Highlights:

Corporate Brief

- *SEBI circular for 'Off-market' transfer of securities by FPI.*
- *RBI circular for submission of returns under Banking Regulation Act, 1949.*
- *MCA notification for Companies (Incorporation) 4th Amendment Rules, 2021.*
- *MCA notification for amendment of the Companies (Meetings of Boards and its powers) Rules, 2021.*
- *MCA general circular for clarification on passing of ordinary and special resolutions by companies.*
- *MCA general circular for relaxation of additional fees for filing forms under Companies Act, 2013 and LLP Act, 2008.*
- *MCA general circular for relaxation of time for filing forms related to creation or modification of charges under Companies Act, 2013.*

RERA Brief

- *Circular Issued by MahaRERA Notifying the Standardized Format for A Declaration About Commencement Certificate;*
- *Order Issued by MahaRERA Regarding Committee for Giving Recommendations For (I) Model Agreement For Commercial/Residential Units/Plots; And (Ii) Draft For Allotment Letter;*
- *Circular Issued by MahaRERA Notifying That Hearing Of The Complaints Shall Be As Per Seniority;*
- *Circular issued by Punjab Real Estate Regulatory Authority clarifying the definition of the promoter of the project, especially in the cases where the owner of the land and the developer of the real estate project are different entities;*
- *Order issued by Rajasthan Real Estate Regulatory Authority regarding new online service of "Special Modification" for updation/correction/modification in Promoter profile and Project details of Registered Projects*
- *Order issued by Rajasthan Real Estate Regulatory Authority regarding the matter of allowing inspection and issuing copies of documents/records available with the Authority.*

NCLT Brief

- *Whether an Application for Arbitration moved under Section 8 of the Arbitration and Conciliation Act, 1996 is maintainable after a Section 7 Petition is filed before the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016.*

- *Whether the approval of a Resolution Plan ipso facto discharges a Personal Guarantor (of a Corporate Debtor) of her or his liabilities under the Contract of Guarantee.*

Corporate Brief

➲ Vide Circular No. EBI/HO/FPI&C/P/CIR/2021/0569" dated 01.06.2021, of Securities and Exchange Board of India, ('SEBI'):

It was decided that:

- **'Off-market' transfer of securities by FPI:**
  1. An FPI (Foreign Portfolio Investor) ("original fund" or its wholly owned special purpose vehicle) may approach its DDP (Designated Depository Participant) for approval of a one-time "off-market" transfer of its securities to the "resultant fund".
  2. The DDP after due diligence, may accord its approval for a one-time "off- market" transfer of securities for such relocation, which shall imply that the FPI has deemed to have applied for surrender of its registration subject to the guidelines pertaining to surrender of FPI registration.
  3. The "off-market" transfer shall be allowed without prejudice to any provisions of tax laws and FEMA.
  4. For the purpose of this circular, the terms "original fund"; "relocation" and "resultant fund" shall have the meanings assigned to them in the Finance Act, 2021.

➲ Vide Circular No. "DoR.RET.REC.19/12.05.009/2021-22" dated 04.06.2021, of Reserve Bank of India, ('RBI'):

It was decided that:

- **Submission of returns under the Banking Regulation Act, 1949 (AACS) [As Applicable to Co-operative Societies] – Extension of time:**

  As per the Banking Regulation Act, 1949, accounts and balance sheet together with the auditor's report are required to be published in the prescribed manner and three copies of the same shall be furnished as returns to the RBI within three months from the end of the period to which they refer i.e., by 30th June. State Co-operative Banks and Central Co-operative Banks are also required to submit these statements as returns to the National Bank for Agriculture and Rural Development (NABARD). In view of the difficulties faced by many of the Primary (Urban) Co-

operative Banks (UCBs), State Co-operative Banks and Central Co-operative Banks in finalizing their Annual Accounts, due to COVID-19 pandemic, the RBI has extended the period by three months i.e., on or before 30th September, 2021, for furnishing of accounts and balance sheet along with the auditor's report for the financial year ending on March 31, 2021.

➲ **Vide notification No. "F. No. 1/13/2013-CL-V-Vol.IV" dated 07.06.2021, of Ministry of Corporate Affairs, ('MCA'):**

It was decided that:

- **Amendment of the Companies (Incorporation) Rules, 2021**

1. In rule 38A, in the Companies (Incorporation) Rules, 2014, the following amendments were made:
   a) A new format of the e-form "INC-35 AGILE-PRO-S" which needs to be accompanied with the e-form during the incorporation of a company has been introduced, wherein, "S" stands for "Shops and Establishment", which was earlier called as "INC-35 AGILE-PRO".
   b) The purpose of such form is for the Application for registration of Goods and Service Tax Identification Number (GSTIN); Employee State Insurance Corporation (ESIC) registration; Employees' Provident Fund organisation (EPFO) Registration; and profession Tax Registration; Opening of Bank Account and Shops and Establishment Registration.
   c) Such application form shall now contain an application for registration of the following numbers:
      - Profession Tax Registration with effect from the 23rd February, 2020;
      - Opening Bank Account with effect from the 23rd February, 2020;
      - Shops and Establishment Registration.

