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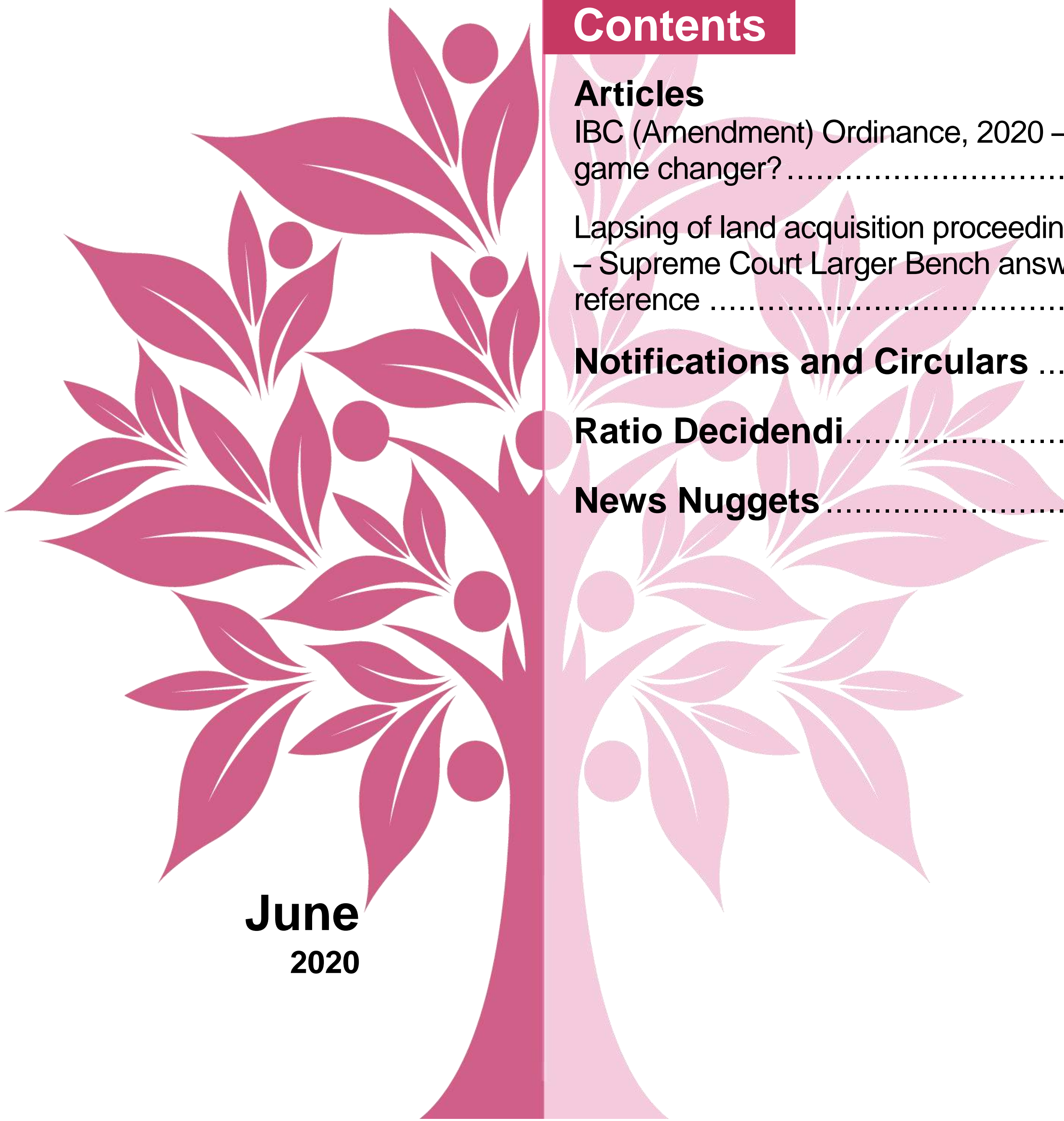

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Articles

IBC (Amendment) Ordinance, 2020 – A game changer?

