

## CCI Order – Advantage Property Buyers

## Simplified Approval of Contracts Involving Interested Directors

## IRDA Releases an Exposure Draft for Pension Products

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## CCI Order – Advantage Property Buyers

The Competition Commission of India (“**CCI**”) on August 12, 2011 delivered an unprecedented order which could give an opportunity to the consumers to complain against the discriminatory approach and abuse of dominant position adopted by the real estate companies in India by imposing unfair conditions on buyers of flats or commercial units.

The order has come in a complaint filed in May 2010 by a flat owners’ association (“**Association**”) against a prominent Indian real estate company (“**Builder**”) and Government authorities. The Association alleged that the Builder had promised to complete the subject residential project in Gurgaon in 2009, but the buyers had not been given possession of their units till the date of filing the complaint. In addition, it was also alleged that the Builder imposed highly arbitrary, unfair and unreasonable conditions on the buyers, which had serious adverse effects and ramifications on the rights of the buyers.

The CCI in its detailed order imposing USD 140 million fine on the Builder has observed that the Buyer’s Agreement (“**Agreement**”) executed by the Builder with its buyers consists of draconian and one-sided clauses. The Agreement gives sole discretion to the Builder on numerous aspects and no rights have been given to the buyers for raising any objections. It has further been observed that:

“The impunity with which these clauses have been imposed, the brutal disregard to consumer right that has been displayed in its action of cancelling allotments and forfeiting deposits and the deliberate strategy of obfuscating the terms and keeping buyers in the dark about the eventual shape, size, location etc. of the apartment cannot be termed as fair.”

The CCI expressed its concern over absence of any specific regulations governing the real estate sector, in general, and the housing sector, in particular. In order to promote overall consumer welfare, to ensure free and fair competition in real estate residential market and to set standards of conduct of enterprises engaged in similar nature of trade, the CCI has made a recommendation to the Central Government and the State Governments to come out with regulations to govern the sector ensuring consumer welfare and to discourage unfair trade practices prevailing in the sector.

The CCI order is expected to snowball and result into numerous flat buyers’ or their associations approaching the CCI with complaints against their builders. It is noteworthy that many provisions in the arrangement scrutinized by the CCI are more or less industry practice and present in the agreements that most other builders execute with their buyers across India today.

## Simplified Approval of Contracts Involving Interested Directors

The Ministry of Corporate Affairs (“**MCA**”) vide a circular dated July 25, 2011 (“**Circular**”) has simplified the procedure for obtaining approval of the Central Government under section 297 of the Companies Act, 1956 (“**Act**”). The procedure comes into effect from September 24, 2011.

Section 297 of the Act prescribes the conditions and procedure for companies to enter into certain contracts in which any of its directors are interested. The section specifies that companies having a paid-up capital of Rupees Ten million

(USD 0.22 million) or more cannot enter into specified contracts involving interested directors without obtaining prior approval of the Central Government.

The MCA has now prescribed that such approval of the Central Government can be obtained online, provided the subject contract has been approved by a special resolution of the shareholders of the company in addition to the board's approval. The specified online application would capture the main terms of the contract as well as details of the resolutions passed approving the contract and would require certification by a practicing Company Secretary or Chartered Accountant before its submission.

The MCA has further prescribed that the board of directors and shareholders, while giving their approval to such a contract shall give specific approval to the effect, inter alia, that the proposed contract is competitive and at an arm's length; the company has not defaulted in repayment of any of its debts or interest thereon; the Company has filed its up to date Balance Sheets and Annual Returns; and that the Company and its directors have complied with certain provisions of the Act (specified in the Circular).

### **IRDA Releases an Exposure Draft for Pension Products**

The Insurance Regulatory and Development Authority (“**IRDA**”) had issued pension product guidelines on September 1, 2010 (“**Guidelines**”), which required all pension products to ensure an accumulation rate of 4.5%, which was also indexed to the Reverse Repo Rate of the Reserve Bank of India. However, the aforesaid requirement of the IRDA was not widely accepted in the market due to the uncertainty of the investment returns. Hence, IRDA has reviewed the position of the pension products and now proposed to expand the options for the pension products.

IRDA has accordingly released an Exposure Draft on Pension Products which proposes that the pension products shall, inter alia, comply with the following objects:

- i. They shall provide an assured benefit (amount in absolute terms), disclosed at the time of sale;
- ii. They may have an optional insurance cover throughout the deferment period or may offer approved riders;
- iii. If the policyholder dies during the deferment period, the nominee shall be entitled to – (a) utilize the entire proceeds of the policy as on that date including the rider benefits, if any, or part thereof for purchasing an annuity at the then prevailing rate; or (b) withdraw the entire proceeds of the policy; and
- iv. All the unit linked pension products shall comply with IRDA (Treatment of Discontinued Linked Insurance Policies) Regulations, 2010.

The draft also suggests usage of the balance amount, on the date of surrender or vesting, to purchase pension, guaranteed for life, at the then prevailing annuity/pension rate.

The acceptance of the aforesaid proposal for the pension products is expected to result in comeback for the Unit Linked Pension Plans (“**ULPPs**”). Since the Guidelines were released, the insurers were reportedly reluctant to design ULPPs arguing that the assured return guarantee required by IRDA was practically and commercially unsustainable for them.