



# AJC NEWSLETTER

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## **Introduction**

We here at Agarwal Jetley & Co. (AJC) are happy to bring another edition of our weekly newsletter capturing the important updates that have taken place in the legal world. We would be happy to hear from you about the 'AJC Newsletter', the hits and misses, inputs and any clarifications that you all require and deem necessary. We thank you in advance and are happy to continue this trend of keeping everyone "Legally up to Date".

## **Aspects covered in this issue**

In this issue we cover various relevant topics. Our associates have looked into the focus provided viz. the use of the word 'may' in an arbitration clause does not mandate to refer dispute to arbitration - Bombay High Court. There is also a look at the recent ban on the import of one hundred one (101) defence equipment items also known as the 'Negative Import List'. Then we look at the Consumer Protection Act, 2019 which came into force on July 20, 2020 and had a special focus on e-commerce platforms. We then look into the 'Agriculture Infrastructure Fund' launched by the Prime Minister on August 10, 2020 for agricultural-entrepreneurs, start-ups, agricultural-tech players and farmer groups for post-harvest management and nurturing farm assets. Finally, we delve into the recent scheme launched the Prime Minister know as 'Transparent Taxation - Honouring the Honest' in order to ensure a transparent tax environment by eliminating physical interface between tax authorities and taxpayers.

## The use of the word ‘may’ in an arbitration clause does not mandate to refer dispute to arbitration - Bombay High Court<sup>i</sup>

### Introduction

The Bombay High Court (“Court”) has recently on June 5, 2020 in Quick Heal Technologies Limited vs NCS Computech Private Limited & Anr (Arb P. No.43 of 2018) (“Case”) held that the use of the word ‘may’ in an arbitration agreement makes the provision optional and does not mandate to refer the dispute(s) to an alternate dispute resolution.

### Facts of the Case

Quick Heal Technologies Limited (“Petitioner”) had entered into a software distribution agreement (“Agreement”) on April 2, 2011 with NCS Computech Private Limited (“Respondent No.1”) and Innovative Edge (“Respondent No.2”) for sale and distribution of software products. Some disputes arose between the parties and when both the parties failed to resolve the disputes amicably, the Petitioner sent the letters to the Respondents invoking the arbitration clause as per Clause 17 of the Agreement. Thereafter, when no action was taken by the Respondents, the Petitioner filed an arbitration petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (“Act”) before the Court seeking appointment of a sole arbitrator to adjudicate the disputes and differences that had arisen between the parties.

### Issue in question

Whether the use of the word ‘may’ in an arbitration clause makes it a mandatory provision to refer to the arbitration if any dispute arose between the parties?

### Court’s analysis

The Court held that in the present case, the use of the word ‘shall’ in a clause clearly indicates that if the dispute arises between the parties, then the parties agreed to discuss in order to resolve the dispute amicably and thereafter the use of the word ‘may’ indicates that in case of failure of amicable settlement, the parties may consider the proposition of an arbitral process.

The Court further held that the use of the words ‘may be referred to arbitration’ in a clause shows that there was no consensus *ad idem* between the parties that they would initiate arbitration process if they fail to settle the disputes amicably and hence, they only agreed to provide their fresh consent in order to proceed with the arbitration as the word ‘may’ does not denote any binding obligation on the parties.

The Court relied on the Supreme Court’s judgements in the matter of *The Labour Commissioner, Madhya Pradesh vs Burhanpur Tapti Mills Ltd and others* (AIR 1964 SC 1687) and *Jamatraj Kewalji Gavani vs State of Maharashtra* (AIR 1968 SC 178) and held that in clauses where the words ‘may’ and ‘shall’ both appear, have their own distinct meaning and the word ‘may’ could never be termed as mandatory/obligatory.

The Court further opined that in accordance with sub-clause (a) of Clause 17 of the Agreement, the parties firstly agreed that all the disputes under the Agreement “shall” be amicably discussed for resolution by the designated personnel of each party making it a mandatory obligation and thereafter the use of the word “may” be referred to arbitration connotes that the dispute can be referred to arbitration if they fail to settle the disputes amicably within thirty (30) days which makes it optional for the parties to refer the disputes to arbitration, which has also made it clear that the parties were aware of the differences between the two and hence were intended to refer to arbitration only upon fresh consent.

### Conclusion

The Court dismissed the petition and held that there is no binding arbitration agreement between the parties and hence in the present Case, an arbitration process cannot be initiated if both the parties did not agree to refer their disputes to arbitration.

