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Litigation Brief

- Does the moratorium under Section 14 of IBC apply to proceedings under Section 34 of the Arbitration & Conciliation Act, 1996?
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Corporate Brief

➲ *Cabinet approves ordinance to change Bankruptcy Rules*

Cabinet has approved the ordinance for changes to Insolvency and Bankruptcy Code, 2016. The Ordinance contains provisions for micro, small and medium scale enterprises, easing some conditions for the segment. Assent of the President is required for the Ordinance to take effect. The ordinance proposes to bring homebuyers on par with financial creditors which will ensure they get their homes or dues when a developer becomes insolvent who will get representation on the committee of creditors and the advance given by them to the builder will be considered credit. Insolvency Law Committee had earlier made suggestions to the MCA to address the situation of home buyers.

➲ *SEBI notifies Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2018*

SEBI notified Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2018 (**"LODR Regulations"**). The LODR Regulations which shall come into effect from 1st April 2019. The major amendments, inter alia include: (i) every listed entity and its material unlisted subsidiaries incorporated in India shall undertake secretarial audit and shall annex with its annual report, a secretarial audit report given by a company secretary in practice, in such form as may be specified with effect from the year ended 31st March 2019; (ii) the board of directors of the top 500 listed entities shall have at least one independent women director by 1st April 2020; (iii) the board of directors of top 1000 listed entities (with effect from 1st April 2019) and top 2000 listed entities (with effect from 1st April 2020) shall comprise of not less than six independent directors; (iv) no listed entity shall appoint a person or continue with directorship of any person as non-executive director who has attained the age of seventy five years unless a special resolution is passed to that effect, in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such a person; (v) top 500 listed entities shall ensure that the chairperson of the board of such listed entity shall be a non-executive director and not be related to the managing director or the chief executive officer as per the definition of the term "relative" defined under the Companies Act, 2013; (vi) the quorum for every meeting of the board of directors of top 1000 listed entities with effect from 1st April 2019 and top 2000 listed entities with effect from 1st April 2020 shall be one-third of its total strength or three directors, whichever is higher, including at least one independent director; (vii) the approval of shareholders by special resolution shall be appointed every year, in which the annual remuneration payable to a single non-executive Director exceeds fifty percent of the total annual remuneration payable to all non- executive Directors, giving details of the remuneration thereof; and (viii) the quorum for a meeting of the nomination and remuneration committee shall be either two members or one third of the members of the committee, whichever is greater, including at least one independent director in attendance. The nomination and remuneration committee shall meet at least once in a year. [See SEBI notification dated 9th May 2018]

➲ *SEBI issues consultation paper on Review of SEBI (Issue of Capital & Disclosure Requirements) Regulations, 2009*

SEBI in order to review and realign SEBI (Issue of Capital & Disclosure Requirements) Regulations, 2009 (**"ICDR Regulations"**) constituted Issue of Capital & Disclosure Requirements Committee (**"ICDR Committee"**) under chairmanship of Shri Prithvi Haldea to review ICDR Regulations with the following objectives: (i) to simplify the

language and complexities in regulations; (ii) to incorporate changes/ new requirements which have occurred due to change in market practices and regulatory environment; and (c) to make the regulations more readable and easier to understand. ICDR Committee suggested certain policy changes. The suggestions were also taken to Primary Market Advisory Committee ("**PMAC"**) of SEBI comprising of representatives from Ministry of Finance, Industry Market Participants, academicians, Institute of Chartered Accountants of India and Institute of Company Secretaries of India. Few recommendations, inter-alia, include: (i) to align the definitions of promoter and promoter group with the Companies Act, 2013; (ii) to restrict the disclosures of group companies to information related to related party transactions and do away with the requirements pertaining to financial information, litigations etc.; (iii) in case of initial public offering, to do away with the requirements that the aggregate of the proposed issue and all previous issues made in the same financial year not to exceed five times the issuer's pre issue- net worth; and (iv) to rationalize the requirements and contents of due diligence certificate. [See SEBI PR No. 12/2018 dated 4th May 2018]

➲ *RBI issues notification for monitoring foreign investment limits in listed Indian Companies*

RBI, receives data on investment made by Foreign Portfolio Investment and Non-resident Indians (NRI) on stock exchanges from custodian banks and Authorised Dealer Banks for their respective clients. RBI in order to enable listed Indian companies to ensure compliance with various foreign investment limits in consultation with SEBI has decided to put in place a new system for monitoring foreign investment limits for which necessary infrastructure and systems for operationalizing the monitoring mechanism is to be made available by the depositories. All listed companies are required to provide the specified data/ information on foreign investment to the depositories. [See REBI Circular No. RBI/2017-18/172 A.P. (DIR Series) Circular No. 27 [(1)/20(R)] dated 3rd May 2018]

