Highlights

Corporate Brief

Special Economic Zones Bill introduced: amends the definition of 'Person' under the Act

Recently, the Special Economic Zones (Amendment) Bill, 2019 ("Bill") was introduced in June, 2019. The Bill seeks to amend the Special Economic Zones Act, 2005 ("Act") and replaces the Special Economic Zone (Amendment) Ordinance that was promulgated on March 2, 2019.

The Act provides for the establishment, development and management of Special Economic Zones for the promotion of exports. Under the Act, the definition of a person includes an individual, a Hindu undivided family, a company, a co-operative society, a firm, or an association of persons. The Bill adds two more categories to this definition by including a 'trust', or 'any other entity which may be notified by the central government.' The reason given for this is that trusts or entities are very common form of operating bodies in the financial sector, and it has therefore become necessary to amend the definition of 'Person' under the Act.

NCLT holds that a foreign court order cannot withhold the Indian Insolvency Process

The National Company Law Tribunal ("NCLT") recently admitted the insolvency petition filed by State Bank of India) ("SBI") against grounded airlines company Jet Airways, under Section 7 of the Insolvency and Bankruptcy Code ("IBC"), stating that the airlines had defaulted payment of nearly Rs. 469 (Rupees four hundred sixty nine) crores and declared a moratorium on recovery of dues from Jet Airways.

Notably, the NCLT also rejected an intervention application filed by a trustee appointed by a Netherlands Court, who pointed out that Noord Holland District Court had passed an order of bankruptcy against Jet Airways on 21st May, 2019. One of the submissions of the intervenor was that it has appointed an Indian law firm for assistance in taking control of the Corporate Debtor company and its assets in India under the bankruptcy law of the Netherlands and sought for dropping the resolution process in India, to avoid multiplicity of proceedings.

Rejecting the intervention, the NCLT held that Sections 234-235 of IBC, which deal with cross border insolvency process, were yet to be notified. Therefore, NCLT was not empowered to entertain the order passed by the Netherlands jurisdiction in this case, where the registered office of the Corporate Debtor company is situated in India, and the jurisdiction specifically lies with NCLT.

Disqualification of directors under Section 164 (2) (A) of the Companies Act 2013 for default before 1st April, 2014 is illegal

Recently, while disposing of a batch of nearly 300 (three hundred) writ petitions, the High Court of Karnataka declared that the period prior to 1st April, 2014 cannot be taken into consideration for disqualification of directors under Section 164(2)(a) of the Companies Act, 2013.

The petitions challenged the list published by the Ministry of Commercial Affairs ("MCA") in September, 2017, disqualifying nearly 3,00,000 (three lakh) directors under Section 164(2)(a) and Section 167(1)(a) of the Companies Act, 2013, for failing to file annual returns and statements for a period of three consecutive years. No period prior to 1st April, 2014 can be taken into consideration to be a part of the continuous period of three financial years and thereby impact a director of a defaulting private limited company.

Kerala High Court holds that Complaint under Section 138 of the NI Act is not maintainable against Trustees for dishonour of cheque

Recently, the High Court of Kerala held that no prosecution is possible against a trust and its trustees for the dishonour of cheque invoking section 141 of the Negotiable Instruments Act, 1881 ("NI Act").

Section 141 of the NI Act deals with the liability of companies in case of dishonour of cheques. The primary question before the High Court was whether a trust and its trustees fall within the definition of 'company' under the explanation

to section 141 of the NI Act. The Court concluded that a trust is not a body corporate or association of individuals and that it does not fall within the meaning of 'company' under section 141 of the NI Act.

NCLAT disposes off the Bhushan Power case: expresses no opinion on the matter

The facts of the case are such that one of the former directors of Bhushan Power and Steel Limited approached the Punjab and Haryana High Court complaining that the copy of the resolution plans were not supplied to the ex-directors. After this, the Punjab and Haryana High Court remanded the matter back to the NCLT directing it to take a fresh decision on the matter after deciding upon the issue of non-supply of copies to ex-directors.

Subsequently, the Committee of Creditors ("CoC") of Bhushan Power and Steel Limited approached the NCLAT for early disposal of the matter by contending that the Punjab and Haryana High Court has no jurisdiction to pass any order, when the matter was pending and therefore it cannot order to remit the matter for fresh decision as more than 270 days had also passed.

The NCLAT held that there was no clarity as to why the Punjab and Haryana High Court had passed such an order and further, the writ petition was also heard ex-parte and disposed off without notice to the respondents of the matter. The NCLAT further stated that there was a lack of clarity as to why the Punjab and Haryana High Court passed an order as did not have territorial jurisdiction over Delhi where the principal bench of NCLT is situated which was also considering the matter at the time. The NCLAT however did not express any conclusive opinion as to whether the Punjab and Haryana High Court had supervisory jurisdiction over all the tribunals or not and disposed off the appeal.