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## Government bans import of 101 defence equipment items<sup>ii</sup>

### Introduction

On August 9, 2020 the Defence Minister of India Rajnath Singh (“**Defence Minister**”) announced restrictions on the import of one hundred and one (101) weapons and military platforms and the Indian Government released a list of the systems that would be progressively banned for importation between December 2020 and December 2025, affecting weapons ranging from sniper rifles to missile destroyers and space satellites. This comes pursuant to Finance Minister Nirmala Sitharaman’s announcement in May, 2020 to boost the domestic defence sector and indigenisation.

The ‘Negative Import List’ (“**List**”) will come into effect from December which means the import ban could be extended to more items. The List has been put together by the Ministry of Defence, Government of India (**MoD**) after several rounds of consultations with all stakeholders, including the military and the industry, and factoring in the future capabilities of the defence sector to locally manufacture equipment and ammunition. The move is aimed at boosting the defence manufacturing sector in the country, which the Government hopes can act as an engine to revive long-term economic growth.

This decision will offer a great opportunity to the Indian defence industry to manufacture the items in the List by using their own design and development capabilities or adopting the technologies designed and developed by Defence Research and Development Organisation (**DRDO**) to meet the requirements of the Indian armed forces. The main aim of this move is to apprise the Indian defence industry about the anticipated requirements of the armed forces so that they are better prepared to realise the goal of indigenisation. The Defence Minister stated that all necessary steps would be taken to ensure that the timelines for production of equipment as per the List are met, which would include a co-ordinated mechanism for hand holding the industry by the armed forces. The List has been produced by the defence services due to which they have

become an equally important stakeholder in this scheme and are driven by the newly-created ‘Department of Military Affairs’ (**DMA**) under the Chief of Defence Staff, General Bipin Rawat. More such equipment for import embargo would be identified progressively by the DMA in consultation with all stakeholders. A note of this would be made in the Defence Procurement Procedure, 2020 and Defence Acquisition Procedure, 2020 to ensure that no item in the List would be processed for import in the future.

Imports account for sixty five per cent (65%) of India’s military requirements and India has signed contracts worth billions of dollars during the last decade for weapons and systems including fighter jets, air defence missile systems, submarine hunter planes, attack helicopters, heavy-lift choppers and lightweight howitzers. India was the third-biggest military spender in the world in 2019 after the United States of America and China according to Stockholm International Peace Research Institute.

Following the embargo on certain defence imports, it is estimated that contracts worth almost four lakh crore rupees (Rs. 4 lakh crore) will be placed upon the domestic defence industry within the next six (6) to seven (7) years. Almost two hundred sixty (260) schemes of such items were contracted by the tri-services at an approximate cost of three point five lakh crore rupees between April, 2015 and August, 2020. A separate budget head of fifty two thousand crore rupees has been created for domestic capital procurement in the current financial year to boost the defence industry in the country.

### The List includes:

#### Aviation

- (i) Imports banned by December, 2020:

General purpose bombs, fixed-wing mini-UAVs, light combat helicopters, light transport aircraft, GSAT-6 (international)

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satellite terminals, Tejas LCA systems, short-range maritime reconnaissance aircraft.

(ii) Imports banned December, 2023:

Astra Mark I air-to-air missiles, basic trainer aircraft, GSAT-7C and GSAT-7R communications satellites.

(iii) Imports banned by 2024:

Expendable aerial target (drones), 264-jet engines, long-range land-attack cruise missiles.

### Infantry combat systems

(i) Imports banned by December, 2020:

7.62x51 mm sniper rifles, various weapons and vehicle simulators, bullet proof jacket sand ballistic helmets, nuclear/bio/chemical detection and decontamination equipment, military trucks ranging from 4x4 to 12x12 wheels.

(ii) Imports banned by December, 2021:

7.62x39 mm assault rifles, light machineguns, all kinds of land mines, multi-purpose grenades.

(iii) Imports banned December, 2022:

Lightweight rocket launchers, 40 mm under-barrel grenade launchers.

### Armoured vehicles

(i) Imports banned by December, 2020:

120 mm sabot shells (for Arjun tank).

(ii) Imports banned by December, 2021:

125 mm sabot shells (for T-72 and T-90 tanks), wheeled armoured fighting vehicles.

(iii) Imports banned by December, 2023:

30 mm shells (for BMP-2 main gun).

