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GUEST POST

CURRENT STATUS OF INVESTOR STATE ARBITRATION IN INDIA

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Investor-State Arbitration (ISA) as we all know has been portrayed as an unfavorable outcome in ***"bilateral investment treaties" (BIT),*** and states have gone so far as to terminate their BITs in order to avoid such unfavorable outcomes of BITs. ISA refers to the process of resolution of disputes between foreign investors and host states. India's rendezvous with BITs begun in the year 1994, and thereafter ended in the year 2011 after the award in *"White Industries Australia Ltd. v. Republic of India".* These dissolved treaties have been pursued to be supplemented by a new generation of BITs to be concluded in 2015 on the basis of a new Model Indian BIT which replaced the existing Bilateral Investment Promotion Agreement (2003) This article in this regard proposes various approaches towards dealing with possible lawsuits arising from the *"sunset clauses"* of the Bilateral Investment Treaties which have now been terminated. This article will further enquire into the options available to ensure continued consumer rights in the absence of BITs, with the goal of encouraging *international investment.*

To read more, visit- https://www.jusip.in/section-7-requirements-under-the-insolvency-bankruptcy-code-ibc/

TRIVIA

The table illustrates landmark decisions pertaining to Investment-State Arbitration in India.

CASE NAME	YEAR	HOLDING
Louis Dreyfus Armateurs (LDA) SAS (France) v. The Republic of India	2018	This was the first investor state arbitration which can be regarded as a victory for India as the arbitral award directed LDA to pay 36 million. It was also observed that under Article 2(1) of the India – France BIT, indirect investments by an investor are outside the scope of protection, if he/she owns less than 51% of the intermediate investment vehicle.
Deutsche Telekom AG v. The Republic of India	2018	The jurisdictional objections raised by India were rejected. The award granted in the India-Germany 2013 arbitration was challenged in the Swiss courts. Federal Supreme Court also subscribed to the reasoning of the award and refused to set is aside.
Nissan Motors Co. Ltd. V Republic of India	2019	An interesting analysis of 'investment dispute' under Vienna Convention of Law for Treaties was given by the board. The interpretation mandated that forum for resolution of dispute, other than the one/s mentioned in the treaty, in an international dispute must not be inferred by the investor instead clearly mentioned in the contract.
Khaitan Holdings (Mauritius) Limited v Republic of India	2019	While there was an ongoing arbitral proceeding under India – Mauritius BIT. A suit for anti-arbitration injunction was filed by India in the Delhi High Court. The court refused to grant any such injunction and opined that such a relief can be given only in compelling and rare circumstances.
Vodafone International Holdings BV v. The Republic of India	2020	This case did not stem from the investment contract between GOI and Vodaphone. The issue arose due to a retrospective tax legislation. Conduct of the government was found to inconsistent with Article 4(1) of the India – Netherlands BIT, which guaranteed 'fair and equitable' treatment.

INTELLECTUAL PROPERTY RIGHTS

Delhi High Court: No absolute bar on arbitrability trademark disputes

In the case of ***M/S Golden Tobie Pvt. Ltd. V M/S Golden Tobacco Limited,*** the Hon'ble High Court of Delhi observed that disputes concerning trademarks are arbitrable. Section 8 of Arbitration and conciliation Act, 1996 that deals with, *'power to refer parties to arbitration where there is an arbitration agreement'* was interpreted. The plaintiff relied on the fourfold test laid down by the court, recently, in the case of ***Vidya Drolia and Ors. v. Durga Trading Corporation*** and argued that the instant case involves trademarks, henceforth, will have *erga omes (towards everyone)* implications with respect to sovereign functions of the state. However, the court observed that, the instant case primarily does not belong to the trademark genre; it is a contractual dispute contending the termination of assignments and agreements of trademarks between the parties. In this case trademark assignment, does not involve sovereign functions of the state and is by a contractual matter. This case is of prime importance as it propagates the idea that all trademark matters are not absolutely barred from arbitration, furthermore, have the limitation of disputes concerned with the grant registration of trademarks.

Venus Remedies wins legal battle against French firm for intravenous Paracetamol solution patent

On June 4th, the Indian Patent Office decided in favour of Venus Remedies. Venus Remedies, a Himachal Pradesh based manufacturing company, won a 10-year-long patent battle against French firm SCR Pharmatop with regards to production of the intravenous paracetamol solution in the country. The Indian firm had opposed the patent of the French firm in 2011 and consequently it was revoked in 2018. Following this SCR Pharmatop had moved to the Delhi High Court and the Intellectual Property Appellate Board (IPAB). The IPAB had directed the Indian Patent Office to hear the matter again. The Indian Patent Office, after hearing both the parties, observed that the patent lacked any inventive step which made it superior(enhanced therapeutic efficacy) over the solutions which already exist and ruled in favour of the Indian firm.

