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THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2018: A STEP FORWARD TOWARDS MAKING INDIA A CENTRE OF ROBUST ALTERNATIVE DISPUTE RESOLUTION MECHANISM

Arbitration has come to be the most effective and sought after method of dispute resolution in commercial contracts rather than litigation, which more often than not, turns out to be a long drawn and expensive process. However, international commercial arbitrations in India has not gained as much momentum as the domestic arbitrations due to its limitations, *namely*, the absence of an impactful institution for international arbitration, existence of a stringent timeline for passing arbitral awards and the involvement of domestic courts in the appointment of arbitrators. To deal with such aforementioned constraints, high level committee was set up which, *inter alia* recommended setting up of an Arbitration Promotion Council of India and a Specialist Arbitration Bench to deal with and dispose international as well as domestic commercial disputes and as a result Arbitration and Conciliation (Amendment) Bill 2018 ("**Bill**") was passed by the Union Cabinet to bring in reforms as under:

Setting up the Arbitration Promotion Council of India ("APCI")

- One of the promising amendment proposed *vide* this Bill is the introduction and establishment of the APCI, an independent body to lay down standards to grade arbitral institutions and accredit arbitrators and arbitral institutions in India, which shall be chaired by a Judge of the Supreme Court or Chief Justice or Judge of any High Court or any eminent person.

- Establishment of the APCI and its consequent accreditation will help improve the existing under-performing arbitral institutions and incentivise them to enhance their functioning. This will help foster healthy competition between the institutions to achieve international standards.

Provision for establishment of designated arbitral institutions

Another significant amendment proposed *vide* the Bill is the establishment of designated arbitral institutions by the Supreme Court or the High Courts, for speedy appointment of arbitrators to resolve disputes. This will help diminish the burden on the Courts as the applications to the Courts pertaining to "court appointed arbitrators" will shift to such arbitral institutions.

Protection of confidential information of parties and providing immunity to the Arbitrator

The Bill also proposes the introduction of a new section which mandates that the arbitrator and the arbitral institutions shall keep confidentiality of all arbitral proceedings except award. This amendment may enhance the trust that Parties may repose in the arbitrator, and help in faster resolution of the disputes. However, the Bill does not contemplate the consequences of breach of the confidentiality obligations by the arbitral institutions. Further, the Bill proposes to provide immunity to the arbitrators from suits or other legal proceedings, for any action or omission done in good faith in the course of the arbitration proceedings thus protecting them in all instances where the decisions/ awards have been passed in good faith.

Concerns and complexities of the Amendment Act, 2015 ("Act") addressed by the Bill

Applicability of the Act to certain instances: The applicability of the Act to arbitration matters and court proceedings has also been clarified in the Bill and a new provision has been proposed in the Bill to enunciate cases and matters to which the Act shall not apply, unless the parties to the arbitration thereto agree otherwise.

Exclusion of International Arbitration from the bounds of timeline

A timeline of twelve (12) months was imposed on the Tribunal for issuing arbitral awards under the provisions of Section 29A by the Act. The Bill proposes to exclude international arbitration from the bounds of the aforesaid timeline and make the timelines applicable in cases of domestic arbitration from the date of completion of the

pleadings of the parties involved in such domestic arbitrations.

This abovementioned proposed amendment will allow more complex international commercial arbitrations (*to be seated in India*) which are being governed by institutional rules, by removing the impediment of timelines.

Conclusion

The legislature, in order to improve the Arbitration landscape, both ad hoc and institutional and to clarify the issues that have arisen while and during the practical application of the provisions of the exant laws, have drafted and proposed this Bill. Although, the establishment of the APCI and arbitral institutions appears to be a promising move towards setting up a dedicated body as well as acting as a framework for the promotion of international as well as domestic arbitration, there still seems to be certain lacunae that may require legislative attention. Some of these include ambiguity in the powers and functions of the APCI, possibility of delay in the conduct of arbitral proceedings due to exclusion of timeline in connection with international arbitration, and issue pertaining to protection of confidential information in cases where the matter proceeds to Court or is requisitioned to Court in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

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INITIAL COIN OFFERINGS: A MODE OF FUND RAISING

Initial Coin Offering ("**ICO**") is a form of fund raising that has gained recognition and speed in the recent past. The concept revolves around crypto currencies and blockchain technology. Crypto currency is a digital currency where encryption techniques are used to regulate the generation of the units of currency, more commonly called "mining".

How does an ICO work?