➲ **Vide notification No. "F. No. 1/32/2013-CL-Part-V" dated 15.06.2021, of Ministry of Corporate Affairs, ('MCA'):**

It was decided that:

- **Amendment of the Companies (Meetings of Boards and its powers) Rules, 2021**:
  In the Companies (Meetings of Board and its Powers) Rules, 2014, rule 4 shall be omitted which deals with the "*matters not to be dealt with in a meeting through VC (video conferencing) or OAVM (other audio visual means)*".

➲ **Vide general circular No. "10/2021" dated 23.06.2021, of Ministry of Corporate Affairs, ('MCA'):**

It was decided that:

- **Clarification on passing of ordinary and special resolutions by companies under the companies Act, 2013 read with rules made thereunder on account of COVID-19- extension of time:**
  The earlier limit till 30th June, 2021, for the companies to conduct their EGMs (Extra Ordinary General Meetings) through VC (Video Conferencing) or OAVM (Other Audio Visual Means) or to transact items through postal ballot has been now extended till 31st December, in accordance with the framework earlier provided.

➲ **Vide general circular No. "11/2021" dated 30.06.2021, of Ministry of Corporate Affairs, ('MCA'):**

It was decided that:

The time period for filing the forms under Companies Act, 2013 and LLP Act, 2008 (other than forms CHG-1; CHG-4; CHG-9) which are due for filing during 01.04.2021 to 31.07.2021 has been extended till 31.08.2021, without any additional fees.

➲ **Vide general circular No. "12/2021" dated 30.06.2021, of Ministry of Corporate Affairs, ('MCA'):**

It was decided that:

Where the date for filing of forms CHG-1 and CHG-9 i.e. forms for creation or modification of a charge is before 01.04.2021 or falls between 01.04.2021 and 31.07.2021, the period for filing the charge as per the Companies Act, 2013, has been extended and now, the timeline of 30 (thirty) days within which the charge is required to be filed shall be counted from 01.08.2021.

RERA Brief

Circular Issued by MahaRERA Notifying the Standardized Format For A Declaration About Commencement Certificate

- The Maharashtra Real Estate Regulatory Authority ("**MahaRERA**") vide its circular dated 07.06.2021, bearing Circular no: 32/2021,No.MahaRERA/Admin/fileno.27/59/2021, notified the standardization of the format for a declaration pertaining to the commencement certificate.
- In view of Section 4(2)(c) and (d) of the Real Estate (Regulation & Development) Act, 2016 ("**RERA Act**") and rules and regulations made thereunder provide for enclosures of valid and authenticated copies of approvals and commencement certificate, sanctioned plans, layouts, etc. which are approved by the competent authority and the layout approvals are obtained for the entire project multiple times. However, certain approvals are also obtained in a stage-wise manner including the Commencement Certificate up to a Plinth/Zero FSI/ or Commencement Certificate up to a particular floor.
- Since the flat buyers are not aware of these processes of approvals, the MahaRERA has decided to prescribe a declaration by the Promoter to certify the exact stage of commencement certificate, making the flat buyers aware of the same.
- The declaration format shall be called *"Format-D"* of the circular which has been annexed with the circular itself. The promoter will be required to upload it while registering the project, alongside the commencement certificate.
- The promoter shall be required to update the commencement certificate or approvals obtained by him, at every later stage.
- The order has come into effect from 07.06.2021.

Order Issued by MahaRERA Regarding Committee For Giving Recommendations For (I) Model Agreement For Commercial/Residential Units/Plots; And (Ii) Draft For Allotment Letter

- The MahaRERA vide its order no. 17/2021 dated 14.06.2021, bearing No.MahaRERA/Secy/FileNo. 27/2021, constituted a committee to give recommendations vis-à-vis suggestions for Draft (i) Draft Agreement for Sale; and (ii) Draft for allotment letter.
- The chairman may at any time form subgroups of the members for particular activities. The timelines and scope of work in consultation with MahaRERA.
- The expected time for the committee to submit its report shall be within 30 (thirty) days.
- Member secretary shall also ensure that all administrative support and assistance to the committee for carrying out its function.