By **Dinesh Babu Eedi and Manasa Tantravahi**

Introduction

Novel Corona Virus Disease 2019, or Covid-19, has created havoc across the globe. Till date, the pandemic has infected lakhs of people across the world and the said number has been increasing rapidly each day. Due to outbreak of Covid-19, various countries including India, have imposed lockdowns to combat the spread of the disease. This unprecedented situation has impacted the economy, financial markets and business operations severely, and also led to the non-performance or delay and defaults in payments to the creditors/banks/financial institutions.

The Government of India, in order to safeguard the interest of corporate persons, had framed various schemes and granted several reliefs to the entities in India.

In this regard, to rescue those corporate persons who may commit defaults towards their debt obligations, the Central Government brought forth a slew of amendments for the Insolvency and Bankruptcy Code, 2016 ("**Code**"), including the raising of threshold for initiating the Corporate Insolvency Resolution Process ("**CIRP**") under Section 4 of the Code, from one lakh rupees to one crore rupees, vide a notification issued by the Ministry of Corporate Affairs (MCA) dated 24-03-2020.

Recently, on 05-06-2020, the Government of India has also notified the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 ("**Ordinance**"), thereby suspending operation of certain Sections of the Code. This Ordinance was issued by the Government of India as part of its *Atma Nirbhar* economic reforms.

The preamble of the Ordinance states that it has been promulgated to prevent corporates from being forced into insolvency/liquidation, due to unprecedented situations arising out of Covid-19 pandemic.

Highlights of the Amendments

The following are the highlights of the amendments introduced through the Ordinance:

a) Insertion of Section 10A, which states that no application for initiation of CIRP under Sections 7, 9 and 10 of IBC, shall be filed for ***any default occurred*** ***on or after 25-03-2020***, for a period of six (6) months. This period can be further extended, by notification, up to a maximum of one (1) year.

b) A Proviso to Section 10A states that no application under Sections of 7, 9 and 10 shall "***ever***" be filed for initiation of CIRP for defaults occurring during the said period, which is occurring between 25-03-2020 to 24-09-2020.

c) No Resolution Professional (RP) appointed for an already initiated CIRP is allowed to file an application under Section 66 of the Code (for fraudulent or wrongful trading), since as per the new Section 10A, the already commenced CIRPs for defaults occurred after 25-03-2020 are suspended from the date of the Ordinance.

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In short, the operations of Section 7, 9 and 10 of the Code, that deal with applications filed against Corporate Debtors by Financial Creditors, Operational Creditors and the Corporate Debtors themselves, respectively, are suspended with immediate effect, for a minimum period of six (6) months, with respect to the defaults committed by the Corporate Debtors during the period i.e., between 25-03-2020 to 24-09-2020, or any other extended period. However, the said suspension of Sections 7, 9 and 10 is not applicable to the defaults committed by the corporate persons under the said Sections before 25-03-2020..

Default

Section 3(12) of the Code defines 'default' as *non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be*. The phrase 'debt has become due and payable' means that the debt is payable at the present moment. Whenever, as per the contract between the parties, debt is payable after a certain point of time or on happening of a certain event, the debt becomes due only after that point of time. Thus, if in a case, the debt is payable and the person has not made the payment, a default can be said to have occurred and an application against the same can be brought.

The Supreme Court of India, in the judgment of *Innoventive Industries Limited v. ICICI Bank and Anr*[1] had held that the moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted.

Challenges under the Ordinance

While the present Ordinance can be observed as an immediate wave of relief for corporate persons facing challenges in their businesses during the pandemic, the Ordinance boasts of a few ambiguities that could prove detrimental in the long run.

Perpetual Applicability of Section 10A

As per Section 10A, the suspension is in place from 25-03-2020 till 24-09-2020, ("**Exempted Period**") unless extended for another six months, which means the maximum suspension can last is till 24-03-2021. However, the proviso to Section 10A states that "***no application shall ever be filed for initiation of CIRP for default occurring during Exempted Period***" and therefore the proviso substantially enlarges the scope that is sought to be achieved by the main Section. The language of proviso seems to put a blanket, forever exemption for defaults committed during the Exempted Period. It is a well settled rule of interpretation that a proviso cannot substantially enlarge the main provision[2].