The concept of ICO is similar to that of Initial Public Offering ('**IPO'**). In an ICO, however, instead of issue and allotment of shares of the company, the company will create crypto-tokens and shall issue such tokens to the investors corresponding to the value of the investment.

The company proposing to raise funds through ICO presents whitepaper on the new virtual currency that it is desirous of launching. Whitepaper typically details everything you need to know about the new currency including commercial, technological and financial details. Based on the responses received from the public, the company determines the amount that it wants to raise in the form of crypto currency. The company thereafter creates digital tokens and assigns to the token, a value that it deems fit. Investors, thereafter invest in the company using any common and popular crypto currency in exchange for which, tokens of equivalent value are given to the investors. Upon generation of targeted funds, the company closes its ICO and encashes the crypto currency collected from the investors. The investors are, thereafter, free to encash their digital token/s or trade them on exchange platform/s which recognizes and list the said digital token/s as a recognized crypto currency.

Analysis of Advantages and Risks

One of the significant advantages of ICO is that it is a source of funding wherein, upon generation of sufficient funds, issue of tokens and closing of the ICO, the liability of the company towards token holders ceases to exist, as opposed to the traditional and most common method of fund raising through issue of shares for investment received in an IPO. Further, ICOs are self regulated. This essentially means that the rules for funding including the value of the tokens, time of encashment of tokens, etc. are determined by the company. ICOs are based on crypto currencies, which is highly volatile

Regulation of Crypto Currencies:

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In India, there is no regulatory body which regulates crypto currencies, since any form of virtual currency is not considered legal tender in India. However, in certain countries like South Korea, Japan, Switzerland and Germany, the authorities have established and laid down guidelines and regulations which make it easy to regulate the movement of money invested in virtual currencies by its citizens.

A notable effort at regulating illegal trade in virtual currencies can be seen in the latest announcement by South Korea's Financial Services Commission. South Korean Government has announced a ban on anonymous trading in crypto currency and has directed investors to convert their virtual bank account into real-name bank account and connect it with their existing real-name bank account, so as to ensure that deposits and withdrawals are allowed only between the real-name bank account and the connected (converted) crypto-exchange account.

Applicability in India

In India, the government has clarified, time and again, that crypto currencies are not legal tender in transactions and cannot be used as or replace the existing currency. However holding crypto currencies or investing therein is not illegal.

However, since crypto currency is not declared as a legal tender in India, an Indian company may not be able to raise funds in the form of ICO from any individual or entity in India. However, Indian companies may raise funds in virtual currencies through ICO from global investors in countries like USA, Japan, Singapore and Europe, to name a few. A few notable such fund raising through ICO were successfully concluded by Drivezy India Travels Private Limited and Belfrics Cryptex Private Limited which raised funds through ICO in Japan and Singapore, respectively.

Conclusion:

In the present day, virtual currencies have come to be accepted globally and commonly invested in by the general public, despite its volatility. Any attempt by the Governments of the world, at regulating the virtual currencies rather than placing a blanket ban or de-recognizing them *per se*, will go a long way in regulating the illegal activities connected therewith, giving the investors and companies an opening into this contemporary method of fund raising, however the exact modalities of such form of fund raising are yet to be seen.

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MCA notifies commencement of Section 132 (3) and (11) of the Companies Act, 2013

Central Government, *vide* its notification dated 21st March 2018, notified provisions of sub-sections (3) and (11) of Section 132 of the Companies Act, 2013, pertaining to functions and powers of the National Financial Reporting Authority and the appointment of secretary and employees thereof, *respectively*, to come into force on and from 21st March 2018. Also, the National Financial Reporting Authority (Manner of Appointment and other Terms and Conditions of Service of Chairperson and Members) Rules, 2018 dated 21st March 2018 was notified by the Central Government.

[*Source: www.mca.gov.in/Ministry/pdf/commencementNotification2103_21032018.pdf*]

GST Council recommends introduction of e-way Bill

GST Council in its 26th meeting held on 10th March 2018, recommended e-way bill to be introduced with effect from 1st April 2018 for inter-State movement of goods across the country and from 1st June 2018 for intra-State movement of goods, for individual consignments of value in excess of Rs. 50,000/- (Rupees Fifty Thousand only). Under the e-way bill system, transporters will have to produce an e-way bill for moving any goods worth Rs 50,000/- (Rupees Fifty Thousand only) and above, from one state to another. Consignments of value lesser than Rs. 50,000/- (Rupees Fifty Thousand only) are exempted from generation of e-way bill. Further, the time period for the recipient to communicate his acceptance or rejection of the consignment would be the validity period of the concerned e-way bill or 72 hours, *whichever is earlier*. Further, extra validity period has been provided for Over Dimensional Cargo.