### Artillery

(i) Imports banned by December, 2020:

Tracked 152 mm/52 cal self-propelled guns, 155 mm/52 cal towed guns, 155 mm/39 lightweight howitzers, 6x6 artillery tractors, Pinaka multiple-rocket launcher systems.

(ii) Imports banned by December, 2022:

155 mm artillery ammunitions, 122 mm Grad rockets.

(iii) Imports banned by December, 2024:

Electronic artillery fuses and bi-modular charge systems.

### Air defence, sensors, electronic warfare etc.

(i) Imports banned by December, 2020:

Ground-based mobile ELINT, low-level transportable radars, high power radars, short-range surface-to-air missiles.

(ii) Imports banned by December, 2022:

Electronic warfare systems.

(iii) Imports banned by December, 2024:

Land-based close-in-weapon systems (CIWS), 23 mm anti-aircraft shells, light low-level terrain radar.

### Naval systems

(i) Imports banned by December, 2020:

Naval cruise missiles, naval CIWS for self-defence, missile destroyers and “next-generation” missile vessels, shallow-water anti-submarine craft, water jet fast attack craft, 50-ton tugs, ammunition barges, floating docks, next-generation maritime coastal battery (Brahmos), anti-submarine rockets and launchers, depth charges, medium-range naval guns, lightweight torpedo launchers, chaff decoy rockets and launchers, integrated ship’s bridge system, large ship and submarine sonars.

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- (ii) Imports banned by December, 2021:  
Conventional submarines, naval inertial navigation systems.
- (iii) Imports banned by December, 2022:  
Electronic artillery fuses and bi-modular charge systems.
- (iv) Imports banned by December 2025:  
Long-range land-attack cruise missiles (naval, air or land based).

### Impact

The Government's "Make in India policy" debuted in 2014 and it compelled foreign companies to set up production lines on the Indian soil. As a result, DRDO has made significant strides in radar, jet and rocket propulsion technology, aided by tech transfers

from Israel, Russia and the United States of America. The new bans may clarify and expedite Indian defence procurement and help signal the industry the area of focus of efforts. It's also worth noting that many important 'Make in India' projects involve foreign manufacturers opening factories on the Indian soil. While this ensures that the defence dollars make their way to the Indian factory workers and partner companies, foreign firms are still receiving a cut and may retain key proprietary technologies and design experience. This might increase now that Foreign Direct Investment (FDI) cap in defence has been raised from forty nine per cent (49%) to seventy four per cent (74%) in order to encourage more FDI. The major complaint from the domestic defence industry was the absence of a commitment from the armed forces on procuring a defence item that was developed and produced in India. By putting certain items on the embargo list and creating a separate budget head for domestic capital procurement, the government has sent a signal to indigenous industry.

**Consumer Protection Act, 2019 – a special focus on e-commerce<sup>iii</sup>**

### Introduction

The Consumer Protection Act, 2019 ("Act") came into force vide a notification dated July 20, 2020. The Act would replace the old Consumer Protection Act, 1986 ("Erstwhile Act").

The Indian Parliament keeping in mind the era of digitisation which has provided easy access, a large variety of choices, convenient payment mechanisms, improved services and shopping as per convenience to the consumers, along with challenges related to consumer protection, on August 06, 2019, passed the landmark Consumer Protection Bill, 2019 which aimed to provide the timely and effective administration and settlement of consumer disputes.

The union minister for consumer affairs, food and public distribution Ram Vilas Paswan stated that the Act would empower consumers and help them in protecting their rights through its various notified rules and provisions like consumer protection councils, consumer

disputes redressal commissions, mediation, product liability and punishment for manufacture or sale of products containing adulterant or spurious goods.

### Key highlights of the Act

- (i) E-commerce transactions - The Act has widened the definition of 'consumer'. The definition now includes any person who buys any goods, whether through offline or online transactions, electronic means, teleshopping, direct selling or multi-level marketing. The Erstwhile Act did not specifically include e-commerce transactions.
- (ii) Enhancement of pecuniary jurisdiction - Revised pecuniary limits have been fixed under the Act:
  - a) the 'District Forum' can now entertain consumer complaints where the value

- of goods or services paid does not exceed one crore rupees;
  - b) the 'State Commission' can entertain disputes where such value exceeds one crore rupees but does not exceed ten crore rupees; and
  - c) the 'National Commission' can exercise jurisdiction where such value exceeds ten crore rupees.
- (iii) E-filing of complaints - The Act provides flexibility to the consumer to file complaints with the jurisdictional consumer forum located at the place of residence or work of the consumer. This is unlike the current practice of filing at the place of purchase or where the seller has its registered office address. The Act also contains enabling provisions for consumers to file complaints electronically and for hearing and/or examining parties through video-conferencing. This is aimed to provide procedural ease and reduce inconvenience and harassment for the consumers.