➲ *SEBI issues master circular for Underwriters registered with SEBI*

SEBI in order to enable the users to have access to the applicable circulars/ directions at one place, issued a master circular for Underwriters registered with SEBI, which is a compilation with of all existing/ applicable circulars issued by Market Intermediaries Regulation and Supervision Department of SEBI to Underwriters. The highlights of the circular, inter alia, include: (i) conditions for granting registration where a connected person has been granted registration, (ii) designated e-mail ID for regulatory communication with SEBI; (iii) periodic reporting on change in status or constitution; (iv) revised procedure for seeking prior approval for change in control through single window; (v) online registration mechanism for securities market intermediaries; and (vi) grievance redressal mechanism. [See SEBI master circular no. SEBI/HO/MIRSD/DOP1/CIR/P/2018/80 dated 11th May 2018]

➲ *SEBI issues circular on non-compliance with certain provisions of SEBI (Listing Obligations and Obligations and Disclosure Requirements) Regulations, 2015 and Standard Operating Procedure for suspension and revocation of trading of specified securities*

SEBI had issued a circular specifying the uniform structure for imposing fines as a first resort for non- compliance with certain provisions of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**"Listing Regulations"**) and the standard operating procedure for suspension of trading in case of non-compliance is continuing and/ or repetitive. SEBI has issued the circular to streamline the process, to maintain consistency and to adapt a uniform approach in the matter of levy of fines for non-compliance with certain provisions of Listing Regulations, the manner of suspension of trading of securities of a listed entity and the manner of freezing the holdings of the promoter and promoter group of a non-compliant listed entity. Stock exchanges will now be required to take action as prescribed in case of non-compliance with the Listing Regulations and follow the prescribed standard operating procedure (**"SOP"**) for suspension and revocation of suspension of trading of specified securities. Stock exchanges can also deviate from the SOP if found necessary, only after recording reasons in writing. [See SEBI circular no. SEBI/HO/CFD/CMD/CIR/P/2018/77 dated 3rd May 2018]

➲ *SEBI issues master circular on Credit Rating Agencies*

SEBI issues a master circular on credit rating agencies (**"CRAs"**) which is a compilation of the circulars issued by SEBI up to 31st March 2018, which are operational as on the date of this circular. The circular, inter-alia, includes: (i) registration requirements: (a) online registration mechanism for securities market intermediaries, (b) digital mode of payment, (c) grant of prior approval for change in control of CRAs, and (d) surrender of certificate of registration; (ii) rating operations: (a) standardization of rating symbols and definitions, (b) operation manual/ internal governing

document, (c) rating process, (d) monitoring and review of ratings, and (e) standardization of press release for rating actions; (iii) reporting and disclosures: (a) default studies, (b) periodic disclosures, (c) continuous disclosures and reporting; (iv) internal audit for CRAs; and (v) redressal of investor grievances. [See SEBI circular no. SEBI/HO/MIRSD/DOP2/CIR/P/2018/76 dated 2nd May 2018]

➲ *MCA notifies Companies (Specification of Definitions Details) Amendment Rules, 2018*

MCA has notified the Companies (Specification of Definitions Details) Amendment Rules, 2018 (**"the Rules"**). In the Rules, the reference of the word "total share capital" has been deleted in the definitions of "associate company" and "subsidiary company" and it stands replaced with "total voting power". [See MCA Notification no F. No. 01/13/2013-CL-V- (Pt. I) dated 7th May 2018]

➲ *MCA amends Companies (Meetings of Board and its Powers) Rules, 2014*

MCA has notified the Companies (Meetings of Board and its Powers) Amendment Rules, 2018 for amendment in the Companies (Meetings of Board and its Powers) Rules, 2014 (**"the Rules"**). The amendments, inter-alia, include: (i) in rule 4 of the Rules, the approval of annual financial statements, approval of board's report, approval of prospectus, audit committee meetings for consideration of financial statement and the approval of the matter relating to amalgamation, merger and demerger were not to be dealt with in a meeting through video conferencing or other audio visual means. Vide the amendment a proviso has been added in the Rules, wherein, the quorum in a meeting through physical presence of directors, any other director may participate through video conferencing or other audio visual means; and (ii) rule 13 of the Rules shall be substituted with, where a resolution passed at a general meeting to give any loan or guarantee or investment or providing any security or the acquisition shall specify the total amount up to which the Board of Directors are authorized to give such loan or guarantee, to provide such security or make such acquisition. Provided that company shall disclose to the members in the financial statement the full particulars in accordance with provisions of the section 186(4) of the Companies Act, 2013. [See MCA Notification no F. No. 01/32/2013-CL-V- Part dated 7th May 2018]