[*Source:https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwjxsKzyZvaAhUMpY8KHbsvAiQQFggtMAE&url=http%3A%2F%2Fwww.cbec.gov.in%2Fhtdocs-cbec%2Fpress_release%2Fpress-release-ewaybill.pdf&usg=AOvVaw1b5PLjRU1lwdkIIS3oEhWp*]

Supreme Court recognises Passive Euthanasia, Living Wills

The Supreme Court *vide* its judgment dated 9th March 2018 in the case of *Common Cause (A Regd. Society)* v. *Union of India and Another* ruled that passive euthanasia may be permissible for terminally ill patients with no hope of recovery, in cases that maybe approved by the medical board. The apex Court further held that '*living will*' should be permitted since a person cannot be allowed to continue suffering in a comatose state when he or she doesn't wish to live, and stated that advance directives for terminally-ill patients could be issued and executed by the next friend and relatives of such person after which a medical board would consider such directives.

[*Source: http://sci.gov.in/judgments (W.P.(C) No.-000215-000215 / 2005)*]

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Linking of Aadhaar not mandatory unless for the purpose of availing Subsidies

The Supreme Court *vide* its order dated 13th March 2018 in the case of *Justice K.S. Puttaswamy (Retd.) & Anr* v. *Union of India & Ors.* directed that the interim order passed on 15th December 2017 (*mandatory linking of Aadhaar on or before 31st March 2018*) shall stand extended indefinitely until the matter is finally heard and the judgment is pronounced on the petitions challenging the constitutional validity of the *Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (**Act**)*. However, the Apex Court directed that the benefits, subsidies and services covered under Section 7 of the Act shall remain undisturbed by the aforesaid order of the Court.

[*Source: http://sci.gov.in/daily-order W.P.(C) No.-000494-000494 / 2012*]

Fugitive Economic Offenders Bill, 2018

In the wake of several scams and fraudulent activities, the Fugitive Economic Bill, 2018 was proposed on 12th March 2018, with the objective of providing authorities with the power to confiscate properties of economic offenders who have left the territory of India to avoid facing criminal prosecution and refuse to return to India to face the criminal charges against them. The Bill defines a "fugitive economic offender" and also lays down the procedure for declaration of an individual as a fugitive economic offender, pursuant to which, the Court may confiscate properties of the concerned offender which are proceeds of the crime, benami properties in India or abroad, and any other property of the concerned offender in India or abroad

[*Source: http://www.prsindia.org/billtrack/the-fugitive-economic-offenders-bill-2018-5166/*]

RBI discontinues Letters of Undertaking (LoUs) and Letters of Comfort (LoCs) for Trade Credits

Reserve Bank of India *vide* its Circular dated 13th March 2018, has issued directions for discontinuation of the practice of issuing LoUs/ LoCs for Trade Credits for imports into India by AD Category –I banks, except in case of compliance with the provisions contained in Department of Banking Regulation on "Guarantees and Co-acceptances".

[*Source: https://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=11227*]

Courts cannot refer parties to Arbitration on oral consent given by their counsel

Supreme Court *vide* its judgment dated 9th March 2018 in the case of *Kerala State Electricity Board and Another* v. *Kurien E. Kalathil and Another* ruled that in the absence of an arbitration agreement, the Court can refer parties to arbitration only with the written consent of the parties either by way of a joint memo or joint application and not on mere oral consent given by their counsel. Referring the parties to arbitration could be made only when the parties agree for settlement of the dispute through arbitration by a joint application or a joint affidavit before the court.

[Source: http://mpsja.mphc.gov.in/Joti/pdf/LU/reference%20to%20arbitration.pdf]

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Secured Creditor should mandatorily consider Debtor's Representation under Section13 (3A) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act")

The Supreme Court *vide* its judgment dated 19th March 2018 in the case of *ITC Limited* v. *Blue Coast Hotels Limited and Others* held that while recovering secured property from non-performing assets, a secured creditor should mandatorily consider the debtor's representation under Section 13 (3A) of the SARFAESI Act, after the initiation of proceedings under Section 13 of the SARFAESI Act. Section 13 (3A) of the SARFAESI Act enables debtors to make a representation or raise objections after notice is issued to them by creditors under Section 13 (2) of the SARFAESI Act. The creditor is then expected to consider such representation and communicate his views on the same within fifteen (15) days.

[*Source:*http://supremecourtofindia.nic.in/supremecourt/2016/12679/12679_2016_Judgement_19-Mar-2018.pdf]

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