

Newsletter

January - March 2021

It gives us immense pleasure to circulate this edition of DMD Advocates' newsletter focusing on recent legal developments in India.

In this edition, we have covered some of the key orders, judgements, notifications and advisories issued by the government, courts, tribunals and regulatory authorities from January to March 2021.

We hope you enjoy reading this edition and find it useful in your area of work.



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Supreme Court

Arbitration: Refusal to condone delay for appeal under Section 34 of Arbitration Act appealable under Section 37 - 11 February 2021

In the matter of Chintels India Ltd. vs. Bhayana Builders Pvt. Ltd., a three-judge bench of the Supreme Court has held that an appeal under Section 37(1)(c) of the Arbitration Act, 1996 would be maintainable against an order refusing to condone delay in filing an application under Section 34 of the Arbitration Act, 1996 to set aside an award. To access a copy of the judgement dated 11 February 2021, click [here](#).

IBC: Supreme Court: Pledgee not a financial creditor under the Insolvency & Bankruptcy Code - 3 February 2021

In the matter of Phoenix ARC Private Limited vs. Ketulbhai Ramubhai Patel, a three-judge bench of the Supreme Court upholding the decision of the Resolution Professional as also approved by the National Company Law Appellate Tribunal (NCLAT), has held that a holder or beneficiary of pledged assets is not a

'financial creditor' within the meaning of Section 5(8) of the Insolvency and Bankruptcy Code, 2016 (IBC). The court also relied upon its earlier judgement in the matter of Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited vs. Axis Bank Limited and others, (2020) 8 SCC 401. To access a copy of the judgement dated 3 February 2021, click [here](#).

IBC: NCLT/NCLAT can exercise jurisdiction under section 60(5)(c) of the IBC to stay termination of contracts - 8 March 2021

The Supreme Court, in the matter of Gujarat Urja Vikas Nigam Limited vs. Mr. Amit Gupta & Ors. [Civil Appeal No. 9241 of 2019], has held the following:

(a) NCLT/NCLAT can exercise jurisdiction under Section 60(5)(c) of the IBC to stay termination of Power Purchase Agreement (PPA) only on account of Corporate Insolvency Resolution Process (CIRP) being initiated against the Corporate Debtor (CD).

(b) NCLT/NCLAT correctly stayed the termination of PPA, since allowing it to terminate the PPA would certainly result in the corpo-



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rate death of the CD due to the PPA being its sole contract; and

(c) Broader question of validity/invalidity of ipso facto clauses in contracts was left open for the legislative intervention. To access a copy of the judgement dated 8 March 2021, click [here](#).

IBC: Prohibition in Section 29A and Section 35(1)(f) of the IBC must also attach itself to a scheme of compromise or arrangement under Section 230 of the Companies Act, 2013 - 15 March 2021

The Supreme Court in a recent judgement, in the case of Arun Kumar Jagatramka. vs. Jindal Steel and Power Ltd. & Anr. (Civil Appeal No. 9664 of 2019 and other appeals), has held that (i) prohibition placed by the Parliament in Section 29A and Section 35(1)(f) of the IBC must also attach itself to a scheme of compromise or arrangement under Section 230 of the Companies Act, 2013, when the company is undergoing liquidation under the auspices of the IBC, and (ii) Regulation 2B of IBBI (Liquidation Process) Regulations, 2016 is constitutionally valid. To access a copy of the judgement dated 15 March 2021, click [here](#).

Arbitration: Delay in filing appeals can be condoned as exception and not as rule under Section 37 of the Arbitration and Conciliation Act - 19 March 2021

The Supreme Court in Government of Maharashtra vs. M/s Borse Brothers Engineers and Contractors Pvt. Ltd. observed that a delay beyond 30, 60, or 90 days in filing an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 governed by Article 116 & 117 of the Schedule to the Limitation Act or Section 13(1A) of the Commercial Courts Act, 2015 can be condoned as per discretion of the court as it will lead to speedy disposal of claims. The Court overruled its 2019 judgement of NV International v. State of Assam, wherein it ordered that such delay cannot be accepted. To access a copy of the judgement

dated 19 March 2021, click [here](#).

Limitation: Supreme Court ends the extended limitation period granted from 15 March 2020 to 14 March 2021

The Supreme Court has ended the extended limitation period granted to litigants for filing appeals in 2020 due to the COVID-19 pandemic. This would be applicable in all cases including cheque bounce cases under the Negotiable Instruments Act, or cases under Commercial Courts Act and Arbitration and Conciliation Act. To access a copy of the Supreme Court's order dated 8 March 2021, click [here](#).