BRICS backs India-South Africa's COVID-19 vaccine patent waiver proposal

BRICS on 1st June, extended their global patent protection waiver to COVID-19 Vaccines, backing the proposal made by India and South Africa. In October last year, India along with South Africa and 57 other members of the WTO had

proposed a waiver of certain provisions enshrined under the TRIPS Agreement's (that was negotiated for resolving international IPR disputes) Trade Related Aspects for prevention, containment and treatment of COVID – 19. The BRICS members, in the meeting held on June 1, emphasised on the need of ensuring affordable, timely and equitable access to medicines and vaccines related to the pandemic. Following this, the BRICS ministers gave a joint statement that reaffirmed the necessity for the usage of all relevant measures during the ongoing pandemic, while abiding by the supporting considerations of the World Trade Organisation (WTO) on a Covid-19 vaccine's intellectual property right waiver and the use of flexibilities that are provided for public health under TRIPS and Doha Declaration (which circumvents patent rights for procurement of essential medicines).

Bombay HC offers relief to film producers of Manikarnika Returns

The Bombay High Court on June 9th, in the copyright case of ***Didda v. Manikarnika Returns,*** granted interim relief to the film producer Kamal Jain and directed the police to not to arrest him until July 1. The author of the book, Ashish Kaul had filed an FIR against the film producer along with Kangana Ranaut and her sister Rangoli Chandel for cheating and copyright infringement. The FIR was filed under the IPC Sections 406 (criminal breach of trust), 120B (criminal conspiracy) & 34(common intention) of the IPC and sections 51 (copyright infringement) of the Copyright Act, punishable under sections 63 & 63A. The author alleged that he had sent an excerpt of his book to Kangana over e-mail and she utilised that part in her tweet while announcing the movie, thereby infringing the Intellectual Property Rights of the author. Jain's counsel had submitted to the division bench of the High Court that he will be cooperating with police and appear before the police whenever required. The bench while accepting the statement decided that the arrest of the petitioner did not seem to be warranted, due to the same he shall not be arrested till July 1.

COMPETITION LAW

CCI Orders DG investigation into allegations of anti-competitive agreements between Google and Smart TV manufacturers

The Competition Commission of India (CCI) in the case of ***Kshitiz Arya v. Google LLC*** passed an order directing the DG to probe into allegations against Google on 22nd June. The CCI opined that there is a *prima facie* case against Google and passed an order under section 26(1). The case

was brought to CCI by anti-trust lawyers Kshitiz Arya and Purushottam Anand recently, in May. It was alleged that Google bars any company that comes into an agreement for using its Android TV platform from working with its competitors. If a company intends to use Google's operating system they have to come into an agreement which prohibits them from manufacturing any other device, be it a phone or a TV based on any other version of Android. Google had also approached the CCI requesting, an opportunity for oral hearing over video conferencing. Based on the information on record with the Controller, CCI was convinced that there is a *prima facie* case of anti-competitive *behaviour*

Karnataka High Court dismisses Writ Petitions by Amazon and Flipkart

Amazon Sellers Private Limited along with Flipkart Internet Private Limited recently filed a writ petition before the Karnataka High Court challenging Competition Commission of India's order under Section 26(1) of the Competition Act, 2002. The said order directed the DG to investigate alleged anti-trust practices by the petitioners which are E-commerce platforms. The same came to light after an MSME called Delhi Vyapar Mahasangh filed a complaint against such e-commerce platforms for alleged contravention of various provisions of the Competition Act. These were specifically in regard to anti competitive agreements and abuse of dominance.

The above order however was not set aside by the High Court in view of the two landmark decisions namely, ***CCI V. Steel Authority of India Ltd & Anr and CCI V. Bharti Airtel Ltd & Ors.*** The Court noted that Section 26(1) order is an administrative direction and is passed without any adjudicatory process. Consequently, on basis of the above decisions stated there was no prior requirement of notice or hearing. Therefore, the case was dismissed on the grounds that CCI to order an investigation simply needs to determine whether a *prima facie* case exists or not.

ARBITRATION, MEDIATION AND CONCILIATION

Delhi High Court: S. 34(4) of the Act cannot be resorted to enable the arbitrator to cure certain curable defects.

