Chadha & Co.
Advocates and Legal Consultants

Client Alert

Judicial and Regulatory Updates

There have been a host of recent judicial pronouncements and legislative changes in India that are relevant for companies doing business in India. This Client Alert presents the following:

a. Judicial Updates; and
b. Regulatory update summarizing legislative changes brought about in the recently concluded monsoon session of the Indian Parliament.

Judicial Updates

Emergency Arbitration Sanctified by Supreme Court of India

In a recent ruling in the matter of '*Amazon.com NV Investment Holdings LLC Vs. Future Retail Ltd. & Ors.*', the Supreme Court of India dealt with the question as to whether an award delivered by an emergency arbitrator under the Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules) can be enforced under the (Indian) Arbitration and Conciliation Act, 1996 (Act). In answering the aforementioned question in the affirmative, the Supreme Court has upheld an arbitral award delivered by an emergency arbitrator under the SIAC Rules, thereby sanctifying the concept of emergency arbitration in India, giving recognition to such an award under the Act and reaffirming party autonomy in arbitration proceedings under the Act.

In this matter, the had parties entered into various shareholder agreements, which included the basic understanding that Future Retail was restricted from transferring and selling its retail assets to an agreed list of '*restricted persons*', which included the Mukesh Dhirubhai Ambani Group. Within a few months of the investment made by Amazon in Future Retail, the Future Group entered into a transaction with the Mukesh Dhirubhai Ambani Group, which envisaged the amalgamation of Future Retail with the Mukesh Dhirubhai Ambani Group, the consequential cessation of Future Retail as an entity, and the complete disposal of its retail assets in favour of the said group. As a result of this transaction, Amazon initiated arbitration seeking interim relief under the SIAC Rules, asking for injunctions against the aforesaid transaction. The emergency arbitrator awarded in favour of Amazon.

The primary question dealt with by the Supreme Court was whether an '*award*' delivered by an Emergency Arbitrator appointed under the SIAC Rules can be said to be an order under the Act.

The Supreme Court first reaffirmed party autonomy in arbitration proceedings. It observed that a reading of the relevant provisions of the Act make it clear that parties are free to authorise any person, including an institution, to determine issues that arise between the parties. Further, parties to an agreement are allowed to have such an agreement governed by arbitration

rules such as the SIAC Rules, and are free to agree on the procedure to be followed by an arbitral tribunal in conducting its proceedings. The Supreme Court cited a number of judgments that have referred to the importance of party autonomy as being one of the pillars of arbitration in the Act.

In answering the aforementioned question in the affirmative, the Supreme Court held that a conjoint reading of the relevant provisions of the Act would show that an emergency arbitrator's orders, if provided for under institutional rules, would be covered by the Act. It was held that when the Act uses the expression '*during the arbitral proceedings*', the said expression would be elastic enough to include emergency arbitration proceedings. More importantly, the Supreme Court held that after participating in an emergency arbitration proceeding and agreeing to such institutional rules made in that regard, and undertaking to abide by the emergency arbitration award, a party cannot thereafter claim that it will not be bound by an emergency arbitrator's ruling.

This judgment has far-reaching implications on arbitral disputes in India. While reaffirming party autonomy as a core tenet of arbitration under the Act, it also clears any ambiguity in relation to applicability and enforceability of awards arising out of an emergency arbitration in India.

This judgment is of particular relevance for foreign parties doing business in India. Generally, foreign parties elect foreign seated arbitration in a neutral jurisdiction such as Singapore as their dispute resolution mechanism. This judgment now establishes a precedent for parties to seek interim relief by way of emergency arbitration before their selected arbitration centres, without having to approach local courts in India.

Arbitral Award Not Open to Modification by Court

Another recent judgment of the Supreme Court in '*Project Director, National Highway Authority of India v. M Hakeem & Anr.*' has put to rest the ambiguity in relation to the power of courts to modify or amend an arbitral award. The Supreme Court held that courts cannot modify, revise or vary an arbitral award under the Arbitration Act in proceedings for setting aside the arbitral award.