Circular Issued by MahaRERA Notifying That Hearing Of The Complaints Shall Be As Per Seniority

- The MahaRERA vide its circular dated 21.06.2021, bearing Circular No 34, MahaRERA/Secy/File No. 27/86/2021, notified hearing of complaints as per Seniority.
- Section 31 of the RERA Act enables any aggrieved person to file a complaint with MahaRERA for any violation or contravention of the provisions of the Act or the rules and regulations made thereunder.
- The Hon'ble Chairperson of MahaRERA is empowered with the powers of general superintendence and directions in the conduct of affairs of the MahaRERA under Section 25 of the RERA Act.
- However, in the interest of justice, equity and good conscience, the MahaRERA was of the view that the complaints filed under Section 31 of the RERA Act must be heard and disposed of on merits in accordance with and as per their seniority.
- Accordingly, the MahaRERA has decided that all complaints filed with MahaRERA shall be heard and decided on merits by the respective single benches of MahaRERA or the adjudicating officer as the case may be per the seniority of the complainant which shall be decided as per the date of filing/ registration of the complaint before the MahaRERA except in the cases as follows:

1. where the complainant is suffering from a serious life-threatening illness and an application in that regard is submitted along with Doctor's certificate
2. where a superior Forum/Tribunal/Court directs the complaint is to be disposed of in a fixed time.
3. where the complaint in respect of the same project is clubbed together for hearing then in the event of seniority of the clubbed complaints shall be the date of filing/ registration of the complaint filed first in point of time from amongst the clubbed complaints.
4. where disputes have been settled between the parties before the conciliation bench.

- Apart from the above mentioned, if due to any unavoidable circumstances or in special circumstances if the seniority of any complaint has to be changed, in that event, a proper reason/justification has to be submitted before the Hon'ble Chairperson, MahaRERA

and shall be changed only after obtainment of approval of the Hon'ble Chairperson, MahaRERA.

Circular issued by Punjab Real Estate Regulatory Authority clarifying the definition of the promoter of the project, especially in the cases where the owner of the land and the developer of the real estate project are different entities

- The Punjab Real Estate Regulatory Authority vide its circular dated 04.06.2021, bearing Circular no. RERA/Pb/ENF/2021/28 notified guidelines and directions for compliance and information in respect to the promoter of the project.
- There are no provisions that lay down that there can be only one promoter for a project. Section 2(zk) of the RERA Act, explicitly recognizes that there can be more than one promoter. In the project which has recognized more than one promoter, the responsibility between the promoters assumes importance.
- The general rule is that the promoters are jointly liable for the functions and responsibilities. However, if there is an agreement between the promoters delineating the responsibilities of each, this shall be taken into account while fixing the liability for specific acts of omission or commission. In absence of either (i) an agreement or understanding among promoters; or (ii) decision of a competent forum as to their respective responsibilities, the Punjab Real Estate Regulatory Authority will hold that promoter(s) liable for a particular act of commission or omission that they deem responsible for the same.
- The second issue resolved by the Punjab Real Estate Regulatory Authority was that where the land is not fully owned by the promoter, will the landowner of the remaining part to be treated as the promoter? In respect of the same, the Punjab Real Estate Regulatory Authority further notified that there can be various kinds of agreements and relationships between the landowner and the developer; and a uniform policy cannot be applied in different situations. Examples are stated below:
    1. grant of general power of attorney by the landowner in the favor of the developer granting all rights over the land.
    2. the special power of attorney or an agreement in which rights of the development over the land are given but not the title therein.
    3. profit-sharing arrangements between the development and the landowner.
    4. cases in which the landowner becomes entitled to a share of the developed land.
- The situations are varying and can be assumed that there are different dimensions. The landowner can be treated as a promoter depending upon the circumstances of every case. It is clarified that a landowner will be considered as a promoter if one or more of the following conditions are satisfied:
    1. The landowner himself has a role in the development and management of a project.
    2. The landowner gives way only the right of development over the land but not the power of sale of developed land to the developer.
    3. The landowner is to get a share in the profits of the project. It is also seen in many cases payment for the land is often made by the developer in installments. In such cases merely receiving a part of the proceeds of the sale of the agreement with the developer does not arrange to be one of the profit sharing.
    4. The landowner is to get a share in the area developed for sale before the completion of a project. If such share in the developed area is admissible only after completion of the project, the landowner is in the nature of an allottee and will not be treated as the promoter.
    5. If an agreement between the landowner and promoter specifically provides that the former will be a promoter.
    6. There are cases especially in relation to large projects, including megaprojects, where the original promoter sells part of the land under the original project to another promoter for the development of a smaller and separate real estate project thereon. Though the area is sold yet the original promoter continues to be responsible for the provision and maintenance including the area sold by it. In such cases, the original promoter will also be treated as a promoter for the smaller project.
- The third Issue as notified was who is the promoter in cases of regularized unauthorized colonies. And as per the current policy, all persons whose name the regularization certificate has been issued are initially treated as promoters of the project.
- Subsequently, however, the person in whose name the regularization certificate has been issued enters into an agreement with another promoter, the above guidelines will apply. In such cases, the person in whose name the regularization certificate was issued will be considered to be a landowner and the person subsequently entering the picture will be treated as a developer.