In ***Airports Authority of India v Bentwood Seating system P Ltd*** the High Court of Delhi set aside award granting specific performance of the contract on the ground that arbitral tribunal had failed to return a finding on one of the principal issues i.e. whether the contract had been obtained by

fraud. The court held that, if it was proved that contract was procured by fraud, specific performance of the said contract could not be granted notwithstanding that same was not one of the reasons stated in letter of termination. The court held that it is not a case where reasons for conclusion are sketchy and require clarification, but is case where arbitral tribunal has not decided one of the principal disputes between the parties. It was also observed that such a defect cannot be cured by court proceedings, enabling the arbitral tribunal to issue clarifications for an irregularity likewise the instant case.

Delhi High Court: A non signatory may be bound to Arbitration Agreement

In ***Shapoorji Pallonji and Co. Pvt Ltd v Rattan India Power Ltd &Ors.*** the Delhi High Court found that the non-signatory had fully participated in contract formation which included arbitration agreement, bank guarantees and the invitation for tenders were issued in its favour. The direct beneficiary of the contract was the non-signatory, whereas the signatory was merely an alter ego of the non-signatory. The court mandated that the doctrine of estoppel shall apply the same way in making a non-signatory a party to arbitration, in as much as the non-signatory. There were no objections to specific amendments in the contract that referred to it and in fact even the final bills under the contract were submitted to non-signatory. Also, the court observed that the doctrine has been used frequently in the courts of United States of America, to rule that a party associated with a substantive contractual agreement is bound by arbitration clause. Leading to applying the alter ego, implied consent and estoppel principles the court held the non-signatory to be bound by the arbitration agreement.

INSOLVENCY BANKRUPTCY CODE

The Insolvency Professionals to act as Interim Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (recommendations) Guidelines, 2021

The above guidelines were issued by the Insolvency and Bankruptcy Board of India on June 1, 2021 under Section 16(3) of the IBC, 2016 which stipulates that the IBBI is required to recommend a Panel of Insolvency Professionals for appointment as Insolvency Resolution Professional (IRP). The objective behind issuance of these guidelines is to ensure that the process of appointment of IRP is stream-

lined and made effective but stipulating a Panel of Insolvency Professionals to the Adjuration Authority. The guidelines outline the following criteria for appointment as Insolvency Professional:

a. No pending disciplinary enquiry against the individual either by IBBI or Insolvency Professional Agency

b. Should not be convicted in the last three years before appointment

c. Must express consent to be included in the Panel for the described period

d. Must undertake to discharge responsibility as IRP, Liquidator, Resolution Professional or Bankruptcy Trustee, when appointed by the Authority.

e. Professional must hold an Authorization for Assignment which shall remain valid till the validity of Panel.

Calcutta High Court on whether claim of arbitral award holder can frustrate approval of resolution plan under Section 31, IBC

In the case titled ***Sirpur Paper Mills Ltd (Award Debtor-Petitioner) Vs. I K Merchants Pvt Ltd (Award Holder-Respondent),*** an arbitral award was delivered on 07 July 2008 in favour of the Respondent. The petitioner thereafter filed an application under Section 34 to set aside the same before the Hon'ble Calcutta High Court. However, Corporate Insolvency Resolution Process was initiated against the Petitioner. Consequently, an amount was demanded by the Respondent on 31 March 2014. The same was approved by NCLT order dated 16 May 2018. The Petitioner before the High court submitted that since CIRP under IBC was already initiated the said application under Section 34, Arbitration and Conciliation Act may not be proceeded with. The Court however rejected their submissions and held that initiation of CIRP shall not defeat the dispute which existed prior to the same against Corporate Debtor. The High Court in view of the ratio of the decision in Committee of Creditors of ***Essar Steel India Ltd v. Satish Kumar Gupta*** and ***Ghanshyam Mishra & Sons Pvt Ltd v. Edelweiss Asset Reconstruction Co Ltd*** held that once the resolution plan is approved under Section 31, IBC, a creditor cannot initiate proceedings for recovery of claims which are not part of such Resolution Plan. Thus, the application under Section 34 to set aside the order was termed infructous by the Court since the claim was extinguished upon approval of Resolution Plan as per Section 31, IBC.