RBI introduces FX-Retail: foreign exchange trading platform for retail participants

Recently, the RBI introduced an electronic trading platform for buying/selling foreign exchange by retail customers of banks, called 'FX-Retail' which would be rolled out by the clearing corporation of India Limited ("CCIL") on 5th August, 2019.

The objective of introducing FX-Retail was to encourage transparent and fair pricing for retail users (individuals and Micro, Small and Medium Enterprises) in the foreign exchange market. Banks may be able to charge their retail customers a pre-agreed flat fee towards administrative expenses, which should be publically declared. This would bring down the total cost faced by the retail customer in the foreign exchange market. Further, FX-Retail would also help in facilitating direct access of retail customers to the market, rather than through price-setting by their banks, which would bring down the risk faced by banks in warehousing transactions. Detailed guidelines regarding the operation of the platform, including the process of customer registration, shall be issued by the CCIL.

SEBI makes key observations/amendments in its board meeting held on 27th June, 2019

SEBI released the minutes of its board meeting held on 27th June, 2019, and passed some key considerations, some of which are:

a) Regarding the SEBI (Prohibition of Insider Trading) Regulations, 2015, SEBI Board approved amendments clarifying that the trading window closure for listed companies shall be applicable from end of every quarter till 48 hours after the declaration of financial results.
b) For the purpose of bringing uniformity and consistency in valuation and to make existing provisions on valuation of money market and debt securities more reflective of best practices, various proposals for amending the extant provisions were approved.
c) The framework regarding Risk Management of Liquid Funds, Investment Norms and Valuation of Money Market and Debt Securities by Mutual Fund was reviewed and proposals were accepted
d) The term 'Encumbrance' as defined in SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, was amended which shall henceforth include:
    i. any restriction on the free and marketable title to shares, by whatever name called, whether executed directly or indirectly;
    ii. pledge, lien, negative lien, non-disposal undertaking;
    iii. any covenant, transaction, condition or arrangement in the nature of encumbrance, by whatever name called, whether executed directly or indirectly.

GST Brief

Finance Bill introduced in the Parliament: makes key recommendations regarding the CGST, IGST, UTGST and Service Tax

The Finance Bill, 2019 was presented in the Parliament on 5th June, 2019 and made key recommendations regarding the Central Goods and Services Tax Act, 2017 ("**CGST**"), Integrated Goods and the Services Tax Act, 2017 ("**IGST**"). Some of the recommendations are:

a) CGST

i. Amendment of the term 'adjudicating authority' to insert the words 'National Appellate Authority for Advance Ruling'

ii. Amendment of Section 25 to provide for mandatory Aadhaar submission or authentication for persons who intend to take or have taken registration
iii. Insertion of Section 31A to provide that supplier shall mandatorily offer facility for digital payments to his recipient

b) IGST

i. Insertion of Section 17A to provide for transfer of amount in the electronic cash ledger between the Center and the States as a consequence new facility given to the taxpayers under section 49 of the CGST

c) Service Tax

i. Provision of retrospective exemption from Service Tax on service by way of grant of liquor license by the State Government, during the period from 1.04.2016 up to 30.06.2017
ii. Provision of retrospective exemption from Service Tax to the long duration degree or diploma programmes except executive development programme provided by the Indian Institutes of Management to the students during the period from 1.07.2003 up to 31.03.2016

Real Estate Brief

MAHARASHTRA RERA CASES:

➲ Maha RERA: The Promoter to register project, as area less than 500 square meters but apartments were more than 8.

In the matter of M/s Geetanjali Aman Constructions ("**Promoter/Appellants**") Vs. Hrishikesh Ramesh Paranjpe and others ("**Respondent**"):

FACTS:

The Appellants were engaged in development and construction of real estate projects and had commenced the construction of project in Pune in the year 2013, in which area of the plot was 382 sq. meters and consisted of 22 flats and 9 shops.

The Appellants had sought guidance from the Authority on registrability of their project on commencement of RERA as the project had an area less than five hundred square meters but apartments were more than 8, however it received no response from the MahaRERA Authority.

The allottees in its complaint alleged that the Promoter did not register the project with MahaRERA Authority and have thus violated section 3 of the Act.

The Ld. Member of MahaRERA Authority heard both sides and passed the order which directed the Promoters to register the project within two days and to pay a penalty of Rs.30,00,000 u/s 59 of the Act for registration and if the Promoters failed to register the project in the directed time, then a further penalty of Rs.10,000/- per day to be imposed untill registration of the project they would be restrained from selling/transferring any part of the project and collecting money from the allottees. Also, the Promoter u/s 7 of the Act would have to show cause as to why MahaRERA should not take the project in its control.

The Appellants in its review application before Maharashtra Appellate Tribunal submitted that the project was erroneously held registrable as it had more than 8 tenements even though land to be developed was less than 500 sq.mtrs.