The Supreme Court, while reviewing the relevant provisions of the Arbitration Act which deal with the power of courts to set aside arbitral awards, held that such power is limited to only setting aside awards on very limited grounds, and does not give the power to courts to modify, amend or vary an award, and the courts cannot undertake an independent assessment of the merits of the award.

This judgment will allow the removal of potential bottleheads in the enforcement of arbitral awards in India. It also reaffirms two of the core tenets of arbitration, which are limited judicial interference and finality of an arbitral award.

Indian Parties Can Choose a Foreign Seated Arbitration

The Supreme Court, in another recent landmark judgment of '*PASL Wind Solutions Private Limited Vs. GE Power Conversion India Private Limited*', has considered

various questions relating to arbitration between two Indian companies. The questions, include whether two companies incorporated in India can choose a forum for arbitration outside India, whether such award will be a '*foreign award*' under Part II of the Arbitration and Conciliation Act, 1996 (Arbitration Act) and be enforceable as such, and whether an application under Section 9 of the Arbitration Act for interim relief would lie.

In this matter, a settlement agreement was entered into between two Indian incorporated companies, which included a dispute resolution clause providing for arbitration in Zurich, Switzerland, under the Rules of Arbitration and Conciliation of the International Chamber of Commerce (ICC). It was agreed between the parties that the substantive law applicable to the dispute would be Indian law. Disputes arose between the parties pursuant to the agreement and such disputes were referred to arbitration before the ICC. While the seat of arbitration was Zurich, the parties agreed that Mumbai, India would be the venue of the arbitration proceedings for the purpose of convenience of the parties.

The Supreme Court held that nothing stands in the way of party autonomy in designating a seat of arbitration outside India even when both parties happen to be Indian nationals and that an award from such arbitration will be a '*foreign award*' under Part II of the Arbitration Act and will be enforceable as such.

The Supreme Court observed that there are four ingredients for an award to be designated as a '*foreign award*' sought to be enforced under Part II of the Arbitration Act, namely:

- The dispute must be considered to be a commercial dispute under the law in force in India;
- It must be made in pursuance of an agreement in writing for arbitration;
- It must be disputes that arise between '*persons*' (without regard to their nationality, residence or domicile); and
- The arbitration must be conducted in a country which is a signatory to the New York Convention, 1958.

It was also reaffirmed by the court that where, in an arbitration which takes place outside India, assets of one of the parties are situated in India and interim orders are required *qua* such assets, including preservation thereof, the courts in India may pass such orders.

This judgment of the Supreme Court has settled a long-standing question of law in relation to the rights of Indian parties to elect a foreign seat of arbitration. Foreign entities often choose neutral jurisdictions for their disputes in India. With this judgment, Indian subsidiaries of foreign entities will now be able to choose foreign seats of arbitration as well.

Regulatory Update

Corporate law reform

Limited Liability Partnership (Amendment) Bill, 2021

The Indian Parliament passed the Limited Liability Partnership (Amendment) Bill, 2021, (LLP Bill) seeking to amend the existing

Limited Liability Partnership Act, 2008 (LLP Act).

The LLP Bill has decriminalized certain offences and now provides that violation of the said offences will be punishable with a fine only in place of criminal liability. The violations are in relation to requirements for operation of an LLP, which include:

- changes in partners of the LLP;
- change of registered office;
- filing of statement of accounts and solvency, and annual return; and
- arrangement between an LLP and its creditors or partners, and reconstruction or amalgamation of an LLP.

However, the LLP Bill enhances criminal liability if an LLP or its partners carry out an activity to defraud its creditors, or for any other fraudulent purpose.

The LLP Bill envisages appointment of '*Adjudicating Officers*', appointed by the Central Government, for awarding penalties under the LLP Act and establishment of special courts to ensure a speedy trial of offences under the LLP Act.

The LLP Bill also provides for formation of a '*small limited liability partnership*', which is an LLP where the contribution from partners does not exceed Rs 25 lakhs[1] (which may be increased up to INR 5 crores[2]), the turnover for the preceding financial year is up to Rs 40 lakhs (which may be increased up to Rs 50 crores), or which meets any such requirements as may be prescribed by the Central Government.

