authorising (and implicitly urging) itself and all High Courts (**HC**) to adopt measures required to ensure robust functioning of courts through the use of video conferencing (**VC**).[1]

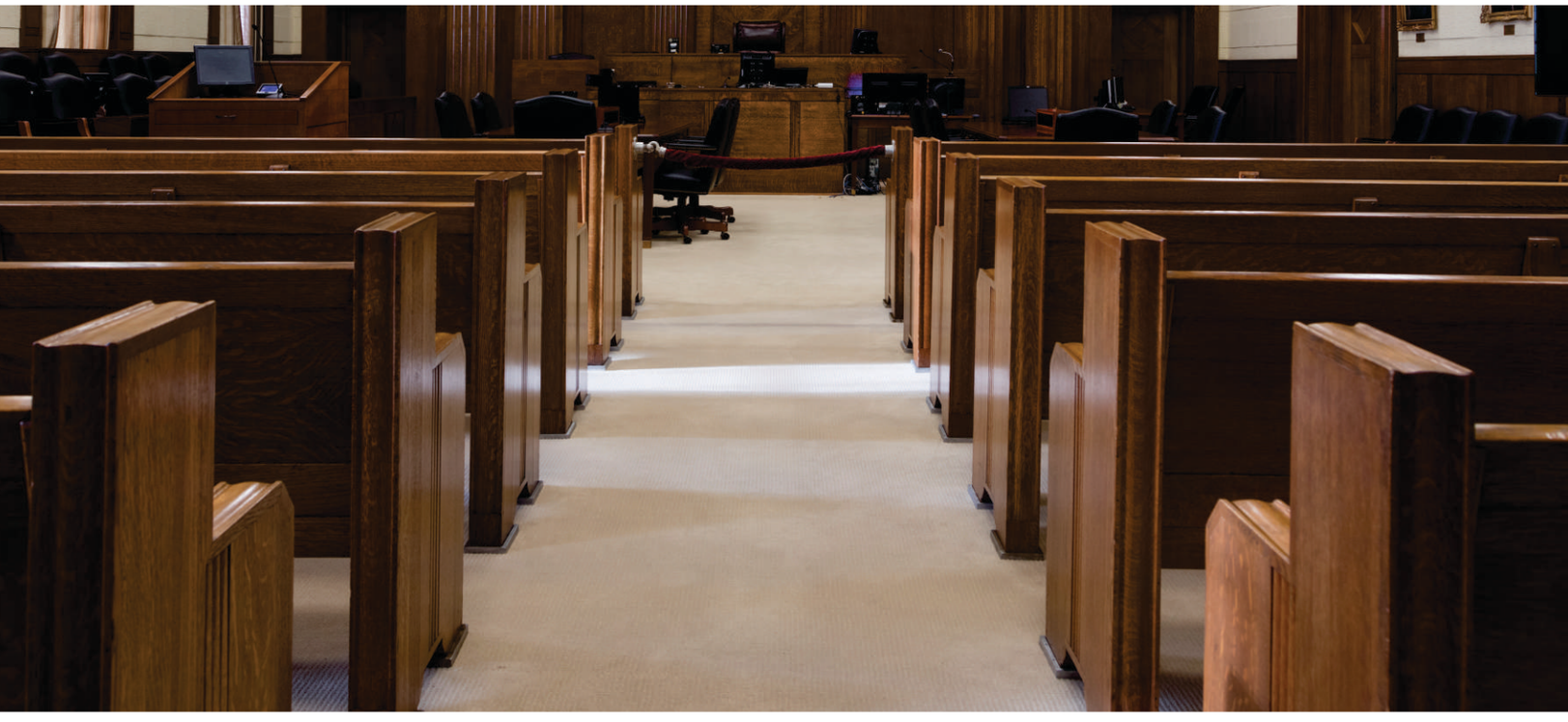
Four months after the lockdown was first imposed, virtual hearings are set to become the norm, given

1 Order dated 6th April 2020 in Suo Motu Writ (Civil) No. 5/2020; https://main.sci.gov.in/supremecourt/2020/10853/10853_2020_0_1_21588_Judgement_06-Apr-2020.pdf

that there are no physical hearings in most Courts (barring some lower Courts), with no likelihood of physical hearings in the near future. Under the circumstances, the current system needs to be honed, augmented, and adapted to make it an efficacious alternative, for hearing all matters virtually, irrespective of the urgency or the type of case. Some facets of the virtual hearing ecosystem, which need to be addressed are discussed below.