Order Issued by Rajasthan Real Estate Regulatory Authority Regarding New Online Service Of "Special Modification" For Updation / Correction / Modification in Promoter Profile And Project Details Of Registered Projects

- The Rajasthan Real Estate Regulatory Authority vide its order dated 14.06.2021 bearing Order No. F1(198) RJ/RERA/GM/2021/722 pertaining to the new online service of **"Special Modification"** for updation/ correction/modification in promoter profile and project details of registered projects.
- However, Rajasthan Real Estate Regulatory Authority had left out certain items of Promoter Profile and Project details was left out of scope but now they have launched another online service by the name of 'Special Modification' whereby promoters will be able to update/correct/modify all those remaining items of the promoter profile and the project details, though with online approval of Rajasthan Real Estate Regulatory Authority. Under this service, an application can be made even for the change of promoter in respect of any registered project.
- The following directions were issued:
  1. For updates/corrections/modification to be made in project details, promoter to select the items that need to be modified form the list given in 'Application for Modification of Project Details" under Special Modification (Project Modification) module and fill the proposed details, while mentioning the reason for modification and uploading all the relevant documents. One application means one item has to be modified, if there are more then they will need a separate application for each item.
  2. For updation/corrections/modifications to be made in existing promoter profile which do not amount to change of promoter select the "Case A" application for modification of Promoter Profile under Special Modification (Profile Modification) module.
  3. For change of promoter in respect of a particular registered project, select the tab 'Case B' in 'Application for Modification of Promoter Profile' under Special Modification (Profile Modification) module.
  4. The fee shall be payable as follows:
     i. A fee of INR 5000/- (Rupees Five Thousand only) has to be deposited for each application made under Special Modification (Project Modification) module
     ii. A fee of INR 5000/- (Rupees Five Thousand only) is to be deposited for each application for change/modification/updation in existing Promoter Profile (Case A) made under Special Modification (Profile Modification) module.
     iii. For change of Promoter (Case B) under Special Modification (Profile Modification) module, a fee equal to the sum of registration fee and standard fee, currently payable on registration of new project shall be payable.
     iv. Additional fee may be demanded by Authority if found payable in facts and circumstances of a particular case (especially in cases of change of Project Status, Project Type)
  5. No offline/paper applications will be entertained in future. It is to ensure timely updates of the promoter profile and Project details of the registered project so that the allottees and the potential buyers get correct/updated information at all times.

Order Issued by Rajasthan Real Estate Regulatory Authority Regarding The Matter Of Allowing Inspection And Issuing Copies Of Documents/Records Available With The Authority

- The Rajasthan Real Estate Regulatory Authority vide its order dated 15.06.2021 bearing Order No. F1(5)RJ/RERA/2018/Part/D-738 issued directions in the matter of allowing inspection and issuing of copies of documents/record available with the Rajasthan Real Estate Regulatory Authority.
- In response to the application filed Under RTI Act of 2005, the Rajasthan Real Estate Regulatory Authority shall provide copies of documents/records as per the provisions of the RERA Act.
- The Rajasthan Real Estate Regulatory Authority's website shall have all details of registered real estate projects, including documents are available which shall be download for free. Scanned copies of order passed by the Rajasthan Real Estate Regulatory Authority in complaints or otherwise are also available for free.
- In furtherance, certified copy of each order passed shall be made available to the authorized representative of all parties to the complaint by hand, free of charge. And in cases where there is no authorized representative appointed, or the authorized representative does not collect the copy within 10 (ten) days such certified copy shall be made available to the concerned party, by speed post, free of charge.
- If any party still requires to inspect, obtain certified copies of any documents or record which are available with the

Rajasthan Real Estate Regulatory Authority, such party or its authorized representative shall submit an online application in Form R-6 as digitalized and adapted for online processing and hosted on the Rajasthan Real Estate Regulatory Authority's web portal (Fees annexed as table in Order).

- The Rajasthan Real Estate Regulatory Authority reserves the right subject to provisions of RTI shall by way of order, direct any information, document or paper maintained by the Authority to be confidential and shall not be made available for certified copies or inspection.
- The Nodal officer appointed shall be handling all the applications submitted in Form-6 shall respond to such as soon as possible under 14 working days from the date of online submission of Form R-6.