Further, the expression "***no application shall ever be filed'*** as used in the Proviso to Section 10A creates distress in terms of whether this means a complete abatement/ suspension of the trigger sections, available even after the Exempted Period ends, with respect to the amounts defaulted during the said Exempted Period. If that be the case, a forever protection granted for the defaults committed by corporate persons during the Exempted Period which would actually result in a permanent ban on CIRPs.

If it is to be interpreted in the above manner, the other alternatives available to creditors, in that event, would be filing of civil cases or proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act)/ Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI Act).

[1] (2018) 1 SCC 407

[2] Dwarka Prasad Vs. Dwarka Das Saraf, 1975 AIR 1758

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No talk about personal guarantors

The provisions of the Code relating to personal guarantors to corporate debtors came into effect on 01-12-2019. However, it has not been experimented with widely by the creditors. The Ordinance does not bar initiation of insolvency proceedings against personal guarantors to corporate debtors. As to how far the initiation of insolvency proceedings against personal guarantors, while the corporate debtors are exempted from the same, is legally tenable, may lead to interpretational issues.

Suspending even voluntary insolvency

In times of unprecedent situations like this, the exit/closure of corporates should have been made easier. Instead, the Ordinance prevents filling and admission of voluntary insolvency applications, and this is self-defeating to corporate debtors. The only other options now available for the aggrieved debtors are winding up under Chapter XX of Companies Act, 2013 (this is not available to creditors), which has been rarely used after enactment of the Code, or voluntary liquidation under the under Part II of Chapter V of the Code (this is not available to corporates who have committed any defaults).

Thresholds for CIRP

As per the Ordinance, any default occurred on or after 25-03-2020 for a period of six months, is protected from the applicability of section 7, 9 or 10 of the Code. Vide the notification dated 24-03-2020, the threshold for 'default' has been revised to Rupees 1 Crore. Different NCLT Benches through their various recent orders passed in *Foseco India Limited v. Om Boseco Rail Products Limited*[3], and *Arrowline Organic Products (P) Ltd. v. Rockwell Industries Limited*[4], had held that the notification of 24-03-2020 increasing the threshold for default is prospective.

Therefore, for all defaults occurred prior to 24-03-2020, the default threshold is Rupees 1 Lakh, whereas the default occurred on 24-03-2020 alone, for which applications can still be preferred under Section 7, 9 or 10 of the Code, is Rupees 1 Crore. The newly introduced Proviso to Section 10A, defeats the purpose of introduction of the increased thresholds till such time Exempted Period continues.

Conclusion

The primary objective of the Code is re-organisation and insolvency resolution in a time bound manner for maximization of value of assets. In order to not abuse the same in the present economic scenario, notwithstanding the ambiguities, the Ordinance is a welcome move. However, the suspension may guide creditors to rely on enactments like SARFAESI Act/RDDBFI Act, thereby, retracting the reasons for the Code. It is also self-defeating to a corporate debtor since there is no direct imposition of moratorium on initiation of judicial proceedings, or the option to file for voluntary bankruptcy.

Further, any proceedings initiated under the Code for defaults committed on or after 25-03-2020 till 05-06-2020 will be hit by the Ordinance and stand dismissed,.

The Ordinance, also, does not shine upon any special insolvency resolution framework for MSMEs under Section 240A of the Code, which was also in the pipeline, as per the *Atma Nirbhar Bharat Abhiyan* reforms. Though the notification dated 24-03-2020 was intended to benefit the MSMEs, the notification is not line with such intention. Further, it is not actually very beneficial to MSMEs, since MSMEs will not be entitled to

[3] CP No. IB/1735/KB/2019 (Kolkata)

[4] IA/341/2020 in IBA/1031/2019 (Chennai)

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practically initiate any action until the threshold (now increased to Rs. 1 crore) which is very unlikely to cross.

Conclusively, it appears that the main purpose of the Ordinance, read with notification dated 24-03-2020 which increased the threshold limit, has been to merely ease the infrastructural and capacity constraints noose around the NCLTs and to discourage large volumes of applications filed for initiation of CIRP.

