Highlights

Corporate Brief

- MCA further amends SBO Rules: clarifies the provisions of previous circular
- SEBI issues guidance note on DVRs: recommends changes in existing provisions
- MCA introduces National Guidelines on Responsible Business Conduct: flavours of the United Nations Guiding Principles
- SC decides on quasi-contractual obligations in contract which stipulating a sum for its breach
- RBI issued Master Direction on current ECB framework in India

GST Brief

- 34th GST Council made recommendations regarding Real Estate Sector
- Government enhances threshold limits for registration under GST, w.e.f 1st April, 2019
- Calcutta HC holds that redistribution of electric supply is chargeable to Service Tax

RERA Brief

- MAHA RERA issues SOP for revocation of registration of project.
- Punjab RERA issues procedure for change of bank accounts by the promoters.
- Tamil Nadu RERA notifies Tamil Nadu Real Estate Appellate Tribunal Regulations, 2019.
- Supreme Court: Buyer cannot be required to wait indefinitely for possession.

Litigation Brief

- Supreme Court Declares One-Sided Clauses in Builder-Buyer Agreements Constitute Unfair Trade Practice

Corporate Brief

➲ *MCA further amends SBO Rules: clarifies the provisions of previous circular*

The Ministry of Corporate Affairs ('MCA'), vide notification dated 12th March, 2019 ('said Notification'), notified an amendment with respect to disclosure of significant beneficial ownership in the shareholding pattern of listed entities. The Notification modified a circular that was issued by the Securities Exchange Board of India ('SEBI') in December, 2018 ('Circular') and states that:

a) The Circular shall be applicable to listed entities that are reporting companies (companies that are required to identify the existence of a Significant Beneficial Owner or 'SBO' associated with it) in accordance with the Companies (Significant Beneficial Ownership) Rules, 2018 ('Rules')

b) The submissions under the Circular shall be in accordance with the Rules and the revised formats of the Circular

c) The circular shall come into force with effect from the quarter ended June, 2019

➲ *SEBI issues guidance note on DVRs: recommends changes in existing provisions*

On 20th March, 2019, SEBI issued a guidance note on enabling issuance and listing of shares with differential voting rights ('DVR'), also known as dual class shares or ('DCS') in the international scenario. DVR refers to shares having rights that are disproportionate to their economic ownership, either having superior voting rights (multiple of voting power on an ordinary share or 'SR Shares') or inferior voting rights (a fraction of voting power on an ordinary share or 'FR Shares'). In the current regime, DVR shares cannot be issued with higher or superior voting rights. They can only be issued, subject to certain conditions, with lower voting rights. For this purpose, a DVR group was constituted in the Primary Market Advisory Committee ('Committee') of SEBI to deliberate on the said issue and consequently a report ('Report') has been released on the same.

The Report proposes that the structure of the issuance of DVR could be under two heads:

a) Issuance by companies whose equity shares are already listed on stock exchanges; and

b) Companies with equity shares not hitherto listed but proposed to be offered to the public.

Some of the recommendations of the Committee are:

I. **FR SHARES**

a) <u>First issue of shares</u>

A company, whose equity shares are listed and traded on a recognized stock exchange for at least 1 (one) year, shall be permitted to issue FR Shares by way of:

(i) rights issue;

(ii) bonus issue pro rata to all equity shareholders; or

(iii) Follow-on Public Offer ('FPO') of FR shares.

While, the first two options hereinabove shall provide FR shares to all the existing equity shareholders of a company, the third option shall provide a right to all existing shareholders to subscribe to the FR shares, along with the third parties.

b) <u>Subsequent issue of FR Shares</u>

A company that has already listed FR Shares shall be eligible to transact a rights issue or a bonus issue of FR Shares of the same class to all shareholders on a pari-passu basis

c) <u>Pricing</u>

The pricing of FR shares shall be in accordance with regulatory considerations applicable to mode of issuance of FR Shares.