NCLT Brief

➲ Whether an Application for Arbitration moved under Section 8 of the Arbitration and Conciliation Act, 1996 is maintainable after a Section 7 Petition is filed before the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016.

IN THE MATTER OF: Indus Biotech Private Limited V/s Kotak India Venture (Offshore) Fund (earlier known as Kotak India Venture Limited) & Ors. (Decided by the Hon'ble Supreme Court of India on 26.03.2021)

Issues:

1. Whether an Application for arbitration moved under Section 8 of the Arbitration and Conciliation Act, 1996 can be considered by the National Company Law Tribunal ('**NCLT**') if a Section 7 Application is pending adjudication?
2. In the circumstances whereby the parties are in the process of determining the amount due and payable, then in order to record satisfaction of default, is it sufficient to claim that a certain sum of debt is due and payable?

Facts:

1. Kotak group of entities ('**Kotak**') had subscribed to the equity shares and Optionally Convertible Redeemable Preference Shares ('**OCRPS**') in Indus Biotech Private Limited ('**Indus Biotech**') by way of the Share Subscription Agreement and Shareholder's Agreement dated 20.07.2007, 12.07.2007, 09.01.2008 and Supplemental Agreements dated 22.03.2013 and 19.07.2017 ('**Agreements**').
2. Subsequently, Indus Biotech decided to make a Qualified Initial Public Offering ('**QIPO**'). However, in terms of Regulation 5(2) of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 ('**SEBI Regulations**'), a company having outstanding convertible securities or any other right which entitles a person to receive equity shares of the issuer, cannot issue a QIPO.
3. In this context, Indus Biotech proposed to convert the OCRPS issued to Kotak into equity shares. In the process of the said negotiation, a dispute is stated to have arisen between the parties as to the calculation and conversion formula to be applied in the conversion process. As per the formula applied by Kotak, it would be entitled to 30 percent of the total paid up share capital. As against this, as per the formula applied by Indus Biotech, Kotak would be entitled to 10 percent of the total paid up share capital.
4. Since the parties had not arrived at an amicable conclusion in this regard, Indus Biotech contended that the dispute should be referred to arbitration by an Arbitral Tribunal. However, as per Kotak, on redemption of OCRPS, an amount of Rs. 367 crores approximately was due and payable by Indus Biotech to Kotak.
5. Since the aforesaid amount is due, demanded and not paid by Indus Biotech, on 16.08.2019, Kotak filed a Section 7 Petition under the Insolvency and Bankruptcy Code, 2016 ('**the Code**') before NCLT, Mumbai, for initiation of Corporate Insolvency Resolution Process ('**CIRP**') of Indus Biotech.
6. In the said Petition, Indus Biotech moved a Miscellaneous Application under Section 8 of the Arbitration and Conciliation Act, 1996 ('**Act, 1996**'), thereby seeking a direction to refer the parties to Arbitration. Vide Order dated 09.06.2020, NCLT came to a conclusion that the material placed before is not sufficient to record satisfaction of default and allowed the Section 8 application filed under the Act, 1996, thereby dismissing the Section 7 Petition filed under the Code.
7. Aggrieved by the said Order, Kotak moved the Hon'ble Supreme Court ('**the Court**') by way of a Special Leave Petition. It is pertinent to mention that in this regard, a Petition under Section 11 of the Act, 1996 for constitution of an Arbitral Tribunal was already moved by Indus Biotech before the Court and was pending consideration.

Arguments:

1. The Counsel for Kotak, Mr. Abhishek Manu Singhvi, contended that the Agreements provide the manner of redemption of OCRPS, according to which the date of redemption was fixed as 31.12.2018 and OCRPS, when redeemable, were to be paid within 15 days from the date of redemption. Further, as per the Agreements, the redemption value of OCRPS constituted a debt. Thus, since the said amount was due and not paid within 15 days from the date of redemption, it constituted a default on the part of Indus Biotech.
2. The Counsel for Kotak further contended that when an application under Section 7 of the Code was moved before NCLT, a duty was cast upon NCLT to proceed with the same strictly in accordance with the procedure stated in the Code and that consideration of the Application under Section 8 of the Act, 1996 by NCLT, was without jurisdiction. He further stated that the dispute sought to be raised is not arbitrable.
3. As against this, the Counsel for Indus Biotech, Mr. Shyam Divan, contented that the QIPO related matters and the issue of allotment of equity shares against the OCRPS, were already being considered by the Board during its meetings in March and April 2018 – i.e., much before the date of redemption. It was further contented that since the discussion and deliberations regarding the said matters had not reached a conclusion, it would be inappropriate to consider the Section 7 application and hold that Indus Biotech has defaulted.

