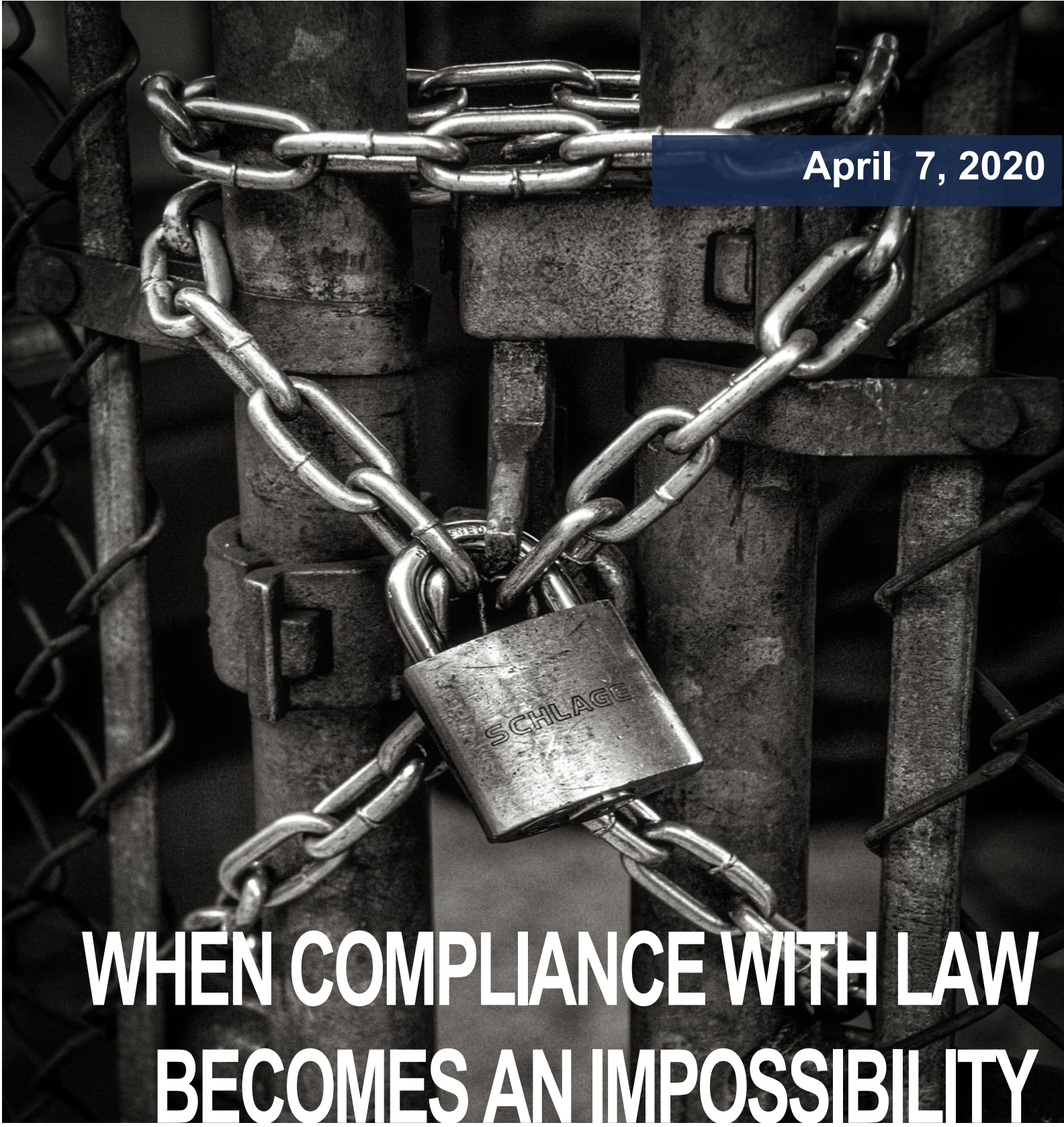

April 7, 2020

WHEN COMPLIANCE WITH LAW BECOMES AN IMPOSSIBILITY

LOOKING BEYOND FORCE MAJEURE: COVID – 19 FALLOUT

argus partners
SOLICITORS AND ADVOCATES

When compliance with law becomes an 'impossibility' – looking beyond force majeure: COVID-19 fallout