[The authors are Joint Partner and Associate, respectively, in Corporate Advisory team, Lakshmikumaran & Sridharan, Hyderabad]

Lapsing of land acquisition proceedings – Supreme Court Larger Bench answers reference

By **Aditya Thyagarajan**

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 ("**2013 Act**") was passed with a view to address various inadequacies in the existing Land Acquisition Act, 1894 ("**1894 Act**"). The 2013 Act contains provisions for enhanced compensation as well as rehabilitation and resettlement. The 2013 Act not only aims to safeguard the interests of landowners, but, also other displaced and affected persons including tenants and those whose main source of livelihood is dependent on the acquired land.

The 2013 Act came into force on 01-01-2014. Section 24 of the 2013 Act deals with the lapsing of proceedings that had been initiated under the 1894 Act and were pending as on 01-01-2014 in certain cases. Section 24 divides pending acquisitions as on 01-01-2014, into three broad categories:

1. Where the award has not been passed.
2. Where the award has been passed within 5 years prior to 01-01-2014.
3. Where the award has been passed more than 5 years prior to 01-01-2014.

The proceedings in the first and second categories of cases do not lapse. For cases in the first category, the acquisitions survive and compensations are to be determined as per the 2013 Act and, for cases in the second category, the compensations continue to be determined as per the 1894 Act. As far as cases in the third category are concerned, where, the award has been passed more than 5 years prior to 01-01-2014, the proceedings may lapse on the fulfillment of conditions, namely:

1. Physical possession of the land has not been taken; *or*
2. Compensation has not been paid.

As far as cases falling under the third category are concerned, certain interpretational issues arose immediately after the enactment of the 2013 Act. One of the issues was whether the satisfaction of both the aforesaid conditions was required for the proceedings to lapse or whether even the satisfaction of any one of the aforesaid

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conditions was sufficient for the proceedings to lapse. Another issue was, if the landowners had refused to accept the compensation, whether the deposit of the compensation in the treasury would amount to the compensation having been paid and would save the acquisition.

Indore Development Authority and Ors. v. Manoharlal and Ors. ("IDA-II")[5]

A five-judge bench was constituted in *IDA-II*, to answer these issues and to resolve the conflict arising from the judgments in the *Pune Municipal Corporation Case* (3 judge bench)[6] and the *Indore Development Authority Case* (3 judge bench, hereinafter "***IDA-I***")[7]. The Apex Court, in *Pune Municipal Corporation Case*, had held that where landowners had refused to accept the compensation, the money had to be deposited in Court. The deposit of compensation in the treasury after this refusal would not be regarded as payment of compensation thereby leading to a lapse of proceedings initiated under the 1894 Act. The correctness of this view was doubted by *IDA-I*.

The 5-judge Bench overruled the *Pune Municipal Corporation Case* and upheld *IDA-I* and concluded that the Government's obligation to pay compensation was complete when it tendered or offered the compensation to the landowners. It was also held that the Government was not obligated to deposit the compensation in Court on the landowner's refusal to accept the same. It was further held that the deposit of the compensation in the treasury instead of the Court caused no prejudice to the landowner and that the consequence of non-deposit in Court was limited to a higher rate of interest being payable as per Section 34 of the 1894 Act. The Court also held that the non-deposit of compensation in Court did not result in a lapse of the acquisition proceedings. Furthermore, it was held that the proceedings did not lapse if the compensation tendered was refused by the landowner or reference was sought for a higher compensation.

Another crucial issue was whether both the conditions mentioned in Section 24(2), that is, non-payment of consideration and failure to take possession, were necessary for the lapse of acquisition. Therefore, the Court had to decide whether the 'or' in '*the physical possession of the land has not been taken* ***or*** *the compensation has not been paid*' had to be interpreted as disjunctive (or) or as conjunctive (and/nor).

It was held that when two negative conditions are separated by an 'or', as per principles of statutory interpretation, they had to be read as conjunctive, that is, 'nor'/'and'. In light of this, the Court held that the 'or' in Section 24(2) has to be read as 'nor'/'and'. This implies that if the award has been passed 5 years or more before 01-01-2014, and neither physical possession was taken, nor compensation was paid, the proceedings would lapse. However, even if either of them was done, then the proceedings would be saved.