II. SR SHARES

a) <u>First issue of shares</u>

SR Shares shall be issued by an unlisted company and only to the promoters of a company. Such unlisted company where the promoters hold SR Shares shall be permitted to do an Initial Public Offer ('IPO') of only ordinary equity shares provided the SR Shares are held by the promoters for more than one year prior to filing of the draft offer document with SEBI.

b) <u>Subsequent issue of SR Shares</u>

A company shall not be permitted to issue SR Shares to any person, including to the promoters, in any manner whatsoever, including by way of rights issue or bonus issue, once its ordinary equity shares have been listed.

c) Lock-in of SR Shares

All the SR Shares issued to shareholders of a company shall remain under a perpetual lock-in after the IPO.

Various conditions and rights attached to the each set of shares have further been suggested by the Committee, through the issued guidance note.

➲ *MCA introduces National Guidelines on Responsible Business Conduct: flavours of the United Nations Guiding Principles*

Recently, MCA revised the 2011 guidelines introduced by it called National Voluntary Guidelines on the Social, Environmental and Economic Responsibilities of Business ('NVGs'). There was a need to revise and update the NVGs in order to align the same with the Sustainable Development Goals ('SDGs') and 'Respect' pillar of the United Nations Guiding Principles ('UNGP'). The revised and updated guidelines are now called National Guidelines on Responsible Business Conduct ('NGRBC').

The NGRBC shall provide guidance to businesses with respect to what constitutes as a responsible business conduct. The primary objective for the introduction of NGRBC is to integrate important national and international developments in the aspects of sustainable development agenda and business responsibility that have occurred since the inception of the NVGs in 2011.

The principles of NGRBC focus on the fact that state businesses should conduct themselves with integrity, respect and promote human rights, be ethical, transparent and accountable in their actions, provide sustainable and safe goods and services, respect and take measures to promote the well-being of their employees and stakeholder interests, etc.

➲ *SC decides on quasi-contractual obligations in contract which stipulating a sum for its breach*

Recently in the case of Mahanagar Telephone Nigam Ltd. (MTNL) v. Tata Communications Ltd. (Tata), the Supreme Court decided on whether quasi-contractual obligations could be inserted in a contract which already stipulates a sum for its breach.

Facts: In this case, there was a contract for a purchase order between MTNL and Tata. As per the terms of the contract, in case of a breach, liquidated damages would be limited to 12% of the purchase value. In pursuance of Tata failing to discharge its obligations under the provisions of the contract, and MTNL suffering damage because of it, MTNL, deducted certain sums of amounts from the invoices that were raised by Tata, which exceeded the abovementioned limit of 12% of the purchase value.

Aggrieved, Tata approached Telecom Disputes Settlement and Appellate Tribunal ('TDSAT'), claiming that the sums that were deducted by MTNL as aforementioned, were excessive than what the contract stipulated in that respect. In reply, MTNL stated that the sums were due under 'quantum meruit'. TDSAT ruled in favour of Tata, pursuant to which MTNL approached the Supreme Court. The specific issue in this matter was whether a claim in quantum meruit, such as the one made by MTNL in this case, would be permissible in cases where parties were governed by a contract.

Held: The Supreme Court held that quantum meruit cannot be claimed in case of existence of a contract. Section 74 of the Indian Contracts Act, 1872 would be considered here wherein the sum that is stated as a liquidated amount can only be charged by way of damages, and not any other sum, in this case quantum meruit. Any amount in excess of the amount decided in the contract charged, would be refunded to Tata

➲ *RBI issued Master Direction on current ECB framework in India*

On 26th March, 2019, RBI issued Master Directions on the External Commercial Borrowings Framework ('ECB Framework') that was revised in January, 2019 and is currently in force in India. Along with consolidating the provisions regarding ECB Framework, the Master Directions also provided for regulations on Trade Credits and Structured Obligations.