Existing Infrastructure

Whilst the SC and most HCs have basic technological infrastructure in place, lower courts (especially those in non-metropolitan areas) are far less equipped in this regard. Further, it is clear that the existing infrastructure is far from ready to resume pre-lockdown caseload. The unavailability of adequate bandwidth, lag during virtual hearings, faulty internet connections on either side, use of less than optimum



VC applications by some Courts, and limitation on the number of participants are only some of the issues faced. Discomfort in the use of technology (on either side of the Bench) and the definite lack of VC etiquette on the part of some lawyers/litigants (including non-muting of mikes, non-compliance with dress code, etc.) only make matters worse. This often leads to only a handful of matters being listed, short and ineffective hearings, non-listing of and long adjournments in matters where the urgency is perceived to be insufficient, thereby stagnating and increasing the backlog.

In order to revert to the pre-lockdown level of hearing and disposal of cases, some suggested measures that could improve the virtual hearing process and thereby make it an accessible platform across all Courts and tribunals, for all matters, are as follows:

- Substantial investment in internet bandwidth, technology and hardware, including separate VC facilities in each Court complex for each Bench.
- In cities/towns where it is not possible for Judges to work from the Court premises, setting up of such infrastructure at their official/designated residence.
- The e-filing system be upgraded, where scanned copies of all pleadings, documents, submissions, and precedents in a matter may be uploaded in a read-only, searchable format.
- All communication and interaction with the Court Registry and officers to be online.
- Judges and Court staff to be apprised of and trained in the use of VC technology and other relevant technology for accessing case files online.
- Standard guidelines across benches of a Court regarding filing of pleadings, listing of matters, etc.

- In the event Judges and Court staff are required to or choose to work from Court premises, standard operating procedures must be notified in this regard.
- Setting up centres in all Court complexes for lawyers and litigants (who are unable to arrange for their own infrastructure) to access the VC system, e-filing system, computers, scanners, etc. A token system could be implemented for using the VC system as well as for using other facilities, to avoid crowding.
- Assessing the current and projected backlog of cases, filling up all vacancies and appointing ad hoc Judges where required.
- Lawyers and their staff as well as Court staff to be categorised as providing essential services.
- Once the necessary infrastructure is in place in a Court complex, regular hearing of all matters to be resumed daily. Judges can log in through VC at the Court premises and lawyers can log in from their homes, offices, or VC centres, which maintains the sanctity of physical distancing.
- A 24-hour helpline to be set up, to assist advocates and litigants.

Listing and Hearing of Cases

Whilst several pending cases have been disposed of by the SC and various HCs since March end, this does not account for the cases that are still pending and have not been listed even once since the lockdown. Many courts continue to list only fresh or urgent matters or specific types of matters considered to be important. If this continues, the existing caseload may spiral. Therefore, it is important that the listing of all pending matters before all sitting Judges of a Court be resumed forthwith, with adequate infrastructure in place.

To avoid such a spiral, listing of cases for virtual hearing must now be urgency and subject-matter agnostic. Cause lists should be prepared scientifically (including through the use of Artificial Intelligence) based on available case data. Individual online waiting rooms (already in place in some Courts) should be set up for lawyers and litigants to wait for their matter to be called out. Where parties are agreeable, under the guidance of the Court, matters can be disposed of based only on written submissions. Where oral arguments must be held, specific amount of time could be allocated to each party, on a chess clock basis. The American system of pre-trial deposition may be adopted (subject to relevant legislative intervention) to enable parties to move for summary judgement or reach a compromise before trial commences. Suits, which are at a nascent stage, may be referred to mediation, arbitration, or conciliation with the consent of parties.

Whilst adoption of inter alia the aforesaid measures would make virtual hearings effective, Courts must also maintain flexibility to hold physical hearings (subject to all necessary precautions) in certain situations where it is unavoidable, or the interests of justice demand it.