➲ *MCA amends Companies (Prospectus and Allotment of Securities) Rules, 2014*

MCA has notified the Companies (Prospectus and Allotment of Securities) Amendment Rules, 2018 (**"the Amendment"**). Vide the Amendment, the rules 3, 4, 5, 6 which provided for: (i) information to be stated in the prospectus; (ii) the rules for report to be set out in prospectus; (iii) other matters and reports to be stated in prospectus; and (iv) period for which information to be provided in certain cases respectively have been omitted. [See MCA Notification no F. No. 01/21/2013-CL-V dated 7th May 2018]

➲ *Department of Telecommunications amends license rule to allow higher spectrum holding*

DOT has amended telecom license norms to allow higher spectrum holding by individual mobile operators and facilitate ongoing consolidation in the sector. The amendment removes limitation on the telecom operator of holding more than 50% in a spectrum band above 1,000 megahertz frequency range that are used for transmitting mobile signals. The spectrum limit has been revised from 25% to 35%. [See File No. 20-586/2018-AS.I of Department of Telecommunications dated 19th March 2018]

GST Brief

➲ *E-way bill in five regions from April 25- Intra- State movement of goods*

The third phase of E-way bill system for intra-State movement of goods rolled out in five more regions- Arunachal Pradesh, Madhya Pradesh, Meghalaya, Sikkim and Puducherry from April 25. The electronic way or E-way bill for inter-State movement of goods valued over Rs. 50,000 was implemented from April 1, along with intra-State E-way bill system for Karnataka.

➲ **Authority for Advance Rulings (AAR),** stated E- rickshaw tyres will attract GST at highest slab of 28 per cent as they are registered as 'motor vehicles' under the Motor Vehicles Act, 1988. AAR passed the order on an application filed by CEAT, seeking to clarify if e-rickshaw can be classified under "three-wheeled powered cycle rickshaw".

RERA Brief

➲ *Central Government has instructed the States to appoint RERA Regulators and lunch Web Portals before 30th June.*

As per news reports, States have been instructed by the Central Government to amend the 'dilutions' in the RERA Rules notified by them before the 30th of June 2018. The

Centre has further asked the States to not bring out any sort of alteration from the Central RERA.

Deadline of 30th June, 2018 has been set out for the State Governments to establish:

i. Permanent Regulators

ii. RERA online Web Portals

iii. RERA Tribunals

➲ *The state of Haryana launches its RERA Web Portal.*

The Haryana Government has launched its official website for RERA (http://www.harera.in). The online portal has been set up for facilitating the Registration of Projects and Real Estate Agents and for the buyers to file Complaints online against the Promoters and Developers for projects in Gurugram. This would be beneficial for all the RERA stakeholders in Gurgaon, Haryana. 65% of all ongoing Projects in Haryana are located in Gurgaon alone. Till now there has been no Registered Project or Developer listed on Haryana RERA website. This Web portal would only handle the Projects located in Gurgaon. Haryana RERA has set up a temporary office in Gurgaon at the Public Works Department (PWD) guest house on Old Railway Road near Gurgaon police station. The permanent RERA office will be established in coming 6 months at Sector 44, Gurgaon.

For the region of Panchkula a different RERA Web Portal is launched (http://rerapkl.gov.in/rerapkl/hrerapanchkula.jsp). The online portal has been set up for the Projects located in the State of Haryana except those which are located in the revenue district of Gurugram. Once fully operational it will help in facilitating the Registration of Projects and Real Estate Agents and for the buyers to file Complaints online against the Promoters and Developers for projects in Haryana except Gurugram.

➲ *Maharashtra Appellant Tribunal for RERA set up.*

The state government has finally approved a permanent Appellate Authority for Maharashtra Real Estate Regulatory Authority. Retired High Court Judge Justice Indira Jain has been appointed as its president. IAS officer S S Sandhu and Sumant Kolhe, associated with the judiciary earlier, have been appointed as members, administration/technical and judicial, respectively.

The permanent Appellate Tribunal will hear appeals against the orders passed by the Maharashtra Real Estate Regulatory Authority (MahaRERA). Homebuyers and Developers can approach the tribunal for appeal against an order given by the MahaRERA. This is the first state to set up the Appellant Tribunal under RERA.

➲ *Penalty of Rs. 2 Lakh imposed for late registration of Projects (Goa RERA)*

Goa Real Estate Regulatory Authority has increased the penalty quantum for delay by the developers in registering their ongoing Projects under RERA. Goa RERA Authority has increased the penalty amount to Rs. 2 Lakh for every late registration from 1st May, 2018. The increased penalty would be applicable till 30th April, 2018. There would a further increase in the penalty if the developer / promoter fail to register their projects within the stipulated time.