Court's Observations:

1. Taking into consideration the provisions of the Code, the Court stated that in order to trigger an application under Section 7 of the Code, four factors must exist: (i) there should be a 'debt', (ii) 'default' should have occurred, (iii) debt should be due to a 'Financial Creditor' and (iv) such default which has occurred must be by a 'Corporate Debtor'. When such an application is filed before NCLT, a duty is cast on it to ascertain the existence of default if shown from the records of the information utility or on the basis of the evidence furnished by the financial creditor. In this regard, the Court referred to the case of *Innoventive Industries Limited Vs. ICICI Bank and Anr.*, wherein the Scheme and the working of the Code was exhaustively dealt with.
2. Basis the above, the Court observed that only because the redemption value was due and payable, and the matter to resolve the issue as to the formula for its calculation was underway, it is not appropriate to assume that there is a default and admit a petition filed by Kotak merely because it has a claim. It further observed that in the process of consideration of a Section 7 application, NCLT has to make an objective assessment of the whole situation before coming to a conclusion as to whether a default has occurred or not and thereafter, admit / reject the application, otherwise a company which is ably running its administration and discharging its debts in a planned manner may also be pushed into CIRP.
3. In addition, with respect to the other issue – i.e., whether an invocation of an arbitration application under Section 8 before NCLT is justified if a Section 7 application is pending before the same Tribunal, the Court considered it appropriate to reproduce the observations made in the matter of *Vidya Drolia and Ors. V/s Durga Trading Corporation (2021 2 SCC 1),* and considered the fourfold test laid down in the matter to determine when the subject matter of a dispute is not arbitrable. The said test is provided below:
    i. When cause of action and subject matter of the dispute relates to actions *in rem,* that do not pertain to subordinate rights *in personam* that arise from rights *in rem*.
    ii. When cause of action and subject matter of the dispute affects third party rights; have *erga omnes* effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;
    iii. When cause of action and subject matter of the dispute relates to sovereign and public interest functions of the State and hence, mutual adjudication would be unenforceable; and
    iv. When the subject matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).
4. Basis the aforesaid tenet of law, the Court observed that in order to determine whether a dispute under Section 7 application is arbitrable or not, it is significant to consider the stage of proceedings under the Section 7 application before NCLT at a time when a Section 8 application is moved under the Act, 1996. As per the observations of the Court, a conspectus of the three possible scenarios is tabulated below:

S.No.	Stage of Section 7 Proceedings when a Section 8 Application is moved under the Act, 1996	Appropriate Course of Action	Reasons
1.	Section 7 Application is pending consideration when a Section 8 application is moved under the Act, 1996.	NCLT is duty bound to first decide the Section 7 application of the Code by examining the material placed on record and the contentions of the Corporate Debtor, and record a satisfaction as to whether there is a default or not, even if the application filed under Section 8 of the Act, 1996 is kept alongside for consideration.	The overriding provision of the Code under Section 238 as well as the time bound process enshrined under the Code.
2.	The irresistible conclusion by NCLT is that there is default and debt is payable and hence, the Section 7 Application is admitted.	NCLT must reject the Section 8 application moved under the Act, 1996.	From the date of admission of the Section 7 application, it becomes a proceeding *in rem* and thus, from that point onwards, any application under Section 8 of the Act, 1996 would not be maintainable despite the position that the agreement between the parties indisputably contains an arbitration clause.
3.	No default is recorded and the Section 7 Application is rejected.	It would leave the field open for parties to secure appointment of Arbitral Tribunal in appropriate proceedings as contemplated in law.	-

5. From the above, it is indubitable that a dispute would be non-arbitrable when a proceeding is *in rem* and a proceeding under the Code is to be considered a proceeding *in rem* only after it is admitted, which is not the case in the present matter. It is further observed that to consider a Section 7 petition as a proceeding *in rem,* NCLT ought to apply its mind, record a finding of default and admit the petition. A mere filing of petition and its pendency before admission cannot be construed as the triggering of proceeding *in rem*.
6. Hence, the trigger point is not the filing of Section 7 application but admission thereof on determination of default. In the instant case, the application under Section 7 was pending and yet to be admitted and therefore, the proceedings had not assumed the status of proceedings *in rem*.
7. In the present matter, upholding the decision of the NCLT, the Court observed that since the discussions were still underway between the parties and the amount payable by Indus Biotech to Kotak was not yet determined, it would be premature to arrive at a conclusion that there was a default in payment of any debt. Further, the Court held that the Section 11 application moved under the Act, 1996 efore the Court for constitution of an Arbitral Tribunal is justified.

➲ Whether the approval of a Resolution Plan ipso facto discharges a Personal Guarantor (of a Corporate Debtor) of her or his liabilities under the Contract of Guarantee.

