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Legal Updates

TRAI releases recommendations on MIB's back reference on TRAI's recommendations dated 19.11.2014 and MIB reference on TRAI's recommendations dated 13.11.2019 relating to platform services

The Telecom Regulatory Authority of India ("**TRAI**"), on 02.02.2021, issued its recommendations ("**2021 Recommendations**") on the Ministry of Information and Broadcasting's ("**MIB**") back reference on TRAI's recommendations dated 19.11.2014 on "Regulatory Framework for Platform Services" ("**2014 Recommendations**") and MIB reference on TRAI's recommendations on "Platform Services offered by DTH Operators" dated 13.11.2019 ("**2019 Recommendations**"). The salient features of the 2021 Recommendations are as follows, *inter alia*:

(a) Anybody registered as a Distribution Platform Operator ("**DPO**") shall be eligible to carry Platform Services ("**PS**") channels, provided that the MIB is able to specify compliance structure to ensure that those providing PS make full disclosure on ownership status and comply to the Programme and Advertising Codes prescribed under the Cable Television Network Rules, 1994.

(b) Any person / entity desirous of providing local news and current affairs as PS, or already providing such services, must be incorporated as a company under the Companies Act, 2013.

(c) A maximum of 15 PS channels may be offered by Multi-Service Operators ("**MSOs**"), Internet Protocol Television ("**IPTV**") operators and Headend-in-the-Sky ("**HITS**") operators.

(d) MIB to obtain security clearance for all MSOs / Local Cable Operators ("**LCOs**") who wish to offer PS and were not security cleared by the Ministry of Home Affairs at the time of registration, while they run their PS. However, if at any time before the MIB obtains the security clearance, it is determined that the programming service offered on PS, and which has been registered on the online system, is inimical to India's national security or to public interest, MIB may require the MSO / LCO to withdraw from distribution of the PS channel or the programming service and / or cancel the registration. Further, TRAI recommended that MIB may establish a procedure to review the security clearance of all DPOs (who are offering PS) including wherever there is any change in their ownership / control, and that MIB may obtain

requisite undertaking from the DPOs at the time of granting permission for offering PS for duly notifying MIB in case of change of ownership / control.

(e) Definition of PS to be as follows: "*Platform services (PS) are programs transmitted by Distribution Platform Operators (DPOs) exclusively to their own subscribers and does not include Doordarshan channels and registered TV channels. PS shall not include foreign TV channels that are not registered in India.*" Registered television channels or television channels means a channel, which has been granted downlinking permission by the Central Government under the policy guidelines issued or amended by it from time to time and reference to the term 'channel' shall be construed as a reference to 'television channel'.

(f) Regarding transmission of programmes: (i) the programme transmitted by a DTH operator / MSO / IPTV / HITS operator as a PS shall be exclusive and the same shall not be permitted to be shared directly or indirectly with any other DPO; (ii) the programme transmitted by a DTH operator / MSO / IPTV / HITS operator as a PS shall not directly or indirectly include any 2 registered TV channels or Doordarshan channel or foreign TV channel. Time-shift feed of registered TV channels (such as +1 services) shall not be allowed as a PS; (iii) the DTH operator / MSO / IPTV / HITS operator shall ensure and provide an undertaking to the MIB in the prescribed format that the programme transmitted is exclusive to their platform and not shared directly or indirectly with any other DPO; and (iv) in case the same programme is found available on the PS of any other DPO, MIB / TRAI may issue direction to immediately stop the transmission of such programme. MIB also reserves the right for cancellation of registration of such PS of the DTH operator/ MSO / IPTV / HITS operator.

RERC issues RERC (Electricity Supply Code and Connected Matters) Regulations, 2021

Rajasthan Electricity Regulatory Commission **("RERC/Commission")** on 03.02.2021 issued RERC (Electricity Supply Code and Connected Matters) Regulations, 2021 **("2021 Regulations")**. The 2021 Regulations provide detailed obligations of Distribution licensees and consumers towards each other. It specifies a set of practices that must be adopted by the Distribution Companies to provide efficient, time bound, and consumer friendly service to the consumer. While framing the 2021 Regulations, RERC has prioritized quality of supply to consumers and ensured low cost, efficient/economical utilization of the licensee network to minimize the time period for getting electric connection. The 2021 Regulations aim at the following:

(a) To efficiently utilize the network, avoid right of way issues and facilitate consumers, enhanced contract demand limit for various voltage levels from the existing levels, subject to technical feasibility.