IBC: Insolvency Process Maintainable Against Corporate Guarantor Even If Principal Borrower Is Not A 'Corporate Person': Supreme Court - 26 March 2021

In the matter of Laxmi Pat Surana vs. Union of India (Civil Appeal No. 2734 of 2020), the Supreme Court has held that action under Section 7 of the IBC can be initiated by the financial creditor against a corporate person (being a corporate debtor) concerning guarantee offered by it in respect of a loan account of the principal borrower, who had committed default and is not a "corporate person" within the meaning of the IBC. The expression 'debt' would include liability of corporate person on account of guarantee given by it in relation to loan account of any person, including one not being a corporate person, in event of default committed by latter. To access a copy of the Supreme Court's judgement dated 26 March 2021, click [here](#).

IBC: Petition under Section 7 or Section 9 of the IBC is an independent proceeding, unaffected by winding up proceedings - 1 March 2021

In the matter of A. Navinchandra Steels Private Ltd. vs. SREI Equipment Finance Ltd. (Civil Appeal Nos. 4230-4234 of 2020), the court reiterated that a petition either under Section 7 or Section 9 of IBC is an independent proceeding which is unaffected by winding up proceedings that may be filed qua same

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company. Further, the argument on behalf of the Appellant that once a winding up petition is admitted, the winding up petition should trump any subsequent attempt at revival of company through Section 7 or Section 9 petition filed under IBC was held to be untenable. The court also observed that the provisions of the IBC would prevail over the provisions of any other general/special law for the time being in force in view of the non-obstante clause contained in Section 238 of the IBC. The Court, while taking into account Section 279 of the Companies Act, 2013, Sections 13(2) and 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and Section 7 of the IBC, held that a secured creditor stands outside winding up, and can realise its security de hors winding up proceedings. To access a copy of the judgement dated 1 March 2021, click [here](#).

Notifications & Amendments



Notification of Section 21 of the Companies (Amendment) Act, 2019 - 22 January 2021

The Ministry of Corporate Affairs (MCA) has notified 22 January 2021 as the date on which the provisions of Section 21 of the Companies (Amendment) Act, 2019 shall come into force. Section 21 of the Amendment Act amends Section 135 of the Companies Act, 2013 dealing with Corporate Social Responsibility (CSR). To access a copy of the Gazette notification regarding the above appointment date, click [here](#) and to access a copy of the Companies (Amendment) Act, 2019, click [here](#).

Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021 - 22

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The MCA has issued the Companies (CSR Policy) Amendment Rules, 2021 (Amendment Rules) to amend the Companies (Corporate Social Responsibility Policy) Rules, 2014. The Amendment Rules will come into force on the date of their publication in the Official Gazette (i.e. 22 January 2021) unless otherwise provided for certain amendments. Some of the key changes made by the Amendment Rules are as follows:

(a) Entities undertaking CSR Activity to register with Central Government

Effective 1 April 2021, every entity covered under Rule 4(1), that intends to undertake any CSR activity, will be required to register itself with the Central Government. However, this requirement will not affect CSR projects or programmes which have been approved prior to 1 April 2021.

(b) COVID vaccine research to qualify as CSR activity

While activities undertaken in pursuance of normal course of business of the company are excluded from the ambit of CSR activities, activities by a company engaged in research and development of new vaccine, drugs and medical devices in their normal course of business, related to COVID-19 for FYs 2020-21, 2021-22, 2022-23, will qualify as CSR, subject to certain conditions.

(c) CSR Policy to include guiding principles for selection, implementation and monitoring of CSR activities

The definition of CSR Policy has been changed. It is now defined as a statement containing the approach and direction given by the board of a company, taking into account the recommendations of its CSR Committee, and includes guiding principles for selection, implementation and monitoring of activities as well as formulation of the annual action plan.

(d) Administrative overheads not to exceed 5% of total CSR expenditure

The administrative overheads cannot exceed 5% of total CSR expenditure of the company for the financial year and any surplus arising

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out of CSR activities will not form part of the business profit of a company and will be ploughed back into the same project or transferred to the unspent CSR Account.

To view the Gazette copy of the Amendment Rules, click [here](#).

The Faceless Penalty Scheme, 2021 - 12 January 2021

The Central Board of Direct Taxes (CBDT) has notified the Faceless Penalty Scheme, 2021 which has come into force from the date of its publication in the Gazette, i.e. 12 January 2021.