When a party to a contract is unable to perform its contractual obligation due to a supervening impossibility which the party could not prevent, then the defaulting party may be excused from performance of the contract in accordance with section 56 of the Indian Contract Act, 1872 or if the contract has a force majeure clause then in accordance with such clause - what is popularly referred to as the *force majeure* exclusion. This is as far as compliance with contracts are concerned. But what happens if compliance with a law becomes impossible? This is a question which has gained relevance in light of the current COVID-19 induced lockdown. While the government has announced relaxations from certain regulatory compliances, there are still many compliances which companies may find difficult to comply with. There could also be certain benefits which a company may fear losing as a result of interruptions in business, and furthermore companies may be looking at some case-specific relaxations. **The principles embodied in the legal maxims '*lex non cogit ad impossibilia*' and '*impotentia excusat legem*' could come to the rescue in such situations. Simply put, law does not compel a man to do that which cannot possibly be performed (*lex non cogit ad impossibilia*), and law will generally excuse a default if a party is unable to perform a duty created by law without any default in him and where he has no remedy (*impotentia excusat legem*).**

The above principles in equity have been recognized and applied by the courts in India in various cases – though not very frequently. When it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like an act of God, the circumstances have been taken as a valid excuse[1]. As explained by the Bombay High Court in a 1938 case[2], if in the interpretation of an enactment, the Court finds that the duty imposed is either impossible of performance and beyond the normal capacity of a reasonable or prudent man, or when performance in the strictest language of the enactment is either idle or impossible, then the enactment must be understood as dispensing with the strict performance of that duty.

Whether or not the above legal maxims can be used in the present circumstances would of course depend on the nature of duty or obligation cast by law and whether the present COVID-19 situation has indeed made performance of such duty or obligation impossible. It would however be relevant to refer to a few judicial precedents with an aim to throw light on the approach of the courts while applying the above principles.

Interestingly, even though the legal principles have been in existence for more than a century, the application of the principles is still evolving and the last word on this, may be far from settled.

A natural calamity or an act of God has often been invoked to claim benefit of the above principles.

In a case before the Gujarat High Court[3], the issue was whether the petitioner therein could continue to take benefit of a tax exemption under a sales tax incentive scheme which was subject to the condition that the beneficiaries should continue to generate electricity for a continuous period of 6 (six) years. The petitioner having availed of the benefit could not continue to generate electricity owing to a cyclone as it completely destroyed its windmills. The Gujarat High Court held that the petitioner cannot be denied the benefit under the scheme, only because it could not fulfill the condition due to an act of God (i.e.

[1] *Re: Presidential Poll,* AIR 1974 SC 1682.
[2] *Emperor* v. *Ganpat Laxman Kalgutkar,* AIR 1938 Bom 427.
[3] *Rolcon Engineering Co. Ltd.* v. *State of Gujarat,* (2009)21 VST 118(Guj).

the cyclone) or because of impossibility on its part to perform the same. The Gujarat High Court held that the language used in the scheme cannot be interpreted to read that even if due to factors beyond the control of the industrial undertaking, the wind farm cannot be kept in a running condition, there would be breach of the said condition.

Damage caused by militant labourers and workers has also been held to be a valid reason for the causing of an impossibility.

In a case before the Andhra Pradesh High Court[4], the liquidator of a company filed an application under section 468 of the erstwhile Companies Act, 1956 seeking a direction to the former directors of the company to deliver records of the company. The High Court held that the court cannot issue direction to former directors to produce records if it is proved that the records were destroyed or damaged by militant labourers and workers, and in such a case the maxim '*lex non cogit ad impossibilia'* (the law does not compel a man to do that which he cannot possibly perform) would apply.

Where a legal requirement stipulates a thing to be done within a prescribed time period, in many cases the above legal maxims have been used to extend such time period.

In a case before the Supreme Court[5], the allottee of a plot of land by Haryana Urban Development Authority ("**HUDA**") sent a letter by registered post on November 28, 2001 intimating HUDA that he is not interested in accepting the allotment. However, the letter was received by HUDA on December 3, 2001 which was after the last day stipulated for such intimations, and as a result HUDA forfeited the earnest money which was deposited by the allottee. The Supreme Court relied on the principle '*lex non cogit ad impossibilia',* and observed that the allottee cannot be put to loss for the closure of the office of HUDA on December 1 and 2, 2001 and the postal holiday on November 30, 2001 and that in fact the allottee had no control over these matters. As a result the Supreme Court held that the deposit money should be refunded to the allottee with interest.