The Appellants further submitted that the MahaRERA Authority wrongly held the project liable for registration by interpreting that both the conditions under section 3 of the RERA are to be met cumulatively and not alternatively for exempting the project from registration.

ISSUE:

- *Whether the project being executed by Appellants is liable to be registered in terms of Clause (a) of Sec. 3(2) of the Act?*
- *Whether Appellants are liable to comply with directions for registration of the project and to pay penalties imposed as per the impugned orders?*

OBSERVATIONS:

The Tribunal passed two judgments one by the majority view and another by minority view:

- MAJORITY:
  By reading of "or" in clause of Section 3(2) of the Act if applied to facts of the present case, the total area of the plot being 382 sq.mtrs., project in question is out of purview of registration under the Act. Thus the use of the word 'or' between the two conditions for exemption of the project from registration if area is less than 500 sq.mtrs. or if there is area less than 8 apartments. Once the project meets one of the conditions two conditions mentioned in section 3(2)(a) of the Act, that precedes or succeeds the word 'or' in the said clause, their project is not registrable. Thus, they did not hold the Appellant project as registrable based on erroneous interpretation of the provisions of Clause (a) of Section 3(2) of the Act, therefore the order of Maha RERA was quashed and set aside.

- MINORITY:
  Section 3(2)(a) cannot be read in isolation and must be read with other clauses and provisions. The meaning of the said section should be interpreted in such a manner that the purpose of the section is not defeated. Condition of area of the plot and condition of number of flats for getting exemption from the project are not mutually exclusive to each other and both conditions must be satisfied. The word 'or' used in section 3(2)(a) is to be treated as 'and'. Thus, both the conditions must be satisfied together for seeking exemption from the registration of the project.

HELD:

1. MAJORITY:
   - The impugned order dated 10th December 2018 and 11th March 2019 are quashed and set aside.
   - The consequential effects of the said orders in terms of directions to register the project, penalties etc. are also set aside.
2. MINORITY:
   - The promoters shall register the project with MahaRERA within one month form the date of this order.
   - Promoters shall pay penalty of Rs. 30,10,000/- which is 10% of the total estimated costs as per the certificate of the C.A. within one month from the date of this order.
   - The order imposing additional penalty of Rs. 10,000/- per day till the project is registered is set aside.
   - The order restraining promoters form selling/transferring any part of the project and collecting money from the allottess and also issuance of notice u/s 7 of the Act to show cause as to why MahaRERA should not take the project in its control is confirmed.

➲ TAMIL NADU RERA ORDER: The Builder had filed wrong affidavits regarding built-up areas approved in the sanctioned plans.

In case of Tvl. Geethpriya & Arivazhagan Moorthy ("**Complainants**") Vs. M/s. T.K. Housing & Constructions ("**Respondent**") before the Tamil Nadu RERA Authority ("**Authority**").

Facts:

- The Complainants had made a sale agreement and a promoter agreement on 29.06.2017 for purchasing a villa. The Complainants stated that the Respondent had obtained approval from DTCP during November 2017 and had not registered the project with TNRERA.
- The Respondent had agreed to complete the construction within 10 months from the date of the agreement provided the allottee has no arrear in payment further a grace period of 3 months was also given. However, the promoter neither registered the project with TNRERA nor did it handover the villa as per the agreement.
- The Respondent stated that the construction was 99% complete but the allottee had arrears in payment of Rs.4 lacs. Therefore the Respondent initiated arbitration proceedings, which were not attended by the allottee and thus the Respondent was given the Arbitral award been passed ex-parte.
- The Complainant stated that the built-up area in the agreement was not as per the sanctioned plan.

Issue:

- ***Whether the Respondent should register the project with the Authority?***
- ***Whether the complainants are entitled to get possession of the villa as per the agreement?***

Observations:

- The Authority held that the built up area is 1135 sq. ft. as per the sanctioned plan but the total extent as per the booking, allotment order and construction agreement the total saleable area is 1538 sq. ft. The Respondent filed affidavits wherein it had undertaken to not violate the sanctioned construction plan. The Respondent after giving an affidavit violated the condition and made the agreement with the Complainants by increasing the buit-up area.
- Further the court relied on Emmar MGF Land Ltd. Vs. Mr. Aftab Singh wherein it was held that, arbitration tribunal is a private forum chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals are public for a constituted under the laws of the country. Further the disputes which are to be adjudicated and governed by the statutory enactment, established for specific purposed to subserve a particular public policy, are not arbitral.

Held:

- The Respondent is directed to register the layout with the Authority.