The Scheme will be imposed in respect of such territorial area, or persons or class of persons, or income or class of income or cases or class of cases, or penalties or class of penalties as may be specified by the CBDT. The Scheme lays down the procedure to issue penalty through electronic mode, including the procedures for admission of additional grounds and the admission of additional evidence during the appellate proceedings. It specifies setting up of national faceless penalty centres, regional penalty centres, penalty units as well as review units for the execution of penalty proceedings, to ensure that a penalty order is correctly issued and undergoes proper review before being issued to an assessee.

As per this Scheme, all communication amongst the penalty unit and penalty review unit, with the assessee or any other person or any income-tax authority or the National Faceless Assessment Centre, with respect to any necessary information, documents or evidence etc. for the purposes of imposing penalty under this Scheme, will be done through the National Faceless Penalty Centre. To view the Gazette copy of the Scheme, click [here](#).



Department for Promotion of Industry and Internal Trade (DPIIT)

Standard Operating Procedure (SOP) for processing proposals for foreign investment in sectors/ activities requiring Government approval - 15 January 2021

The DPIIT has released the SOP for processing proposals for foreign investment in sectors/ activities requiring Government approval. The SOP explains the online filing of applications, the procedure for processing, time limits etc. Once a proposal is complete in all respects, no later than six weeks/eight weeks (in cases where comments of MHA have been sought from security clearance point of view) from the receipt of the proposal, the Competent Authority is required to process the proposal for decision and convey it to the applicant, within the next four weeks. Further, for proposals that the relevant Ministry/ Department rejects or in cases where conditions for approval of the proposals are stipulated in addition to conditions laid down in the FDI Policy or sectoral laws/ regulations, the concurrence of the DPIIT is to be compulsorily sought by the relevant Ministry/ Department within 10 weeks/ 12 weeks (in cases where comments of MHA have been sought from security clearance point of view) from the receipt of the proposal. The applicants are required to submit 23 documents, of which nine documents are mandatory. To view a copy of the SOP dated 15 January 2021, click [here](#).

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Webinars & Interviews

Panel discussion on 'Equalisation Levy' organized by Indian Lawyers Association - 6 March 2021

Partner Tushar Jarwal spoke as part of a panel at the Indian Lawyers Association's panel discussion on 'Equalisation Levy'.

Webinar on 'Competition Law - Recent Developments & Impact' - 4 March 2021

PHD Chamber of Commerce organized a webinar on "Competition Law - Recent Developments & Impact". Our Competition law partner Vivek Agarwal was amongst the eminent panellists who shared his views on the benefits & risks of competition law on MSMEs. To view PHD's press release in this regard, click [here](#).

Webinar on Union Budget in association with USISPF - 5 February 2021

DMD Advocates in collaboration with US-India Strategic Partnership Forum (USISPF) conducted a virtual session on India's Union Budget 2021. Our Senior Director and Chief Economist, Sanjiv Malhotra was amongst the eminent panellists. Other panellists included Dr. Arvind Panagariya - Professor of Political Economy at Columbia University, William Foster - VP and Senior Credit Officer at Moody's Corporation and Sanjay Nayar - Chairman of KKR India and Member of the USISPF Board of Directors.

Webinar on Union Budget in association with IGCC - 4 February 2021

DMD Advocates in collaboration with Indo-German Chamber of Commerce (IGCC) organized a webinar to discuss the key budgetary announcements and its implications. Panellists included our taxation Partners Tushar Jarwal and Sachit Jolly and the session was overall moderated by Sanjiv Malhotra, Senior Director and Chief Economist at DMD Advocates. To view the recording of the discussion, click [here](#).

Panel discussion on 'USTR Investigation on EL 2.0 - Next Steps for India' - 16 January 2021

Partner Tushar Jarwal shared his views on the U.S. Trade Representative (USTR) investigation on Equalisation Levy (EL) in a recent panel discussion organized by Taxsutra. To view the recording of the panel discussion, click [here](#).

Webinar on 'Bilateral Investment Treaty Arbitration: Cairn and Vodafone awards' by International Fiscal Association (IFA) - 9 January 2021

Our Founder and Managing Partner (Delhi), Ms Anuradha Dutt, shared her expert views on the recent Cairn Energy and Vodafone awards rendered by the Permanent Court of Arbitration at the Hague under Bilateral Investment Agreements are one of a kind landmark rulings on retrospective taxation which could bear a far-reaching impact on tax policy.

Senior Partner Anuradha Dutt shares her views on recent arbitration award in the case of Cairn Energy with ET Now - 23 December 2020

In an exclusive interview with ET Now, our Founder & Managing Partner (Delhi), Ms Anuradha Dutt shared her views on the arbitration award rendered by the Permanent Court of Arbitration at The Hague in the case of Cairn Energy Plc. To view the interview, click [here](#).