(b) To facilitate emergency services, dedicated feeders, i.e. Railway, Hospitals, PHED, Defence, are exempted from power cuts. The existing hazardous electric lines may now be shifted at lower cost. However, Regulations have been made more stringent to stop/minimize theft and malpractices.

(c) In light of the Electricity (Right of Consumers) Rules, 2020 dt. 31.12.2020, the Commission has incorporated the provisions of the Rules appropriately wherever it deemed fit with a view to provide better services to the consumers and for creating consumer awareness and bringing in clarity.

(d) Various definitions including that of Load factor have been modified to bring in clarity and also to bring them in conformity with Electricity Act, 2003 and other Regulations.

(e) No additional amount for extension of distribution mains/supply line will be required to be deposited for domestic and non-domestic (in urban area and in rural area) up to 300 meter as against 50 meter proposed in the draft.

(f) The distribution companies are purchasing push fit meters for which no separate meter box is required. Accordingly, it has been clarified that in case of push fit meter, no extra cost towards meter box shall be recovered.

(g) To provide timely information to consumers, a provision for application tracking mechanism has been introduced. Procedures for submission of application, submission of installation certificates, transfer of connection and change of category have been rationalized so as to avoid any inconvenience to consumers.

(h) To facilitate consumers regarding metering issues, consumers have been allowed to purchase own meters and a provision for self-meter reading has also been introduced.

Distribution Companies shall have to provide the data access to consumer, if they so require.

(i) To avoid any hassles to consumer seeking permanent disconnection, a provision has been made for prompt refund of security and issue of No dues certificate on permanent disconnection.

MCA initiates process of decriminalisation of compoundable offences under the LLP Act 2008 and other proposed changes

Ministry of Corporate Affairs ("**MCA**") on 03.02.2021 has proposed the following changes to the Limited Liability Partnership Act, 2008 ("**LLP Act**") for greater ease of doing business for law abiding LLPs:

(a) To initiate the process of decriminalization of compoundable offences under the LLP Act. In all 12 offences are proposed to be decriminalised and 1 provision (section 73) entailing criminal liability is proposed to be omitted.
(b) To reduce the additional fee of Rs 100 per day by suitably amending section 69 of the LLP Act.
(c) To introduce the concept of small LLPs.
(d) To allow LLPs to raise capital through issue of fully secured non-convertible debentures.

Companies (Incorporation) 2nd Amendment Rules, 2021

MCA has notified the Companies (Incorporation) Second Amendment Rules, 2021 ("**2021 Rules**") to further amend the Companies (Incorporation) Rules, 2014. The 2021 Rules have been made with a view to make space for easing norms around setting up of one person company and conversion of one person company into any other type of company. The following amendments have shall come into effect from 01.04.2021:

(a) Non -resident Indians who are citizens of India can now set up a One Person Company in India which was not permitted earlier.
(b) Sub-rule (7) which bars conversion of One Person Company into any other company unless certain specific conditions have been met is being omitted.
(c) Conversion of one person company into a public limited company or a private limited company is now allowed anytime. The following changes have been made with respect to conversion of One person Company:

i. The One Person company shall alter its memorandum and articles by passing a resolution in accordance with subsection (3) of section 122 of the Act to give effect to the conversion and to make necessary changes incidental thereto.
ii. A One Person company may be converted into a Private or Public Company, other than a company registered under section 8 of the Act, after increasing the minimum number of members and directors to two or seven members and two or three directors, as the case may be, and maintaining the minimum paid-up capital as per the requirements of the Act for such class of company and by making due compliance of section 18 of the Act for conversion.

(d) A private company other than a company registered under section 8 of the Act may convert itself into one person company by passing a special resolution in the general meeting.

Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2021

MCA has issued the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2021 to further amend the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 to insert a new sub-rule 25 (1A) Rule 25 specifying that a scheme of merger or amalgamation under section 233 of the Companies Act, 2013 may be entered into any of the following class of companies, namely:-

(a) Two or more start- up companies; or
(b) One or more start up company with one or more small Company

"Start Up Company" means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognised as such in accordance with notification number G.S.R. 127 (E), dated the February 19, 2019 issued by the Department for Promotion of Industry and Internal Trade.

As per the above amendment mergers and amalgamations among start -ups and between start-ups and small companies will be eligible for the fast- track process. The idea is to improve ease of doing business.

Companies (Specification of Definitions Details) Amendment Rules, 2021

MCA has notified the Companies (Specification of Definitions Details) Amendment Rules, 2021 to further amend the Companies (Specification of Definitions Details) Rules, 2014 inserting the definition of "small company" to mean a company whose paid- up capital and turnover shall not exceed Rupees 2 crores and Rupees 20 crores respectively. This definition shall come into force from 01.04.2021.