Procedural Formalities in Litigation – Overhauling the Current System

In the current situation, Courts have had no option but to modify or dispense with many procedural formalities, inconsistent with a VC setup. However, if virtual hearings are to be the norm, procedural requirements prescribed under law will necessarily have to be adapted. Some of the challenges in complying with procedural requirements are:

a. **Notarising Documents and Attesting Affidavits:** The SC *vide* its notice dated March 23, 2020,[2] relaxed the requirement of filing attested and notarised affidavits. Subsequently, other Courts also followed suit, permitting compliance with attestation and notarisation requirements, later. However, this is only a temporary measure and begs the question whether there is an alternate e-solution to physical notarisation and attestation processes. In India, the notary must physically sign and stamp the document to certify its genuineness[3]. Attestation of affidavits by an oath commissioner has its foundation in Section 139 of CPC, Section 4 of the Oaths Act, 1969, Order IX of the SC Rules, 2013 and rules of the respective HCs. These requirements are indispensable to prevent fraud and protect both the person executing the document and third parties relying on the

2 Circular dated March 23, 2020 issued by the SC; https://main.sci.gov.in/pdf/cir/23032020_153213.pdf
3 See: The Notaries Act, 1952 read with the Notaries Rules, 1956

statements and information in the document presented. However, there is nothing to suggest that the same cannot be achieved by electronic means. In the United States, remote online notarisation performed utilising audio-video technology has been allowed in over 27 states, subject to certain conditions being met,[4] and legislation on this issue has been introduced in the Senate in the wake of the difficulties faced during the pandemic.[5] Many states in the US also recognise mechanisms for remote administration of oaths or affirmations.[6] A similar system may be implemented in India, where the notary/ oath commissioner can interact over VC to administer their duties, with the help of tamper-proof technology and procedural safeguards, such as confirmation of identity of signatory/witness by production of identity proof during the VC, etc. An example closer home would be the shift to e-registration of documents in Mumbai and certain other cities, where parties can now get their documents registered at their own homes, without having to travel to the office of the jurisdictional sub-registrar of assurances.

b. **Service of Documents:** Recognising the difficulties being faced by litigants in physical service of notice, summons, etc., during the lockdown, the SC held that service of notices, summons and pleadings, etc., may be effected by e-mail, fax, and commonly used instant messaging services, such as WhatsApp, etc.[7] Previously, the Delhi HC also issued a similar direction,[8] dispensing with physical service temporarily. While electronic means of service were available before the pandemic[9], physical service has been the preferred mode by litigators and Courts alike. Therefore, the Courts should consider encouraging electronic modes of service, including instant messaging services, as the preferred option, being a quicker, economical and environmentally more feasible option.

c. **Inspection of Records:** Typically, advocates would physically inspect court records in Court. Since this may not be feasible presently, Courts ought to consider giving electronic access to such record to litigators. To prevent foul play, Courts may consider use of secure data rooms for such inspection. Facial recognition and fingerprint authentication may be used as an added layer of security.

d. **Recording of Evidence:** In this shift towards virtual hearings, recording of evidence and examination of witnesses remains a cause of concern. Though recording of evidence of witnesses through VC is not new, it is not a common practice in trial Courts. On April 6, 2020, the SC permitted recording of evidence through VC only by mutual consent of parties. The argument against virtual cross-examination, is that it gives room for the witness to be prompted and it is tougher for litigators/the Court to pick up on non-verbal cues. Notably, major strides were made in the rules for VC issued by Delhi HC.[10] The rules provide for a Coordinator to be present at the 'Court Point' or 'Remote Point' (the place where a person appears through a video link such as jails, mediation centres, hospitals, overseas, etc.) at the time of cross-examination of a witness to facilitate the process and ensure that there is no foul play. The rules provide for a detailed procedure with sufficient safeguards.

Technical Knowhow and Re-training

Digital literacy is the need of the hour. Training lawyers and their staff, to effectively utilise technology is imperative for the success of paperless courts. The effective use of e-filing portals requires lawyers and clerks to be able to operate computers, register with the court websites, make payments online, attach digital signatures and use software to format the documents. Efforts have been made to help litigators, including organising webinars, issuing detailed guides, setting up centers to provide

4 See: *E-Signatures and Remote Online Notarizations*, Ballard Spahr LLP, June 8, 2020;https://www.ballardspahr.com/alertspublications/legalalerts/2020-03-20-e-sig-remote-online-notarization
5 On March 18, 2020, Senate Bill 3533, the Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020 (the SECURE Act), was introduced in the US.
6 See *US Remote Deposition and Oath Status*, Perkins Coie, July 20, 2020;https://www.perkinscoie.com/en/news-insights/us-remote-deposition-and-oath-status.html#florida
7 Order dated July 10, 2020 passed by SC in Suo Moto Writ Petition No. 3/2020.
8 Circular dated June 9, 2020 issued by the Delhi HC; http://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_DRMG217T7AG.PDF
9 Delhi Courts Service of Processes by Courier, Fax and Electronic Mail Service (Civil Proceedings) Rules, 2010 and Bombay High Court Service of Processes by Electronic Mail Services (Civil Proceedings) Rules, 2017
10 Video Conferencing Rules dated June 1, 2020, issued by the Delhi HC; http://delhihighcourt.nic.in/writereaddata/upload/Notification/NotificationFile_ULDC4UVQWZ9.PDF