Compliance with law has been excused in various cases when an impossibility arises for no fault of the person.

In a case before the Kerala High Court[6], the question before the High Court was whether converted paddy land would require the permission of the Collector under Kerala Land Utilisation Order, 1967[7] which was issued under the Essential Commodities Act, 1955. The High Court held that if the paddy was in cultivation, then the Collector can exercise the power to compel cultivation of paddy; however when land becomes uncultivable for paddy, the enabling power will become otiose, and law does not compel a person to do that which he cannot possibly perform. Hence, when the land has become unfit to produce paddy, the Collector cannot compel the landowner to cultivate paddy.

In a case before the Madhya Pradesh High Court[8], a bank obtained a decree from a court on the basis of a mortgage against the non-applicant/judgment-debtor. The decree of the court required the judgment-debtor to pay interest till full recovery. In execution of the decree, the property attached was put to sale by auction and the highest bidder deposited the bid money in civil court deposit. Several objections were filed to the sale by third parties. The objections were overruled and the litigation went upto the Supreme Court. As a result of the objections filed and pending decisions of the courts, the sale

[4] *Safe Pack Polymers Ltd.* v. *G.V.N. Raju*, (2008)143 CompCas 71 (AP).
[5] *HUDA* v. *Babeswar Kanhar*, AIR 2005 SC 1491.
[6] *Archana Varghese* v. *The District Collector, Pathanamthitta*, 2015(2) KLJ 59.
[7] Clause 6 prohibits conversion of land which has been under cultivation with any food crops for a continuous period of 3 (three) years immediately before the commencement of the above order or after the commencement of the order, except with the written permission given by the Collector.
[8] *Punjab National Bank* v. *Baba Kishandas Thakur Das*, 1996 JLJ 777.

was finally confirmed by the executing court only after 3 (three) three years. After the sale was confirmed, the decree holder claimed that, on the principal sum, he was entitled to interest not only till the amount was deposited by the bidder in the civil court, but also till the sale was confirmed. The judgment-debtor argued that, for no fault on his part, decision on objections raised to the auction sale took more than 3 (three) years, and he cannot be fastened with the liability of interest from when the purchase money in full came to be deposited in the court till the confirmation of sale by the court after 3 (three) years. The Madhya Pradesh High Court agreed with the judgment-debtor and held that the judgment debtor, after the auction price came to be deposited in the civil court, could not have taken any other action to avoid his liability towards future interest at the contractual rate as decreed. The judgment-debtor has, therefore, to be saved from such adverse consequences over which he can have or had no control. It was held that impossibility or inability is a good excuse in law and the principles embodied in '*lex non cogit ad impossibilia'* and '*impotentia excusat legem*' should save the judgment-debtor from his liability towards interest on the purchase price which continued to remain in deposit with Civil Court because of the pendency of decision on the objections.

Another case regarding compliance with section 33 of the Indian Electricity Act, 1910 is also relevant. The said section required the cause of an accident to be notified in writing to the Electric Inspector within 24 (twenty four) hours of the occurrence. In a case before the Bombay High Court[9], it was held that in that case it was impossible to give the exact cause of the accident because the persons from whom that information could be obtained had been injured and were incapable of making a statement for a number of days after the accident. Therefore the requirement of the notification that the cause of the accident must be intimated was impossible of performance within 24 (twenty four) hours of the accident.

The Bombay High Court[10] has applied the legal maxim '*impotentia excusat legem*' where the assessee was required to pay additional tax for no fault of his but because of the retrospective amendment brought in by the legislation.

In another case, the Bombay High Court[11] relied on the principles '*lex non cogit ad impossibilia'* and '*impotentia excusat legem*', to hold that since in that case no individual notice for an increase in the assessment was served on the assessee under the Maharashtra Municipalities Act, 1965, it was impossible for the assessee to raise objections to the valuation and assessment relating to their property as laid down in section 170 of the act (which sets out the procedure for filing an appeal and states that the appeal should be brought within 15 (fifteen) days next after the presentation of the bill complained of). Importantly, the Bombay High Court relied on *Broom's Legal Maxim* and discussed the following 3 (three) points when pleading impossibility:

"(i) In the first place, it must see that the nature of the necessity pleaded be such as the law itself would respect, for there may be a necessity which it would not. A necessity created by a man's own act, with a fair previous knowledge of the consequences that would follow, and under circumstances which he had then a power of controlling, is of that nature.