This is aimed at benefiting more than 2 lakh companies in compliance required.

Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021

MCA issued Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021 ("**Amended CSR Rules**") vide notification dated 22.01.2021 to allow companies to undertake multi-year projects and also require that all CSR implementing agencies be registered with the Government. Other salient features of the Amended CSR Rules include:

(a) Activities undertaken by a Company under Section 135 of the Companies Act, 2013, and activities undertaken in pursuance of normal course of business of the company engaged in research and development activity of new vaccine, drugs and medical devices, any research and development activity of new vaccine, drugs and medical devices related to COVID-19 for financial years 2020-21, 2021-22, 2022-23 subject to the conditions specified, are now included under the definition of CSR under Regulation 2(d);

(b) *International Organization* is now defined under Rule 2(g) as an organization notified by the Central Government as an international organization under section 3 of the United Nations (Privileges and Immunities) Act, 1947. International organisations have been permitted to carry out designing, monitoring and evaluation of the CSR projects or programmes.

(c) Companies have been permitted to set off the excess amount spent under CSR up to three succeeding financial years and they have also been allowed to create or acquire capital assets through CSR in the name of beneficiaries or a public authority or registered trust, among others.

(d) Non-compliance with CSR provisions has been decriminalised by shifting such offences to penalty regime, while Companies having CSR obligation below Rs 50 lakhs have been exempted from constituting a CSR Committee.

The idea for the amendment is to move from just looking at expenditure to focusing on impact of CSR projects implemented under the Companies law. The amendment is intended to boost transparency.

Supreme Court rules that collusive commercial transactions with corporate debtor will not constitute 'financial debt'

Supreme Court in Civil Appeal 2842 of 2020 titled as *Phoenix Arc Pvt. Ltd. v. Spade Financial Services Ltd. and Ors.* affirmed the decision of National Company Law Tribunal ("**NCLT**") holding that Spade Financial Services Pvt. Ltd. ("**Spade**") and AAA Landmark Pvt. Ltd. ("**AAA**") which is a wholly owned subsidiary of Spade, due to the collusive nature of their transactions alleged to be a financial debt, cannot be labelled as financial creditors. The Hon'ble Supreme Court held that Spade and AAA are related parties of the corporate debtor and are ineligible to be a part of the Committee of Creditors ("**CoC**") in accordance with the first proviso of section 21(2) of the Insolvency Bankruptcy Code, 2016 ("**Code**").

Succinctly capitulating the background, claims were invited by the Insolvency Resolution Professional ("**IRP**") during the Corporate Insolvency Resolution Process ("**CIRP**") and accordingly, Spade and AAA filed their claims as financial creditors. NCLT vide its order dated 31.05.2018 allowed Spade and AAA to submit their claims however, on applications filed by YES Bank and Phoenix Arc Pvt. Ltd. ("**Phoenix**") i.e. the financial creditors, seeking exclusion of AAA and Spade from the CoC on the ground that they are/were related parties of the corporate debtor, held that Spade and AAA did not qualify to be considered as financial creditors. Contention raised by Spade and AAA was that they were not related parties on the date of the admission of insolvency application. Accordingly, the question that arose before the Hon'ble Supreme Court was whether

the disqualification under the proviso would attach to a financial creditor only in praesenti, or if the disqualification also extends to those financial creditors who were related to the corporate debtor at the time of acquiring the debt?

Supreme Court held observed exclusion under the first proviso to section 21(2) of the Code is related not to the debt itself but to the relationship existing between a related party financial creditor and the corporate debtor. The court observed that as such a financial creditor who *in praesenti* is not a related party, would not be debarred from being a member of the CoC. However, in case where the related party divests itself of its shareholding or ceases to become a related party in a business capacity with the sole intention of participating the CoC and sabotage the CIRP, it would be in keeping with the object and purpose of the first proviso to section 21(2), to consider the former related party creditor, as one debarred under the first proviso. Further, for the nature of transactions, the Hon'ble Court observed that a transaction which is sham or collusive would only create an illusion that money has been disbursed to a borrower with the object of receiving consideration in the form of time value of money, when in fact the parties have entered into the transaction with a different or an ulterior motive. The Code has made provisions for identifying, annulling or disregarding "avoidable transactions" which distressed companies may have undertaken to hamper recovery of creditors in the event of the initiation of CIRP. The Hon'ble Court concluded that since the commercial arrangements between Spade and AAA, and the corporate debtor were collusive in nature, they would not constitute a 'financial debt' as for the success of an insolvency regime, the real nature of the transactions has to be unearthed in order to prevent any person from taking undue benefit of its provisions to the detriment of the rights of legitimate creditors.