GST Brief

➲ *34th GST Council made recommendations regarding Real Estate Sector*

The 34th meeting of the GST Council held on 19th March, 2019 at New Delhi made recommendations on the operational details for the implementation for lowering the effective GST rate of 1% with respect to affordable houses and 5% on construction of houses other than affordable houses, with respect to new projects commencing after 1st April, 2019 and subject to fulfilment of certain conditions in pursuance thereto In the event that the developer opts for ongoing projects, it has to file Annexure IV on the portal by 10th May, 2019, otherwise new rates shall be deemed to

have been opted by the developer, based on the following conditions:

a) No Input Tax Credit ('ITC') on services and goods option.
b) Developer to pay tax on services that are provided to the owner of the land against transfer of development rights ('TDR').
c) The land owner can avail the ITC of the tax that is paid to the builder if he sells and pays tax on under construction flats.
d) Builder shall pay tax (28%) under Reverse Charge Mechanism ('RCM') in the event that cement is purchased from the unregistered supplier.
e) 80% of the value of input and input services should be from registered supplier.
f) In a financial year, where 80% threshold is not met, tax at 18% has to be paid by builder on shortfall.

[*Source: Notification No. 03/2019-Central Tax*]

➲ *Government enhances threshold limits for registration under GST, w.e.f 1st April, 2019*

The Central Government recently enhanced the threshold limit for registration to Rs. 40,00,000 (Rupees forty lakhs only) for those engaged in exclusive supply of goods. Provided, the said threshold limit would not apply to the following persons who are:

a) engaged in making intra-State supplies in the States of Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Puducherry, Sikkim, Telangana, Tripura, Uttarakhand,
b) required to take compulsory registration under section 24 of CGST Act,
c) suppliers of tobacco and manufactured tobacco substitutes, ice cream and other edible ice, Pan masala.

[*Source: Notification No. 10/2019-Central Tax*]

➲ *Calcutta HC holds that redistribution of electric supply is chargeable to Service Tax*

Recently in the case of Srijan Realty Private Ltd. V Commissioner of Service Tax, the High Court of Calcutta decided on the issue of whether supply of electricity by the petitioner to the occupiers of a commercial complex by the name of 'Galaxy Mall', is a service that would be exigible to Service Tax under the Finance Act, 1994.

Facts: Galaxy Mall was developed and operated by the petitioner and had various occupants. For the purpose of supplying electricity to Galaxy Mall, the petitioner had entered into an agreement with Indian Power Corporation Ltd ('IPCL'). Upon receipt of electric supply from IPCL, the Petitioner redistributed the same to the occupiers of Galaxy Mall and consequently, the raised bills upon such occupiers. In pursuance of this, the Petitioner collected Service Tax from the occupiers but upon objections raised from some occupiers and legal advice obtained, discontinued such collection basis the fact that the Petitioner believed it was not liable to pay Service Tax under the Finance Act, 1994.

Held: The court held that the transaction of the petitioner fell within the definition of 'Service' under Finance Act, 1994 as it involved supplying electric supply to occupants (after conversion from high-tension electric supply to low-tension supply) and consequently raising bills from the occupants regarding the same and realizing electricity consumption charges from such occupants was a service rendered by the petitioner and such and was exigible to Service Tax under the Finance Act, 1994.

RERA Brief

MAHARASHTRA RERA ORDER:

➲ MahaRERA issues SOP for revocation of registration of project:

MahaRERA has issued a SOP for revocation of registration of project under Section 7 and 8 of RERA 2016 and it can take such action as it may deem fit for carrying out the remaining development work. It allows homebuyers to remove a developer in case a project is not completed on time. The SOP states that an association of homebuyers with the consent of at least 51% members can remove the developer from the project. The developer is required to respond to the notice within 30 days. Financial Institutions and any other parties associated with the project would also receive a copy of the notice. After the developer losses right over the project, the project would be handed over to an expert panel who will look after the project. But this stands valid only if the apartment owners have not registered complaints before any forums such as company law or debt recovery tribunals. If the builder looses the right over the project, a designated resolution panel with one member from the association and one member from the consumer forum would help prepare a blueprint. The blueprint to be prepared by them shall detail the current financial status of the project, construction blueprint to determine the amount of construction work needed to complete the project, future expenses, and the deadline to complete the project would to be decided. The blueprint to be ready in 4 months and submitted to MahaRERA. However after analysis of the blueprint, MahaRERA can either allow the same developer to

continue the project with certain conditions or revoke the registration of project. In case the registration is revoked, the bank accounts of the developer will stay frozen.