(ii) Secondly, the party who was so placed used all practicable endeavours to surmount the difficulties which already formed that necessity, and which, on fair trial, he found insurmountable. I do not mean all the endeavours which the wit of man, as it exists in the acutest understanding, might suggest, but such as may reasonably be expected from a fair degree of discretion and an ordinary knowledge of business.

(iii) Thirdly, that all this shall appear by distinct and unsuspected testimony, for the positive injunctions of the law, if proved to be violated, can give way to nothing but the clearest proof of the necessity that compelled the violation."

---

[9] *Poona Electric Supply Co. Ltd.* v. *State*, AIR 1967 Bom 27.
[10] *Mafatlal Apparel Mfg. Co. Ltd.* v. *Deputy Commissioner of Income Tax*, (1998)6 1TTJ(Mumbai) 323.
[11] *Municipal Council, Morshi* v. *Tulsiram Vishwanath Gadbail*, 1977MhLJ 735.

Thus, in almost all cases, the fundamental tests which have been applied by courts before applying the above legal maxims to the facts of a case, are to see whether the event (i.e. non-compliance with a law) was beyond the control of the person, occurred without any fault of the person and it resulted in an impossibility. Succinctly explained by the Bombay High Court in a case in 1938[12]:

> ***"An enactment which expects the discharge of a duty by a licensee in that manner must always be regarded in the administration of the law subject to the maxim lex non cogit ad impossibilia aut inutilia. If in the interpretation the Court finds the duty either impossible of performance and beyond the normal capacity of a reasonable or prudent man, or when performance in the strictest language of the enactment is either idle or impossible, then the enactment must be understood as dispensing with the strict performance of that duty."***

Interestingly, in a 1992 case[13], the Bombay High Court appears to have adopted a higher and stricter standard for application of the above legal maxims. In the said case before the Bombay High Court, Raymond Synthetics had made a public issue of shares and debentures in 1990 which was over-subscribed by 40 (forty) times. The law required refund to be despatched within 10 (ten) weeks from the closure of the subscription list or in the event of unforeseen circumstances, within such period as may be extended by the stock exchange. The company requested the Madhya Pradesh stock exchange ("**MPSE**") for an extension of time for posting refund orders since there were a large number of applications, and about 25 lac refund orders, 3 lac share certificate envelopes and an equal number of envelopes for other kinds of stationery which were required to be posted, and the post offices at Delhi were not equipped to handle such a large influx from a single party. Further, due to a fire, many of the refund orders were destroyed or scattered on the ground in a severely mutilated and damaged condition, and stop payment instructions had to be given to the banker by the company. The MPSE granted an extension of time for issuing refund orders. However, the Bombay Stock Exchange called upon the company to pay delayed interest. The company addressed a letter to the Securities and Exchange Board of India and claimed that the delay in despatch of the refund orders was for reasons that were totally beyond the control of the company, and in spite of the company having taken all necessary steps to ensure the earliest possible dispatch, and therefore, the payment of interest should be waived.

The company argued that it was impossible for the company to complete the process of refund of the excess amount within the stipulated period of 10 (ten) weeks. **The Bombay High Court rejected this argument and held that even assuming that the company was unable to perform the obligation for reasons beyond its control, still the doctrine of impossibility of performance is not attracted to the facts of the present case. The High Court went a step further and added that it is not only impossibility, which is required to be seen, but it also has to be seen whether, apart from being impossible, the obligation leads to harshness or adversely affects the party who has to carry out the obligation**. The High Court held[14]:

> *"In our judgment, the court should invoke the doctrine only in cases where the absolute nature of the obligation leads to harshness or adversely affects the party who has to carry out the obligation and further leads to injustice. On the facts of the present case we have no hesitation in concluding that the obligation to pay interest causes no hardship whatsoever to the company, but permitting the company to retain the excess amount beyond the stipulated period without payment of interest would certainly cause serious prejudice to the interest of the investor."* (emphasis added)

[12] *Emperor* v. *Ganpat Laxman Kalgutkar,* AIR 1938 Bom 427.
[13] *Raymond Synthetics Ltd.* v. *Union of India,* 1992(1)BomCR 133.
[14] *Raymond Synthetics Ltd.* v. *Union of India,* 1992(1)BomCR 133.

Not every inability is an impossibility.