MAHA RERA ORDER:

➲ MahaRERA issues circular regarding revised procedure for transferring or assigning promoter's rights and liabilities to a third party:

- As per Section 15 of the RERA, the promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter and without the prior written approval of the Authority.
- Approvals mentioned u/s. 15 of the RERA will not be required under the following circumstances:
  - Changes in (internal) shareholding or constituents of a promoter's organisation, that doesn't affect obligations and liabilities with respect to the Allottee(s) and the rights and liabilities of the promoters organization;
  - Any conversion of the promoter entity under any statue of:
    a) partnership firm into LLP/ Private Limited Company;

b) Conversion of private Limited Company or unlisted Co to a LLP or otherwise; or
c) Proprietorship change by succession to legal heirs.

- Further a revised procedure for transferring or assigning promoter's rights and liabilities to a third party is to be followed as prescribed hereunder:

  CASES WHERE TRANSFER IS INITIATED BY THE PROMOTER:

  The promoter shall have to apply to MahaRERA with the consent of two-third allottees to seek permission to transfer its rights and liabilities to a third party. The promoter shall have to write to the secretary, MahaRERA. On receipt of such application, the secretary shall initiate action through the legal wing, they would take necessary steps for approval which may include, hearing. MahaRERA would pass an order within one month of either approval or rejection. After receipt of approval, within seven days of completion of transfer, the new promoter shall then apply for the necessary corrections in the existing registration details.

  CASES WHERE TRANSFER IS INITIATED BY A THIRD PARTY BY OPERATION OF LAW OR BY WAY OF ENFORCING OF THE SECURITIES:

- If to secure loan and/or the charge of the project is disclosed in the registration details of the project. The promoter will write to MahaRERA within 7 days of becoming aware of the impending or potential The promoter shall inform each and every allottee of the impending or potential transfer arising out of enforcement of security or mortgage. Within seven days of the transfer, the financial institutions or creditors shall intimate to all the allottees and the secretary, MahaRERA of enforcement of the security which has resulted in the transfer of the ownership of the promoter organisation or transfer of the project. The financial institutions or the new promoter shall then apply for the necessary corrections in the existing registration details. The new promoter is also require to upload an undertaking on the website of MahaRERA.

TAMIL NADU RERA ORDER:

➲ Tamil Nadu circular on collection of registration charge in case of revised registration of project:

Vide its circular the authority has decided that in case of revised registration of the project, the registration charge shall be collected only for the additional FSI area. Earlier registration charge was taken for the entire FSI area of the project.

Litigation Brief

IBC Amendment Bill, 2019

Brief Note on IBC

The Government has suggested the following amendments to the Insolvency and Bankruptcy, Code 2016. The amendments have been brought in to fill the lacunae in the Corporate Insolvency Resolution framework as prescribed in the Code,

The features of the 8 amendments to be carried out are as follows:

1) Emphasizing on a time bound disposal of all Company Application(s). The application has to be admitted or rejected within a period of 14 days by the Adjudicating Authority. **Section 7 (4) amended.**

Transparency on allowing comprehensive corporate restructuring arrangements such as mergers, demergers, amalgamations as part of the resolution plan. **Clause (26) of Section 5 (Explanation of definition of Resolution Plan).**

3) Extension of the time of Corporate Insolvency Resolution Process from 270 days to 330 days which includes litigation and other judicial processes. **Section 12(3) amended.**

4) Votes of all the Financial Creditors as per Section 21(6A) (an authorized representative) shall cast the votes in the accordance with the decision approved by the highest voting share (more than 50%) of financial creditors on present and voting basis**. Insertion of sub-section (3A) in Section 25A.**

5) A unambiguous provision that the financial creditors who have not voted in favor of the resolution plan and the operational creditors shall receive at least the amount that would have been received by them if the amount to be distributed under the Resolution plan has been distributed under the provisions of Section 53 of the Insolvency and bankruptcy Code or the total amount that would have been received if Liquidation of the Corporate debtor had taken place as per the value and has been distributed in accordance with Section 53 of the Code, whichever amount is higher. This provision would have a retrospective effect where the resolution plan has not attained finality or has been appealed against. **Section 30 (2) amended.**

6) Commercial Consideration to be considered in the distribution mechanism as proposed in the resolution plan within the powers of the COC.

7) The Resolution Plan shall be binding upon all the stakeholders involved including Central Government, any State Government or local authority to whom a debt in respect of payment of dues may be owed. **Section 31(1) amended.**

8) The Committee of Creditors within the ambit of its powers may take a decision to liquidate the corporate debtor, any time after constitution of the Committee of Creditors and before the preparation of Information Memorandum. **Section 33(2) amended.**

These amendments being brought into force by the Government seeks to fine-tune the provisions relating to time limit, manner of distribution of amounts amongst the Financial and Operation Creditors, specifies the manner in which representatives of a group of financial creditors should vote and the applicability of the resolution plan on all statutory authorities. The amendments seeks to ensure that all creditors are treated fairly, transparency in the voting process represented by the authorized representative.

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