IN THE MATTER OF: Lalit Kumar Jain V/s Union of India & Ors. [Transferred Case (Civil) No. 245/2020 and other writ petitions]. (Decided by the Hon'ble Supreme Court of India on 21.05.2021)

Issues:

- Whether the Notification dated 15.11.2019 issued by the Ministry of Corporate Affairs regarding the enactment of

certain provisions of the Insolvency and Bankruptcy Code, 2016 in respect of Personal Guarantors is legal and valid?

- Whether the approval of a Resolution Plan relating to a Corporate Debtor operate as a discharge of the liabilities of Personal Guarantors of the Corporate Debtor?

Facts:

- The Ministry of Corporate Affairs ('MCA'), vide notification dated 15.11.2019 ('Impugned Notification'), brought into force provisions of the Insolvency and Bankruptcy Code, 2016 ('the Code') relating to Personal Guarantors ('PGs') to Corporate Debtors ('CDs'), with effect from 1.12.2019.
- The Impugned Notification affected various persons associated with companies as directors, promoters or in some instances, as chairman or managing directors, who had furnished personal guarantees to banks and financial institutions, for the purpose of release of advances to the said companies. After publication of the Impugned Notification, many such persons were served with demand notices proposing to initiate insolvency proceedings under the Code.
- Aggrieved by the same, numerous petitions were filed in different High Courts, challenging the Impugned Notification and the related Rules and Regulations made in respect thereof. Subsequently, since all such cases involved interpretation of common questions of law, they were transferred from High Courts to the Hon'ble Supreme Court so as to avoid any confusion and to authoritatively settle the law.

Arguments by Petitioners:

- The principal ground of attack in all these proceedings has been that since Part III of the Code deals with Insolvency Resolution of two categories – i.e., individuals on one hand and partnership firms on the other, the Central Government could not have selectively brought into force the Code, and applied some of its provisions to one sub-category of individuals, i.e., PGs to CDs. All the Petitioners in unison argued that the Impugned Notification, in seeking to achieve that end, is ultra vires. This argument is premised on the nature and content of Section 1(3) of the Code, which the Petitioners characterize to be conditional legislation, whereby only limited power can be exercised in respect of the subject matter(s).
- The Petitioners further contended that as long as different dates are designated for bringing into force the enactment, or in relation to different areas, the executive acts within its powers. However, when it selectively does so, and segregates the subject matter of coverage of the enactment, it indulges in impermissible legislation.
- The petitioners also submitted that once a Resolution Plan is accepted and approved by the National Company Law Tribunal ('NCLT'), in terms of Section 31 of the Code, the Resolution Plan becomes binding on all stakeholders and the CD is discharged of liability. As a consequence, the PGs whose liability is co-extensive with the principal debtor, i.e. the CD, is also discharged of all liabilities. It was urged therefore, that the Impugned Notification which has the effect of allowing proceedings before NCLT by applying provisions of Part III of the Code, deprives the guarantors of their valuable substantive rights.

Arguments by Respondents:

- The Respondents contended that when the Code was amended by Act 8 of 2018 with retrospective effect from 23.11.2017, Section 2 was amended whereby the pre-amended Clause was substituted by introducing three different classes of debtors, which were PGs to CDs [Section 2(e)], partnership firms and proprietorship firms [Section 2 (f)] and individuals [Section 2(g)]. The purpose of splitting the provision and defining three separate categories of debtors was to cover three separate sets of entities.
- By way of another amendment in 2018 (Act 26 of 2018), Section 60, which deals with the 'Adjudicating Authority for Corporate Persons' was also amended. In Section 60(2), it was added that it applied to insolvency proceedings or liquidation/bankruptcy of a corporate guarantor or PG as the case may be, to a CD. The result of

the amendment is that when a CD faces insolvency proceedings, insolvency of its corporate guarantor and a PG too can be triggered. In other words, the amendment by Section 60(2) achieved a unified adjudication through the same forum for resolution of issues and disputes concerning corporate resolution processes, as well as bankruptcy and insolvency processes in relation to PGs to CDs.

- It was further contended that before the Impugned Notification, proceedings in Part-II were confined to CDs and only another class, i.e. corporate guarantors. PGs and corporate guarantors formed part of the same class inasmuch as they were guarantors since they had furnished guarantees to CDs to secure their loans. Yet, PGs, being individuals, were not included in Part III, for functional and operational purposes.
- In respect of the contention that the Impugned Notification is ultra vires the powers granted to the Central Government under Section 1(3) of the Code, the Respondents contended that a schematic, structural and purposive construction of Section 1(3) of the Code needs to be adopted to determine the scope of the power conferred on the Central Government by Section 1(3) of the Code. The scheme and structure of the Code involves a parliamentary hybridization and legislative fusion of the provisions of Part III, in so far as PGs to CDs are concerned. The object of this hybridization is to empower the NCLT to deal with the insolvency resolution and bankruptcy process of the CD along with the corporate guarantor and PG to CD
- In reference to the contention that the liability of a PG is considered discharged once a Resolution Plan is approved by NCLT, the Respondents contended that the liability of a guarantor is co-extensive, joint and several with that of the principal borrower unless the contrary is provided by the contract. A discharge which a principal borrower may secure by operation of law (for instance on account of winding up or the process under the Code) does not, however, absolve the surety from its liability. Hence, until the debt is paid off to the creditor in entirety, the PG is not absolved of its joint and several liability to make payment of the amounts outstanding in favour of the creditor.