- (iv) Establishment of central consumer protection authority (CCPA) - The Act proposes the establishment of a regulatory authority known as the CCPA, with wide powers of enforcement. The CCPA will have an investigation wing, headed by a 'Director-General', which may conduct inquiry or investigation into consumer law violations.

The CCPA has been granted wide powers to take suo-moto actions, recall products, order reimbursement of the price of goods/services, cancel licenses and file class action suits, if a consumer complaint affects more than one (1) individual.

- (v) Product liability and penal consequences - The Act has introduced the concept of product liability which brings within its scope product manufacturer, product service provider and product seller, for any claim for compensation.

The product seller would include a person who is involved in placing the product for a commercial purpose and would include e-commerce platforms as well. The

defence that e-commerce platforms merely act as platforms or aggregators would not be accepted. Certain exceptions have been provided under the Act from liability claims, such as, the product seller will not be liable where the product has been misused, altered or modified.

- (vi) Unfair trade practices - The Act introduces a specific broad definition of unfair trade practices, which includes sharing of personal information given by the consumer in confidence, unless such disclosure is made in accordance with the provisions of any other law.

- (vii) Penalties for misleading advertisement - The CCPA may impose a penalty of up to ten lakh rupees on a manufacturer or an endorser, for a false or misleading advertisement. The CCPA may also sentence them to imprisonment for up to two (2) years for the same.

In case of a subsequent offence, the fine may extend to fifty lakh rupees and imprisonment of up to five (5) years. The CCPA can also prohibit the endorser of a misleading advertisement from endorsing that particular product or service for a period of up to one (1) year. For every subsequent offence, the period of prohibition may extend to three (3) years.

The Act fixes liability on endorsers considering that there have been numerous instances in the recent past where consumers have fallen prey to unfair trade practices under the influence of celebrities acting as brand ambassadors. In such cases, it becomes important for the endorser to take the onus and exercise due diligence to verify the veracity of the claims made in the advertisement to refute liability claims.

- (viii) Provision for alternate dispute resolution (ADR) - The Act provides for mediation as an ADR mechanism, making the process of dispute adjudication simpler and quicker. This would encourage speedier resolution of disputes and reduce pressure on 'Consumer Courts'.

## Conclusion

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The Act in contrast to the Erstwhile Act provides for a greater protection of consumer interests taking into consideration the current age of digitization. The Act also deals with the technological advancements in the industry, provides for easier filing of complaints and also imposes strict liability on businesses including

endorsers for violating the interest of the consumers. The Act has been introduced after many amendments to provide protection to buyers not only from traditional sellers but also from the new e-commerce retailers/platforms. This would prove to be a significant tool in protecting consumer rights in the country.

## Agriculture Infrastructure Fund<sup>iv</sup>

### Introduction

The Prime Minister on Aug 10, 2020 launched a financing facility of one lakh crore rupees under the Agriculture Infrastructure Fund (“AIF”) for agricultural-entrepreneurs, start-ups, agricultural-tech players and farmer groups for post-harvest management and nurturing farm assets. It is a new pan India central sector scheme. The scheme shall provide a medium to long term debt financing facility for investment in viable projects for post-harvest management infrastructure and community farming assets through interest subvention and financial support. The duration of the scheme shall be from financial year (F.Y.) 2020 to F.Y. 2029 i.e. ten (10) years.

The AIF has been launched as part of *Atmanirbhar Bharat* to make farmers self-reliant.

### Eligibility

Under the AIF scheme, one lakh crore rupees will be provided by banks and financial institutions as loans to primary agricultural credit societies, marketing cooperative societies, farmer producer organisations (“FPOs”), self-help groups, farmers, joint liability groups, multipurpose cooperative societies, start-ups, agri-entrepreneurs, aggregation infrastructure providers and central or state agency or local body sponsored public private partnership project.

### Interest subvention

All loans under this financing facility will have interest subvention of three per cent (3%) per annum up to a limit of two crore rupees. This

subvention will be available for a maximum period of seven (7) years.