Partner Sachit Jolly shares his views on the recent arbitration award in the case of Cairn Energy with CNBC - 23 December 2020

Partner Sachit Jolly shared his views with CNBC on the arbitration award rendered by the Permanent Court of Arbitration at The Hague in the case of Cairn Energy. To view the interview, click [here](#).

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Publications & Case Highlights

Odisha High Court directs the Additional Commissioner to conclude VAT proceedings commenced under Section 79 of OVAT Act in a time bound manner - 25 March 2021

The Odisha High Court vide its order dated 25 March 2021 has directed the Additional Commissioner to conclude the proceedings initiated under Section 79 of the Orissa Value Added Tax (OVAT) Act against GE Power India Ltd in a time bound manner. The Court also directed the Additional Commissioner to consider the jurisdictional objections raised by the Petitioner (GE) and further granted liberty to avail appropriate remedies in accordance with law. DMD team was led by Partner Tushar Jarwal, who was assisted by Counsel Rahul Sateija, Senior Associate Deepak Thackur and Associate Anurag Soan.

CCI Order in favour of client Usha International Limited - 17 March 2021

In a recent win, our Partner Pawan Sharma along with Senior Associate Anuj Shah successfully defended a large Indian company (Usha International Limited) in a cartel/bid-rigging investigation wherein it was inter-alia alleged that Usha International Limited rigged a bid floated by Pune Zilla Parishad, for procurement of sewing machines, by managing other bidders authorized by it and by also bidding alongside the same authorized bidders.

Out of the four defendants, our client is the only one which got exonerated whereas penalties were imposed on the other three defendants for violation of the provisions of the Competition Act, 2002 by the Competition Commission of India (CCI). To view a copy of the CCI order dated 17 March 2021, click [here](#).

Bombay High Court grants bail to our client, a German national, in a case registered under the Narcotic Drugs and

Psychotropic Substances (NDPS) Act - 17 March 2021

In a case recently argued by Partner Tushar Jarwal and assisted by Counsel Rahul Sateija, Senior Associate Deepak Thackur and Associate Anurag Soan the Bombay High Court (Goa Bench) recently granted bail to a German national, who was arrested in March last year in a case registered under the NDPS Act. For further details regarding the case, click [here](#).

Case Analysis: Supreme Court's decision in M/s. Canon India Pvt. Ltd. v. Commissioner of Customs - 13 March 2021

Partner Anay Banhatti analyses the recent Supreme Court judgement dated 9 March 2021 in the case of M/s. Canon India Pvt. Ltd. v. Commissioner of Customs, wherein the Supreme Court has decided on the jurisdiction of the Directorate of Revenue Intelligence (DRI) officers to issue Show Cause Notices under Customs Act. To view the article published by *Tax India Online*, click [here](#).

Delhi HC grants relief to DMD's client, a leading manufacturer in healthcare sector - 16 March 2021

In a case successfully argued by our Partner Tushar Jarwal along with Counsel Rahul Sateija, Senior Associate Deepak Thackur and Associate Anurag Soan, the Delhi High Court has granted relief to our client British Biologicals, challenging the initiation of DGAP investigation for not passing GST rate reduction benefit from 28% to 18%, where the original complainant claimed anonymity and the jurisdictional commissioner filed the complaint on behalf of such person without disclosing the exact particulars under the anonymous complaint. The court directed to raise jurisdictional objections before the NAA and granted liberty to approach HC if required. For further details regarding the case, click [here](#).

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Publications & Case Highlights

Engineering Analysis Centre of Excellence Private Limited vs. CIT & anr., CA Nos. 8733-8734 of 2018 - 2 March 2021

Partner Sachit Jolly successfully argued before the Supreme Court on behalf of Engineering Analysis (lead case) and GE India Technology Centre on, inter-alia, the aspect of impossibility of performance, i.e., obligation to withhold tax cannot be fastened on a payer, when the provision requiring such withholding tax was not on the statute book at the time of remittance. To view DMD's case highlight, click [here](#).

Successfully represented JK Tyres (interveners) in proceedings before the Delhi High Court – 10 February 2021

Our Partner Tushar Jarwal along with Partner Vivek Agarwal, Counsel Rahul Sateja (assisted by Senior Associate Deepak Thackur and Associate Anurag Soan) successfully appeared for JK Tyres (interveners) in proceedings in relation to a writ filed by Bridgestone India before the Delhi High Court. The court dismissed the writ challenging the final findings of the Designated Authority, Directorate General of Trade Remedies (DGTR) dated 27 November 2020, terming such as 'premature'. For further details regarding the case, click [here](#).