NCLAT holds that 'financial debt' includes default in payment of the accepted amounts by the corporate debtor including a 'deposit'

National Company Law Appellate Tribunal ("**NCLAT**") in Company Appeal (AT) (Insolvency) No. 502 of 2020 titled as *M/s Satish Chand Gupta v. Servel India Pvt. Ltd.* held that where there is a default in payment of the accepted amounts by the corporate debtor, it comes within the purview of the definition of 'financial debt'. The present appeal was filed challenging order dated 13.02.2020 passed by the National Company Law Tribunal, ("**NCLT**") New Delhi, which held that corporate debtor is not in default as the amount deposited with the corporate debtor does not come under the definition of the 'debt'. Appellant contended that the amounts disbursed by the appellant came under the purview of a 'financial debt' and merely because the amount is described as 'deposit', will not exclude it from the definition of 'financial debt'. The amounts deposited were disbursed in lieu of gaining interest which was credited by the corporate debtor consistently till 31.03.2018.

NCLAT observed that any person who has the right to claim payment, can file the claim whether matured or unmatured. The question is as to whether there is a default or not. Section 3(11) of the Code defines debt meaning a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. Maturity of claim, default of claim or invocation of guarantee has no nexus with the filing of claim before an 'Interim Resolution Professional' and a 'Resolution Professional'. Accordingly, NCLAT held that for invoking the jurisdiction of NCLAT even a partial failure by the corporate debtor to repay a 'deposit' is sufficient and a distinction between deposit and loan may not be a relevant factor for interpreting the term 'deposit'. NCLAT opined that the definition of the term 'deposit' is of a wider amplitude.

NCLAT held that a resolution professional is not vested with adjudicatory powers

NCLAT in in Company Appeal (AT) (Insolvency) No. 63 of 2021 titled as *Avil Menezes, Resolution Professional of AMW v. Shah Coal Pvt. Ltd.* while observing that a resolution professional, who is only supposed to collate the claims which implies comparison with the record and verification, does not have a locus to maintain an appeal as an aggrieved party. In the present appeal preferred by a 'resolution professional', order of NCLT, Ahmedabad was under challenge which allowed the application of 'Shah Coal Pvt. Ltd.' to include its claim in the category of a 'financial creditor' on the ground that the claim related to supply of goods and fell within the purview of the 'operational debt'. NCLAT concluded that only a creditor can assail such decision and a resolution professional is not vested with adjudicatory powers. NCLAT observed that a resolution professional is part of the mechanism and all its actions are subject to control of the adjudicating authority. This decision has been passed in furtherance to the decision passed in *S. Rajendran v. Jonathan Muralidarane* [2019 SCC OnLine NCLAT 758].

APTEL requests CEA to undertake necessary studies and recommend fair and equitable solutions to issues arising from facility of power banking

Appellate Tribunal for Electricity ("**APTEL**") in *Tamil Nadu Spinning Mills Association v. TNERC & Ors.* set aside and vacated part of the directions passed in the impugned order with respect to the wind tariff order passed by TNERC which, *inter alia*, increased the cross subsidy surcharge, banking charges and open access charges. The wind tariff order also withdrew banking facility for wind power projects commissioned after 31.03.2018 and new or existing wind energy generators selling under third party open access sale scheme.

APTEL observed that several state commissions are struggling to find fair and equitable solutions to the vexed issues arising from facility of power banking and that an ad hoc approach is being followed. APTEL observed that so long as the preferential treatment for renewable sources of electricity is mandated by law and public policy, the benefit of power banking cannot be taken or wished away and acknowledged the need for a fair dispensation wherein the facility causes minimal disturbance to the economic interests of other utilities and consumers. It further stated studies must be undertaken by the state commissions to help evolve a fair, equitable and reasonable package on power banking for renewable sources of energy that would have continuity and certainty. APTEL accordingly requested the Central Electricity Authority ("**CEA**") to undertake the necessary study and recommend fair and equitable solutions balancing the competing interests bearing in mind the legislative scheme and public policy of the states such that all state commissions are properly guided and a uniform policy can be formulated having pan-India application.

A-142, Neeti Bagh
New Delhi – 110 049, India
T: +91 11 4579 2925 F: +91 11 4659 2925
E: mail@neetiniyaman.co
W: www.neetiniyaman.com

Office No. 51, 4th Floor, Nawab Building,
327, Dr. D.N. Road,
Opp. Thomas Cook, Flora Fountain
Mumbai – 400 001, India
T: +91 22 4973 9114