From the perspective of operating an LLP, the LLP Bill empowers the Central Government to prescribe the '*Accounting Standards*' or '*Auditing Standards*' for a class or classes of LLPs.

Doing away with retrospective taxation

The Taxation Laws (Amendment) Bill, 2021

The Taxation Laws (Amendment) Bill, 2021 (Taxation Amendment Bill) amends the Income Tax Act, 1961 (IT Act) and the Finance Act, 2012 (2012 Act). The 2012 Act had amended provisions of the IT Act, which resulted in the imposition of tax liability on any income earned from the sale of shares of a foreign company on a retrospective basis. The main feature of the Taxation Amendment Bill is that it proposes to nullify this retrospective basis for taxation.

According to Indian tax law, non-residents are liable to pay tax on any income which arises from any business, property, asset or other source of income situated in India. The 2012 Act made it so that the shares of any company that is registered or incorporated outside India will be deemed to be, or have always been, situated in India if they derive their value substantially from the assets located in India. As a result, any income earned from the sale of such shares will be subject to income tax in India.

The Taxation Amendment Bill envisages the removal of this tax liability, subject to certain conditions:

- if an assessee has filed an appeal or petition in this regard, it must be withdrawn or the person must submit an undertaking to withdraw them;
- if an assessee has initiated or given notice for any arbitration, conciliation, or

[1] *1 lakh = 100,000*

[2] *1 crore = 10,000,000*

mediation proceedings in this regard, the notices or claims under such proceedings must be withdrawn or the person must submit an undertaking to withdraw them;

- the assessee must submit an undertaking to waive the right to seek or pursue any remedy or claim in this regard, which may otherwise be available under any law in force or any bilateral agreement.

If such conditions are fulfilled, all assessment or reassessment orders issued in relation to such tax liability will be deemed to have never been issued. Further, if the assessee becomes eligible for a refund after fulfilling these conditions, the amount will be refunded to them, without any interest.

The government is yet to come up with precise rules and procedures for seeking refunds, or how and in which form should the undertaking be sought from companies.

Introduction of pre-packaged insolvency resolution

Insolvency and Bankruptcy Code (Amendment) Bill, 2021

The Insolvency and Bankruptcy Code (Amendment) Bill, 2021 (IBC Amendment Bill) introduces the concept of pre-packaged insolvency resolution process (PIRP) for micro, small, and medium enterprises (MSMEs). Unlike the corporate insolvency resolution process (CIRP) under the Insolvency and Bankruptcy Code, 2016 where creditors and the debtor itself can initiate the process, PIRP can be initiated only by the debtor. Another difference compared to CIRP is that once PIRP is initiated, the board of directors of the debtor will continue to manage the affairs of the debtor. However, the management may be taken over by a resolution professional if there has been fraudulent conduct or gross mismanagement.

The IBC Amendment Bill prescribes a minimum default amount of at least INR 1 lakh for initiating PIRP, which may be increased to INR 1 crore. Further, PIPR may be initiated by a corporate debtor classified as an MSME under the MSME Development Act, 2006. For applying for PIRP, the debtor must obtain approval of at least 66% of its financial creditors (in value of debt due to creditors) who are not related parties of the debtor.

Path towards privatization

The General Insurance Business (Nationalisation) Amendment Bill, 2021

The General Insurance Business (Nationalisation) Amendment Bill, 2021 (Insurance Amendment Bill) was passed to amend the General Insurance Business (Nationalisation) Act, 1972 which was enacted to nationalize all private companies undertaking the general insurance business in India. The Insurance Amendment Bill seeks to enable increased private sector participation in public sector insurance companies. The Insurance Amendment Bill removes a provision mandating at least 51% state ownership in public sector insurance companies.

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About Chadha & Co.

Chadha & Co. is a leading corporate and commercial law firm based in New Delhi, India. The Firm has a specialized inbound practice in advising domestic and foreign corporations doing business in India on all Indian laws and regulations that are relevant to their business.

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