infrastructure and technical support to lawyers free of cost,[11] etc. This effort must permeate to all corners of the country. The State Bar Councils ought to take the lead in this regard. This is imperative, as the ultimate beneficiary would be the litigant.

Conclusion

The decentralisation of court proceedings through an online format provides a great impetus to access to justice in India. The ability of lawyers from remote areas to appear before the judiciary in any part of the country, of litigants to attend court proceedings or even appear in person from their homes – the opportunities are limitless. The idea of public access to virtual courts is also taking shape slowly, such as with the Delhi HC allowing participation of the public in the court proceedings upon request. Furthermore, the SC's decision in ***Swapnil Tripathi v. Supreme Court of India***[12] finds relevance in today's time, wherein the Court allowed live streaming of proceedings in cases of constitutional and national importance, setting out guidelines for the same. The concept of live streaming of court proceedings is prevalent in several jurisdictions in the world and ought to be a major part of the technological revolution underway in Indian litigation.

While there will surely be teething issues, some of which are referred to in this chapter, these can easily be overcome with the help of proactive policy formulation, investment in technology and implementation of new processes from the ground up. The saying "*necessity is the mother of invention*" has never been more appropriate.

11 Bar Council of India, Press Release dated May 22, 2020.
12 (2018) 10 SCC 628.

09

ENFORCEMENT OF SECURITIES LAW IN INDIA

Over the years, the Securities and Exchange Board of India (**SEBI**) has developed extensive powers to regulate the securities market. Simultaneously, the powers of SEBI to enforce its orders against erring securities market participants have also been enhanced. While it is important to track SEBI's substantive powers to regulate the market, it is equally important to trace the trends on enforcement mechanism.

In this section, we look at the recent recommendations on SEBI's enforcement powers, recent trends on disgorgement as a remedy and will discuss in brief whether the Broken Windows approach should be reconsidered.

While the SEBI has been equipped with a wide range of statutory powers,[1] lacunae in its enforcement mechanisms inhibits the effectiveness of its primary mandate of investor protection. Identifying the limitation of resources and complexities of the securities market, it is important to evolve methods to improve SEBI's enforcement mechanism.

1 https://corporate.cyrilamarchandblogs.com/2019/09/securities-law-enforcement-calibrating-the-discipline-of-penalty-imposition/

Recent recommendations on SEBI's enforcement powers

SEBI, in its capacity as a quasi-judicial body, exercises its powers under two parallel processes, namely, Section 11 and Section 11B of the SEBI Act, 1992 (**SEBI Act**), which empowers the securities watchdog to take measures to achieve its mandate of protection of investors as well as development of the securities market and the adjudication process, headed by the Adjudicating Officer.

In a June, 2020 report, SEBI has announced setting up a high level committee under the Chairmanship of Justice A. R. Dave, Retired Judge, Supreme Court of India, (**Committee**), which has proposed certain changes in recognition of the lacunae of its enforcement mechanisms.[2] The Committee identified four areas for improvement in SEBI enforcement mechanism: intermediary regulations, recovery, quantification of unlawful gains and interplay of securities and insolvency law.

First, the Committee recognised the importance of intermediaries given the lack of adequate knowledge or expertise of the retail investors and the difficulty that companies face to adequately equip such investors with the necessary knowledge. Thus, the Committee proposed amendments to the Securities and Exchange Board of India (Intermediaries) Regulations, 2008 (**Intermediaries Regulations**), which despite being enacted several years ago, has several provisions which have not been notified. The Committee identified the following problems in the Intermediaries Regulations, namely, the two-tier enquiry process and the excessive time taken for disposal of enquiry proceedings. It has suggested replacement of this two-tier system and seeks a Designated Member, instead of the Designated Authority (**DA**), for personal hearings; since, on account of the number of DAs being limited, hearings conducted by them leads to additional delays.