PUNJAB RERA ORDER:

➲ Punjab RERA issues procedure for change of bank accounts by the promoters:

In order to maintain uniformity in dealing with requests for change of bank accounts Punjab RERA has issued a procedure for dealing with requests of Promoters for change of bank account originally specified by them at the time of registration of their projects as provided under Section 42(I)(D) of RERA Act, 2016. Procedure states that the request for change of bank account must indicate the reasons for change; along with the details of original inventory available for sale; and the number of units already sold or booked till the date of application for change of bank account and the request has to be accompanied by a statement certified by a Charted Accountant showing the amount of the sale proceeds realized from the allottees of the project-on cost of land and construction of the project.

TAMIL NADU RERA ORDER:

➲ Tamil Nadu Real Estate Appellate Tribunal Regulations, 2019:

The Tamil Nadu RERA has released notifications for Tamil Nadu Real Estate Appellate Tribunal Regulations, 2019.These Regulations would apply to all the proceedings pending in the Tribunal on the date of their commencement and are applicable for the state of Tamil Nadu and to the Union Territories of Andaman & Nicobar Islands and Puducherry. These regulations aim to streamline and codify the process of appeals right from when such an appeal is being presented to the Tamil Nadu Real Estate Appellate Tribunal to the Final Order. They outline the requisite documents required to put such an appeal in motion and define a time schedule to be followed in scrutinizing and finally accepting and numbering the appeal. They also provide the procedure to be followed with regards to summons and hearings.

RERA Cases

➲ Supreme Court: Buyer cannot be required to wait indefinitely for possession:

In the matter of Kolkata West International City Pvt Ltd *("**Appellant/Developer**")* Vs. Devasis Rupa *("**Respondent/Buyer**")*, the Appellant had appealed at Supreme Court from the judgement of NCDRC.

Facts:

- The Buyer had entered into an agreement with the Developer which envisaged that the possession of the Row House would be handed over to the Buyer by 31.12.2008 with grace period of a further six months. In 2011, the Buyer approached the consumer commission and prayed for possession of the Row House and in the alternative for the refund of the amount paid to the Developer together with interest at 12% per annum.
- The State Commission allowed the complaint by directing the Developer to refund the moneys paid together with interest at 12% per annum and compensation of Rs. 5 lakhs. The National Commission modified this order by reducing the compensation from Rs. 5 lakhs to Rs. 2 lakhs.

Issue:

Whether the buyer was entitled to seek refund or was estopped from doing so, having claimed compensation as the primary relief in the consumer complaint?

Observations:

- The Hon'ble Supreme Court refused to interfere with the order of the refund and held that in terms of the agreement, the date for handing over possession was 31.12.2008, with a grace period of six months. Even in 2011, when the Buyer filed a consumer complaint, he was ready and willing to accept possession.
- It further held that it would be manifestly unreasonable to construe the contract between the parties as requiring the buyer to wait indefinitely for possession. Since by 2016, nearly seven years had elapsed from the date of the agreement. Even according to the Developer, the completion certificate was received on 29.03.2016. This was nearly seven years after the extended date for the handing over of possession prescribed by the agreement.
- It held that a buyer can be expected to wait for possession for a reasonable period. A period of seven years is beyond what is reasonable. Hence, it would have been manifestly unfair to non-suit the Buyer merely on the basis of the first prayer in the reliefs sought before the SCDRC. There was in any event a prayer for refund.
- Under these circumstances, the court was of the view that the orders passed by the SCDRC and by the NCDRC for refund of moneys were justified.