### Credit guarantee

Credit guarantee coverage will be available for eligible borrowers from this financing facility under ‘Credit Guarantee Fund Trust for Micro and Small Enterprises’ (CGTMSE) scheme for a loan up to two crore rupees. The fee for this coverage will be paid by the ‘State Government’. In case of FPOs the credit guarantee may be availed from the facility created under FPO Promotion Scheme of ‘Department of Agriculture, Cooperation and Farmers Welfare’ (DACFW).

### Management of the fund

AIF will be managed and monitored through an online management information system (MIS) platform. National, state and district level monitoring committees will be set up to ensure real-time monitoring and effective feed-back. It will enable all the qualified entities to apply for loan under the fund. The online platform will also provide benefits such as transparency of interest rates offered by multiple banks, scheme details including interest subvention and credit guarantee offered, minimum documentation, faster approval process as also integration with other scheme benefits.

The loans will be disbursed in four (4) years starting with sanction of ten thousand crore rupees in the current year and thirty thousand crore rupees each in next three (3) financial years.

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Moratorium for repayment under this financing facility may vary subject to minimum of six (6) months and maximum of two (2) years.

The AIF by way of facilitating formal credit to farm and farm processing-based activities is expected to create numerous job opportunities in rural areas.

## **“Transparent Taxation - Honouring the Honest”- elimination of physical interface between tax authorities and taxpayers<sup>v</sup>**

### **Introduction**

Prime Minister Narendra Modi on August 13, 2020 rolled out a new platform for filing income tax returns to ensure a transparent tax environment by eliminating physical interface between tax authorities and taxpayers.

The announcement by the Government of India on August 13, 2020, on the “Transparent Taxation - Honouring the Honest” (**T2-H2**) is an extension of e-assessment scheme 2019 launched by Government of India in September, 2019. The objective of the platform is to achieve *faceless assessment, faceless appeal and implement taxpayer’s charter*. The faceless assessment and taxpayer’s charter is implemented with immediate effect and the faceless appeal will be effective from September 25, 2020. An order under Section-119 of the Income Tax Act (“**Act**”), issuing direction as to who can be considered as income tax authority for the purpose of conducting survey under Section-133A of the Act has also been issued. The measures include a directive that takes away powers of regular assessing officers to conduct surveys, restricting such powers to only the investigation and tax deducted at source wing, that too only after authorisation from a senior official of director general or principal commissioner rank.

### **What is faceless assessment?**

The word e-assessment has been substituted with the word faceless assessment. In e-assessment the assessee is aware of the assessing officer who carries out the assessment proceedings. In faceless assessment, the assessee is not aware of assessing officer who does the tax assessment. In e-assessment one assessing officer carries out the assessment

whereas in faceless assessment there is a team of assessing officers who carry out the assessment. Assessment under Section-144 i.e. best judgement assessment of the Act is also covered under faceless assessment.

### **Taxpayers charter**

The taxpayers charter was announced in the Union Budget for fiscal year 2020-21 by the finance minister. The charter outlines the rights and duties of an honest taxpayer. It also defines the commitment of the tax department and the expectations from the taxpayers. It is a step towards bringing together rights and duties of the taxpayer and fixing the Government’s responsibilities towards the taxpayer.

### **Other recent direct tax reforms:**

The central board of direct taxes (**CBDT**) has carried out several major tax reforms in direct taxes in recent years. The focus of the tax reforms has been on reduction in tax rates and on simplification of direct tax laws. Corporate tax rates were reduced from thirty per cent (30%) to twenty two per cent (22%) in 2019. For new manufacturing units the corporate tax rates were reduced to fifteen per cent (15%). Dividend distribution tax was also abolished in 2019. The CBDT has also taken several initiatives for bringing in efficiency and transparency in the functioning of the income tax (“**IT**”) department, such as:

- (i) Bringing more transparency in official communication through the newly introduced ‘Document Identification Number’ wherein every communication of the department would carry a computer generated unique document identification number;

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- (ii) Pre-filing income tax returns to increase the ease of compliance for taxpayers and to make compliance more convenient for individual taxpayers;
- (iii) “*Direct Tax Vivad se Vishwas Act, 2020*” to provide for resolution of pending tax disputes.

### **Advantages of T2-H2**

Government has acknowledged that the country can move forward and develop when the life of honest taxpayer is made easy. This scheme is in the direction of making assessee’s life easier. Launching of taxpayers charter is to ensure fair, courteous, and rational behaviour to the honest taxpayers.

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