Court's Observations:

- In view of the contentions made by the Petitioners and Respondents and the various legal tenets of law put forth by them, the Hon'ble Supreme Court observed and held as follows:
- The Code has been hailed as a major economic measure, aimed at aligning insolvency laws with international standards. The aim of the Code is to: (i) promote entrepreneurship and availability of credit; (ii) ensure the balanced interests of all stakeholders and (iii) promote time-bound resolution of insolvency in case of corporate persons, partnership firms and individuals.
- The highlight of the Code is the institutional framework it envisions. This framework consists of the regulator – i.e., the Insolvency and Bankruptcy Board of India), Insolvency Professionals, Information Utilities and adjudicatory mechanisms (NCLT and NCLAT). These institutions and structures are aimed at promoting corporate governance and also enable a time bound and formal resolution of insolvency
- The method adopted by the Central Government to bring into force different provisions of the Code has a specific design: to fulfil the objectives underlying the Code, having regard to its priorities. The Central Government followed a stage-by-stage process of bringing into force the provisions of the Code, regard being had to the similarities or dissimilarities of the subject matter and those covered by the Code.
- By way of amendment of section 2(e) in 2018, a separate and distinct category was introduced, i.e., PGs to CDs to whom the Code applied. It was held that when Section 60(2) alludes to insolvency resolution or bankruptcy, or liquidation of three categories, i.e. CDs, corporate guarantors (to CDs) and PGs (to CDs) they apply

distributively, i.e. the insolvency resolution, or liquidation processes apply to CDs and their corporate guarantors, whereas insolvency resolution and bankruptcy processes apply to PGs, (to CDs) who cannot be subjected to liquidation.

- The Parliamentary intent was to treat PGs differently from other categories of individuals. The intimate connection between such individuals and corporate entities to whom they stood guarantee, as well as the possibility of two separate processes being carried on in different forums, with its attendant uncertain outcomes, led to carving out PGs as a separate species of individuals, for whom the Adjudicating authority was common with the CD, to whom they had stood guarantee. The fact that the process of insolvency in Part III is to be applied to individuals, whereas the process in relation to CDs, set out in Part II is to be applied to such corporate persons, does not lead to incongruity.
- On the other hand, there appears to be sound reasons why the forum for adjudicating insolvency processes – the provisions of which are disparate- is to be common, i.e through the NCLT. As was emphasized during the hearing, the NCLT would be able to consider the whole picture, as it were, about the nature of the assets available, either during the CD's insolvency process, or even later; this would facilitate the Committee of Creditors ('CoC') in framing realistic plans, keeping in mind the prospect of realizing some part of the creditors' dues from PGs.
- The Impugned Notification is not an instance of legislative exercise, or amounting to impermissible and selective application of provisions of the Code. There is no compulsion in the Code that it should, at the same time, be made applicable to all individuals, (including PGs) or not at all. There is sufficient indication in the Code, i.e., by Section 2(e), Section 5(22), Section 60 and Section 179 indicating that PGs, though forming part of the larger grouping of individuals, were to be, in view of their intrinsic connection with CDs, dealt with differently, through the same adjudicatory process and by the same forum (though not insolvency provisions) as such CDs. The notifications under Section 1(3), (issued before the Impugned Notification was issued) disclose that the Code was brought into force in stages, regard being had to the categories of persons to whom its provisions were to be applied. The impugned notification, similarly inter alia makes the provisions of the Code applicable in respect of PGs to CDs, as another such category of persons to whom the Code has been extended. The exercise of power in issuing the impugned notification under Section 1(3) is therefore, not ultra vires; the notification is valid.
- The sanction of a Resolution Plan and finality imparted to it by Section 31 of the Code does not ipso facto discharge a PG (of a CD) of her or his liabilities under the contract of guarantee. As held by this court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.
- In a nutshell, the Impugned Notification was held to be legal and valid. It was also held that approval of a Resolution Plan relating to a CD does not operate so as to discharge the liabilities of PGs (to CDs). The writ petitions, were therefore, dismissed.

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