Second, the Committee analysed several laws under which recovery of monies occurs and concluded that, presently such laws are applied in diverse ways. For instance, under certain laws, recovery of arrears are done in ways similar to that of land arrears; under securities law, procedures under income tax laws are followed, whereas the Competition Commission of India is empowered to devise its own rules. After analysing challenges posed to recovery proceedings, the Committee suggested incorporation of provisions relating to interim attachments which allow for recovery at a later stage. Such provisions will come handy in cases where siphoning of funds to companies in the same group is identified after SEBI has passed its final order. It has also recommended that SEBI should be empowered to impound and retain proceeds/securities/monies, not exceeding actual value of transaction under investigation.

Third, with respect to quantification of unlawful gains, the Committee proposed adoption of financial economics, which means using advanced mathematical methods to calculate the disproportionate gains made, as used in developed jurisdictions. The Committee highlighted the importance of uniformity globally to ensure protection of investors across jurisdictions. It also recommended quantification of profit on the basis of the composite default and imposition of liability on a joint-and-several basis.

Finally, the Committee recognised how defaulters may seek refuge under the Insolvency and Bankruptcy Code (**IBC**) as a means to avoid legal proceedings. To address this, the Committee recommended that the list of non-dischargeable debts should be increased. Further, the Committee requested the Ministry of Corporate Affairs of India to amend IBC for instances involving siphoning of public money. This would ensure that creditors cannot approve a resolution plan involving unlawfully gained public money.

Disgorgement

Disgorgement refers to mandatory repayment of unlawful gains made by an individual or a company. It is imposed to deprive wrongdoers of the fruits of their unlawful activities. Initially, there were unsuccessful attempts by the SEBI to mandate disgorgement such as in the case of Rakesh Agarwal v. SEBI.[3] However, subsequently, the Securities Appellate Tribunal (**SAT**) recognised SEBI's power to disgorge profits earned by wrongdoers in several instances.[4] However, it was in 2014, when the

2 SEBI Report 2020
3 (2004) 49 SCL 351 (SAT)
4 Karvy Stock Broking Ltd. v. SEBI (SAT Appeal No. 6 of 2007) Order dated 2.05.2008; NSDL v. SEBI (SAT Appeal No. 147 of 2006) Order dated 22.11.2007; Opee Stock Link Ltd. and Anr. v. SEBI (SAT Appeal No. 20 of 2009), Order dated 30.12.2009; Himani Patel v. SEBI (SAT Appeal No. 154 of 2009) Order dated 07.09.2009; Shadilal Chopra v. SEBI (SAT Appeal No. 201 of 2009) Order dated 02.12.2009; Dhaval Mehta v. SEBI (SAT Appeal No. 155 of 2008) Order dated 08.09.2009; Dushyant Dalal v. SEBI (SAT Appeal No. 182 of 2009) Order dated 12.11.2010.

principle of disgorgement was officially incorporated under Section 11B of the SEBI Act, which states that under the power to issue directions, SEBI also has the power to require disgorgement of any profit made or any loss avoided by unlawful acts. The Section also states that SEBI is deemed to have always had this power. Section 12A of the Securities Contracts Regulation Act, 1956 as well as Section 19 of the Depositories Act, 1996 were amended to replicate the power to disgorge incorporated under Section 11B of the SEBI Act.

The US Supreme Court has recently clarified the following in the case of Liu v. Securities and Exchange Commission. First, it clarified that disgorgement is an equitable relief and not a punitive action. This has also been upheld in India,[5] implying that the aim of mandating disgorgement is to remedy a wrong instead of penalising the wrongdoer. Requiring disgorgement of an amount in excess of the total gain made by the individual would be tantamount to punishing him and, therefore, would be punitive in nature.

Second, it dealt with the quantum of disgorgement. The US Supreme Court held that the quantum must be the net profit earned excluding legitimate business expenses. The rationale for deducting legitimate business expenses is that there may be expenditure undertaken in the ordinary course of business such as payment of taxes, payment of wages, etc. adding it to the total amount of disgorgement results in a punitive approach in penalising the wrongdoer as it leads to excess payment than net ill-gotten gains.