Held:

- The Hon'ble Supreme Court modified the order of the NCDRC only to an extent of directing that the Appellant shall pay interest at the rate of 9% per annum to the Respondent instead and in place of 12% as directed by the NCDRC and the court affirmed the directions of the NCDRC.

Litigation Brief

➲ *Supreme Court Declares One-Sided Clauses in Builder-Buyer Agreements Constitute Unfair Trade Practice*

Facts of the Case:

Pioneer Urban Land & Infrastructure Ltd. vs Govindam Raghavan (CA No. 12238/2018 alongwith CA No. 1677/2019)

- Appeals filed under Section 23 of the Consumer Protection Act ("the Act") to challenge the order, dated 23.10.2018, passed by National Consumer Disputes Redressal Commission ("NCDRC").
- The Respondent Buyers had a purchased an apartment from Appellant Builder in Sector 62, Gurugram by entering into an Apartment Buyer's Agreement ("the Agreement") dated 08.05.2012 for a total sale consideration of Rs. 4,85,25,280/-.
- As per the terms of the Agreement, the Appellant was to apply for Occupancy Certificate within 39 months with a grace period of 180 days. However, the Appellant failed to apply for the Occupancy Certificate within the stipulated period.
- The Respondent filed a complaint before the NCDRC on 27.01.2017 alleging deficiency of service for Appellant's failure to obtain the Occupancy Certificate and hand over possession of the flat and demanded refund from the Appellant.
- On 06.02.2017, the NCDRC passed an ex-parte Interim Order restraining the Appellant from cancelling the allotment made in the name of the Respondent during the pendency of the case before NCDRC.
- On 23.07.2018, the Appellant obtained Occupancy Certificate and issued Possession Letter to the Respondent on 28.08.2018.
- The Appellant's case before the NCDRC was that since the apartment was complete now, the Respondent must be directed to take possession of the Apartment instead of directing the refund of the consideration paid. However, the Respondent submitted that he now does not want the possession due to inordinate delay of almost 3 years during which he has already taken an alternate property in Gurugram.
- NCDRC vide the Final Order held that the Respondent Buyer cannot be compelled to take the possession and further held that the clauses in the Agreement are one-sided and unfair.
- The Appellant Builder challenged the Order of the NCDRC in the present appeal before the Supreme Court.

Hon'ble Supreme Court observed and held as follows:

- Relied upon Fortune Infrastructure & Anr vs Trevor D'Lima & Ors (2018) 5 SCC 442) to hold that a person cannot be made to wait indefinitely for possession of the flat and is entitled to seek refund of the amount paid along with compensation.
- The bench also referred to Law Commission of India 199th Report which recommended that legislation be enacted to counter such unfair terms in contracts. The report stated that "A contract or a term thereof is substantively unfair if such contract or the term thereof is in itself harsh, oppressive or unconscionable to one of the parties".
- Perusing the clauses of the agreement, the Bench found stark discrepancies between the remedies available to both the parties to the contract. For instance, the Agreement entitles the Builder to charge Interest @18% p.a. on account of any delay in payment of installments from the Respondent – Flat Purchaser. Whereas, the Builder is liable to pay Interest @9% p.a. only for delay in delivering possession of flats.
- Upholding the NCDRC's Order, the bench referred to Section 2 (r) of the Consumer Protection Act, 1986 which defines 'unfair trade practices' in the following words : "'unfair trade practice' means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice ...",
- The bench observed that this definition is not exhaustive and held that "A term of contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder.
- It held that the Clauses relied upon by the Appellant Builder to resist the refund claims made by the Respondent Buyer were wholly one-sided, unfair and reasonable and could not be relied upon. And the incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2(r) of the Consumer Protection Act, 1986.
- Dismissing the appeal, it also directed that the Appellant builder to refund the amount to the Respondent within a period of three months from the date of the order.

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