RERA Case

➲ *Promoter not responsible for VAT Refund to the Allottee (Maharashtra RERA Appellate Tribunal)*

The Appellate Tribunal in its order dated 2.5.2018 stated that the Promoter is not responsible to refund the amount paid towards the VAT. The Tribunal used the Sections 71(3), 72, 38 and 18 of the RERA and came to the decision that the Allottee shall be responsible to collect the VAT amount credited to the State Government with respect to the Agreement. The amount is not with the promoter so he cannot be asked to refund the same as it is credited in the name of the Allottee.

Litigation Brief

➲ *Does the moratorium under Section 14 of IBC apply to proceedings under Section 34 of the Arbitration & Conciliation Act, 1996?*
In the matter of: Power Grid Corporation of India vs Jyoti Structures Ltd.

In a judgment delivered by the single judge of the High Court of Delhi, the question dealt was whether proceedings under Section 34 of the Arbitration & Conciliation Act, 1996 ("the Act") need to be stayed in the light of Section 14 (1) (a) of the Insolvency & Bankruptcy Code, 2016 ("the Code").

In the instant case, a petition was preferred under Section 34 of the Act for setting aside the arbitral award passed in favour of the respondent. During the pendency of these proceedings, an application under Section 7 of the Code was filed by a financial creditor against the respondent company in the National Company Law Tribunal- Mumbai ("the NCLT") seeking initiation of the corporate insolvency resolution process against the respondent. By an order, dated

04.07.2017, the NCLT admitted the application and declared a moratorium in terms of Section 14 of the Code.

Section 14 (1) (a) of the Code runs as under:

"14 (1) Subject to provisions of the sub-sections (2) and (3), on the insolvency commencement date, the Adjudication Authority shall by order declare moratorium for prohibiting all of the following namely: -

(a) *the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority."*

Hence, the issues was if the word "proceedings" used in Section 14(1)(a) of the Code be read to mean "all legal proceedings" or be read restrictively to mean a particular type of legal proceedings viz. 'debt recovery action' which may have an effect of dissipating or diminishing the debtor's assets during the period of its insolvency resolution.

The respondent's case was if the proceedings are stayed, the respondent would be unable to execute the award given in its favour for an extended period till the moratorium exists and be unable to recover its dues thereby further impeding its financial condition.

While deciding the issue, the court, inter alia, relied on the decision in Canara Bank vs Deccan Holdings Limited Company Appeal No. 147/2017 which held that the moratorium provision does not apply to all proceedings viz to proceedings under Article 32 or 226 of the Constitution of India. The Hon'ble Court also relied on the report of the Bankruptcy Law Reforms Committee on the rationale and design of the Code which also demonstrates the moratorium is to apply to recovery actions and filing of new claims against the corporate debtor and the purpose behind moratorium is that there should be no additional stress on the assets of the corporate debtor.

The Hon'ble Court, therefore, concluded that the present proceedings would not be hit by the embargo of Section 14(1)(a) of the Code since "proceedings" do not mean "all proceedings". And that the moratorium under the Code is intended to prohibit debt recovery actions against the assets of corporate debtor and the continuation of proceedings under Section 34 of the Act will not result in endangering, diminishing, dissipating or adversely impacting the assets of the corporate debtor. Therefore, Section 14 of the Code would not apply to the proceedings which are for the benefit of the corporate debtor and are not debt recovery actions.

Further, the Court also remarked that proceedings under Section 34 are a step prior to the execution of the award. Only after determination of objections under Section 34, the party may move a step forward to execute such award and in case the objections are raised against the corporate debtor then its enforceability against the corporate debtor shall certainly be covered by moratorium of Section 14(1)(a).

Note- It is interesting to take into account the impact of a recent Supreme Court judgment delivered in the matter of BCCI vs Kochi Cricket Pvt. Ltd. which clears the position on the applicability of Arbitration and Conciliation (Amendment) Act, 2015 ("Amendment Act") in regard to Section 34 and Section 36 of the Arbitration and Conciliation Act, 1996. The judgment authored by Hon'ble Justice R.F. Nariman rules that the Amendment Act is prospective in nature and will apply to those arbitral proceedings and court proceedings in relation to arbitral proceedings which have commenced on or after the Amendment Act came into force, i.e., 23.10.2015. However, it directs that Section 36 as amended should apply to Section 34 applications filed even before the commencement of the Amendment Act. The amended Section 36 as it stands today requires filing of a separate application for staying the execution of the arbitral award pending a Section 34 application to set aside the arbitral award. The act prior to the amendment granted automatic stay on the execution of the award on filing of a Section 34 application.

However, interestingly, a Section 36 application filed for the enforcement of the arbitral award against the corporate debtor, pending a Section 34 appeal, would automatically be hit by Section 14 of the Code without the requirement of filing a separate application for staying the execution of the award.

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