Article on 'Unwrapping India's Probe into Google Pay' - 6 December 2020

Partner Vivek Agarwal and Associate Anmol Malhotra break down the fine print from the prima facie order of the Competition

Commission of India initiating a detailed investigation into the alleged practices of Google favouring its own Google Pay to the detriment of other UPI based digital payment apps on the Play Store in this article published by *Global Law Experts*. To view the article, click [here](#).

Case Highlight: Judgement of Tis Hazari Court of Additional Chief Metropolitan Magistrate in connection with prosecution launched by IT department - 18 November 2020

Our taxation Partner, Sachit Jolly, along with Principal Associate Divya Bhalla and Associate Abhishek Chauhan, successfully represented a high net worth individual in a prosecution launched by the Income tax Department in connection with the alleged undisclosed bank account in HSBC, Switzerland. The judgement has come as a huge relief for various taxpayers against whom prosecution has been launched by the Income tax Department as a matter of routine, without even examining whether there was any material or evidence which could withstand the scrutiny in any court of law. The judgment also reinforces the settled principle that not all documents/material qualify as evidence and that in the absence of any corroborative material, the base notes received by the Indian Government from the French Government do not meet the test of evidence. To view DMD's case highlight, click [here](#).

PUBLICATIONS

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Awards & Recognition

DMD's Senior Partners featured in "The A-List" compiled by India Business Law Journal - 17 December 2020

Ms. Anuradha Dutt, Founder & Managing Partner (Delhi) and Ms. Fereshte Sethna, Founder & Managing Partner (Mumbai) featured in "The A-List", compiled by India Business Law Journal, which seeks to recognize India's most outstanding 100 lawyers. To access the A-list, click [here](#), [Click here](#) to read the report that accompanies the A-List.

DMD Advocates featured in the "Deals of the Year 2020" list compiled by India Business Law Journal - 9 February 2021

DMD Advocates has featured in the "Deals of the Year 2020" list compiled by India Business Law Journal for securing landmark victory for longstanding client Vodafone at the PCA at The Hague with respect to the Indian government's retrospective tax claim of approximately USD 5.5 billion together with penalty and interest (approximately INR 40,000 Crore) stemming from the company's acquisition of the Indian assets of Hutch back in 2007. To view the article on "Deals of the Year 2020" by IBLJ, click [here](#).

Partner Sachit Jolly has been recognized as a "Highly Regarded" tax controversy lawyer in India by ITR and also ranked by Chambers and Partners

Our taxation partner Sachit Jolly has been recognized as a "Highly Regarded" tax controversy lawyer in India by International Tax Review (ITR) World Tax. Click [here](#) to view the ITR rankings. Also, he has been ranked in [Chambers and Partners](#) India Tax Rankings for his commendable track record in contentious direct tax matters.

Partners Sumit Sinha and Vivek Agarwal recognized as 'India's Future Legal Leaders' by India Business Law Journal

Partners Sumit Sinha and Vivek Agarwal have been recognized as 'India's Future Legal Leaders' by India Business Law Journal. The 'Future Legal Leaders' list was compiled by IBLJ based on extensive research conducted in September and October 2020. To access the entire list, click [here](#).

DMD Advocates selected as an exclusive 'Recommended Firm' for Competition Law in India by Global Law Experts, London

DMD Advocates has been selected as an exclusive 'Recommended Firm' for Competition Law in India by Global Law Experts, London. Our competition law partner, Vivek Agarwal, has been selected as the 'Recommended Attorney' for India.



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Partners & Directors

Anuradha Dutt

Founder & Managing Partner, Delhi
*Litigation,
International Arbitration*

Vijayalakshmi Menon

Founder & Senior Partner, Delhi
Litigation, Intellectual Property Rights

Pawan Sharma

Partner, Delhi
Regulatory, Competition

Ekta Kapil

Partner, Delhi
Litigation

Sanjiv Malhotra

Senior Director & Chief Economist, Delhi
Transfer Pricing

Anay Banhatti

Partner, Mumbai
Taxation

Sachit Jolly

Partner, Delhi
Taxation

Kuber Dewan

Partner, Delhi
Dispute Resolution

Fereshte Sethna

Founder & Managing Partner, Mumbai
*International Litigation,
Alternate Dispute Resolution*

Rashi Dhir

Senior Partner, Delhi
Corporate

Jeremy Lynn Pereira

Partner, Delhi
Litigation, Arbitration

Tushar Jarwal

Partner, Delhi
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Anish Kapur

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