While assessing whether the above legal maxims could apply to a given case, it should be borne in mind that not every inability is an impossibility. In a case before the Delhi High Court[15], the High Court sought to distinguish between inability and impossibility and held that losses or profits made by an entrepreneur or its business plans going awry, cannot possibly be a ground that entitles a businessman to avail duty exemption/concession. In the said case, the High Court refused to excuse the failure of a company to fulfil an obligation to export video software within the stipulated time under an EPCG license inspite of extensions being granted by the authorities. The main thrust of the petitioner's argument was that it had imported certain capital goods which was required to telecast a program on Doordarshan's forthcoming channel DD3, and for which Doordarshan had given in-principle consent. However, the project was abruptly abandoned due to Doordarshan deciding against the introduction of the DD3 channel. The petitioner stated that in the given circumstances the petitioner was unable to create and export video software on its own and thus, could not fulfill its export obligations. Rejecting the contention of the petitioner, the High Court held that frustration of a venture does not alter or affect the obligation of the petitioner to export goods/services of the requisite value and the export obligations were not conditional upon any project or any venture that was planned by the petitioner at the material time[16].

However, subject to what the facts and circumstances are in a given case, it may be possible to distinguish the above Delhi High Court case where an impossibility arises because of the current COVID-19 lockdown and restrictions.

In conclusion.

Though the principles *lex non cogit ad impossibilia* and *impotentia excusat legem* have been around for more than a century, one expects that they will be put to test with full force once the COVID-19 lockdown is over. The exact contours of the principles are yet to be fully defined and one expects some creative tests and principles emerging from the courts! However, borrowing from some of the settled principles which have been established over the years with respect to force majeure in the context of contractual obligations (as opposed to statutory obligations), it would appear that compliance with law will not be excused merely because an obligation has become onerous or that compliance has become burdensome or unprofitable. Hence, the COVID-19 lockdown will not automatically entitle a person to be excused from the rigours of regulatory compliances, but would depend on a case to case basis.

This paper has been written by Adity Chaudhury, Partner.

[15] *DSJ Communications* v. *Union of India*, Civil Writ Petition No. 934/2010, Decided on July 30, 2014.

[16] The Delhi High Court held:

> *"The inability of the petitioner to effect exports cannot be mistaken with impossibility to do so. As I see it, the implication of the petitioner's contentions are that failure to discharge an obligation for want of funds should result in extinguishment of the obligation and, resultantly, the petitioner should be permitted imports without paying any duty or by paying concessional duty because of its failure to make good its ventures. This contention is misconceived and meritless. Custom duty is a statutory levy and an incidence of import; the petitioner having imported the goods in question was liable to pay the same, however, the petitioner availed of an exemption/concession which was conditional. It would naturally follow that failure to meet the conditions would deprive the petitioner of the benefits of the exemption/concession. Even assuming that the failure on the part of the petitioner to meet its export obligations were for reasons beyond its control, the same would not entitle the petitioner for any remission in customs duty. The statutory levy is not conditional on business success or failure of the importer. The maxims lex neminem cogit ad vana seu impossibilia (the law compels no one to do vain or impossible things) or impossibilium nulla obligatio est (there can be no obligation to perform the impossible) have no application in the present case and in relation to a valid statutory levy."* (emphasis added)

DISCLAIMER

This document is merely intended as an update and is merely for informational purposes. This document does not get into detailed deliberations on some of the issues raised nor does it purport to identify all issues concerned. Further, there may have been changes to the law after publication of this document. This document should not be construed as a legal opinion. No person should rely on the contents of this document without first obtaining advice from a qualified professional person. This document is contributed on the understanding that the Firm, its employees and consultants are not responsible for the results of any actions taken on the basis of information in this document, or for any error in or omission from this document. Further, the Firm, its employees and consultants, expressly disclaim all and any liability and responsibility to any person who reads this document in respect of anything, and of the consequences of anything, done or omitted to be done by such person in reliance, whether wholly or partially, upon the whole or any part of the content of this document. Without limiting the generality of the above, no author, consultant or the Firm shall have any responsibility for any act or omission of any other author, consultant or the Firm. This update does not and is not intended to constitute solicitation, invitation, advertisement or inducement of any sort whatsoever from us or any of our members to solicit any work, in any manner, whether directly or indirectly.

You can send us your comments at:
argusknowledgecentre@argus-p.com

Mumbai I Delhi I Bengaluru I Kolkata I Ahmedabad

www.argus-p.com