COMPANY LAW

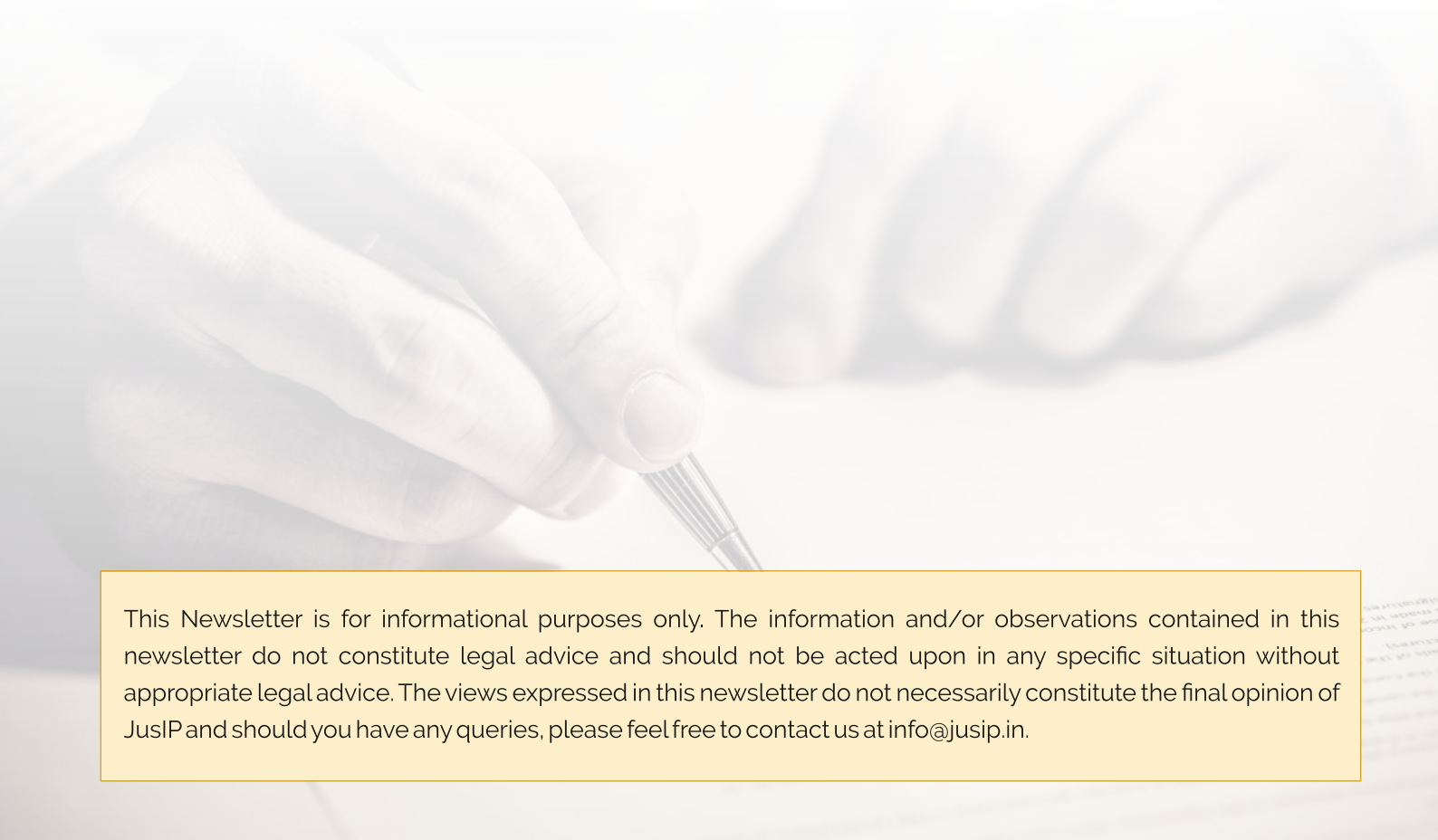
Companies (Meetings of the Board and its powers) Amendment Rules, 2021.

The Ministry of Corporate Affairs (MCA) has amended the Companies (Meetings of the Board and its powers) Rules, 2014. By virtue of this notification the Rule 4 of the MBP rules, which specifies the powers of the board or the matters not be dealt in board meeting held through video conferencing mode, has been omitted. Thus, essentially

increases the ambit of matters which can be dealt in board meetings held through video conferencing mode. In view of this amendment the following matters can be dealt in board meetings held in video conferencing mode,

- Approval of the annual financial statements
- Approval of the Board Report
- Approval of the prospectus
- Approval of Audit Committee report on financial statements including consolidated financial statements
- Approval of matter relating to compromise or arrangement or takeover.

The purpose of this amendment is to allow the board of Directors to take important decisions in times of COVID 19 where physical meeting is not possible.



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