Third, restitution of the disgorgement to the aggrieved parties is essential in ensuring that disgorgement remains an equitable remedy. Disgorgement, by itself, cannot be considered a remedy as deprivation of gains of wrongdoer solely in absence of restitution amounts to a punitive measure. SAT in the case of Mrs. Ram Kishoru Gupta and Mr. Harish Chandra Gupta v. SEBI also recognised this principle.[6] Identifying how SEBI rarely returns the amount to those who have suffered loss, SAT observed that "disgorgement without restitution did not serve any purpose."[7] Here, SEBI argued that identifying and compensating large number of investors who have suffered a loss in the secondary market would be practically impossible and if it selectively decided which investors should receive restitution, it would be discriminatory. However, SAT held that SEBI could not take defence of difficulties posed in restitution as a ground for refusing the same as the essence of disgorgement was restitution. Additionally, the Indian approach of depositing the disgorged amount in the Investor Protection Fund should not be the rule and should only be allowed in exceptional circumstances of inability to identify investors.

Theory of Broken Windows

The Broken Windows theory was introduced in the US in the 1990s, in the context of police enforcement. This theory postulates that penalising all crimes irrespective of their gravity leads to a reduction in more serious crimes since it assumes that leniency towards less serious crimes creates an environment that encourages disorder whereas penalising even small crimes signals a lack of tolerance for any kind of criminal activity.[8] In 2013, Mary Jo White, the then Securities Exchange Commission (**SEC**) Chairman, introduced this theory in the securities market. However, this theory was abandoned post 2016 for several reasons which caused stakeholders to believe it was not effective.

First, following such a method limits the ability of an enforcement agency to prioritise certain crimes, which are more serious than others. Famously, the Republic Commissioner of SEC, Mike Piwowar said, "If every rule is a priority, then no rule is a priority". Prioritising crimes as per their gravity is important in a securities context since not all non-compliances have a negative impact. Moreover, given the complex rules governing the securities market, there could be instances of non-compliance as accidental or caused due to oversight.

Second, authors criticise this theory primarily because it leads to pursuit of smaller crimes at the cost of graver crimes. Every security enforcement agency's resources are limited, including that of

5 Dhaval Mehta v. SEBI (SAT Appeal No. 155 of 2008) Order dated 08.09.2009; Shailesh Jhaveri v. SEBI (SAT Appeal No. 79 of 2012) Order dated 04.10.2012; Karvy Stock Broking Ltd. v. Securities and Exchange Board of India (SAT Appeal no. 6 of 2007) Order dated 02.05.2008.
6 http://sat.gov.in/english/pdf/E2019_JO201944.PDF
7 https://www.thehindubusinessline.com/markets/distribute-disgorgement-money-to-investors-in-3-months-sat-to-sebi/article28916775.ece#:~:text=The%20Securities%20Appellate%20Tribunal%20(SAT,in%20a%20market%20manipulation%20case.
8 Mary Jo White Speech

SEBI's. Given this limitation, pursuing every minor violation will naturally lead to a depletion of resources and affect the ability of the agency to pursue more serious and large scale crimes. In fact, the pursuit of such serious crimes is what creates a perception of zero tolerance in a society and restores its faith in the effectiveness of enforcement. This is because major criminals usually go scot-free on account of their resources and connections.

Third, the policy results in decrease in self-reporting since treating a technical violation tantamount to fraud and publicising it causes harm to the reputation of the company, which in turn dissuades them from approaching the regulator to correct their non-compliances.[9] Thus, there is a significant decrease in cooperation under such a policy since there is a fear of penalty even for minor technical violations which may have been caused due to ambiguities and complexities of the securities market.

Given the disadvantages of pursuing minor infractions, SEBI should turn to possible alternatives to boost its enforcement mechanisms. For instance, certainty of punishment for large institutions has been proposed as one of the most effective mechanisms of building public confidence in a regulator.

Further, as suggested by SEC Enforcement Director Andrew Ceresney, penalising top executive has been considered as having the greatest effect of deterrence. The rationale being that a person is more likely to comply with laws if he/she is afraid of facing punishment for non-compliance.

Additionally, an important concern is that several non-compliances are caused on account of complexities of securities law and difficulty in understanding its ambiguities. Therefore, at times, despite the best efforts undertaken by the companies to be fully compliant with the regulations, they fall short. Hundred percent compliance with all regulations is not always possible. This was recognised by the Department of Justice and SEC in the US and therefore, they have now shifted their focus to analysing whether the company's compliance was largely effective and whether the company acted in good faith in order to determine the need and extent of punishment.[10] Such a policy in India will improve self-reporting and cooperation in the securities market as it will reduce the fear of regulatory action for accidental oversights.

9 Broken Windows Law Review Article
10https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf

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