Conclusion

Though the *IDA- II* judgment has put some crucial interpretational issues to rest, it might be seen as an escape route for the Government, because acquisition proceedings initiated under the 1894 Act can now be saved since the Government may have merely tendered or offered compensation to the landowner.

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[5] 2020 SCC OnLine SC 316.

[6] *Pune Municipal Corporation and Ors.* v. *Harakchand Misirimal Solanki and Ors.* (2014) 3 SCC 183.

[7] *Indore Development Authority and Ors.* v. *Shailendra (Dead) through LRs and Ors.* (2018) 3 SCC 412.

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Notifications and Circulars

Import payment – Extension of time limits for settlement: Under the Master Direction on Import of Goods and Services dated 01-01-2016, remittances against normal imports (i.e. excluding import of gold/diamonds and precious stones/ jewellery) should be completed not later than six months from the date of shipment, except in cases where amounts are withheld towards guarantee of performance, etc. The Reserve Bank of India (RBI) *vide* notification dated 22-05-2020 has extended the time period for completion of remittances against such normal imports (except in cases where amounts are withheld towards guarantee of performance, etc.) from six months to twelve months from the date of shipment for such imports made on or before 31-07-2020.

Resolution timelines under Prudential Framework on Resolution of Stressed Assets revised: RBI *vide* notification dated 17-04-2020 had provided certain relaxations till 31-05-2020 on certain compliances under the Prudential Framework. Given the continued challenges to resolution of stressed assets in the backdrop of COVID-19, the timelines are being extended further as follows *vide* notification dated 23-05-2020:

Compliance	**Relaxation under 17-04-2020 notification**	**Relaxation under 23-05-2020 notification**
Lenders shall undertake a prima facie review of the borrower account within thirty days from date of default (“**Review Period**”)	In respect of accounts which were within the Review Period as on 01-03-2020, the period from **01-03-2020 to 31-05-2020** shall be excluded from the calculation of the 30-day timeline for the Review Period.	In respect of accounts which were within the Review Period as on 01-03-2020, the period from **01-03-2020 to 31-08-2020** shall be excluded from the calculation of the 30-day timeline for the Review Period.
Resolution Plan shall be implemented within 180 days from the end of Review Period.	In respect of accounts where the Review Period was over, but the 180-day resolution period had not expired as on 01-03-2020, the timeline for resolution shall get extended by **90 days** from the date on which the 180-day period was originally set to expire.	In respect of accounts where the Review Period was over, but the 180-day resolution period had not expired as on 01-03-2020, the timeline for resolution shall get extended by **180 days** from the date on which the 180-day period was originally set to expire.

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Companies (Share Capital and Debentures) Amendment Rules, 2014 amended: The Ministry of Corporate Affairs *vide* notification dated 05-06-2020 has amended the Companies (Share Capital and Debentures) Rules, 2014. Pursuant to the amendment, a start-up company, as defined in notification number G.S.R. 127(E), dated the 19-02-2019 issued by the Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, may issue sweat equity shares not exceeding fifty percent of its paid-up capital up to ten years from the date of its incorporation or registration. The earlier time limit was five years from the date of incorporation.

The requirement of investing or depositing on or before 31 day of April every year, a sum which is not less than 15% of the amount of debentures maturing on or before the 31st day of March of next year, has been omitted for privately placed debentures for NBFCs registered with Reserve Bank of India under Section 45-IA of the RBI Act, 1934 and for Housing Finance Companies registered with National Housing Bank; and listed companies.

Further Public Offer – Relaxations from certain provisions of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("ICDR Regulations"): Securities Exchange Board of India *vide* Circular dated 09-06-2020 has provided certain temporary relaxations in the eligibility conditions related to Fast Track Further Public Offer (FPO) till 31-03-2021. Under Regulation 155 of the ICDR Regulations for making a further public offer through the fast track route, certain compliances in relation to filing of the draft offer document and offer documents under Regulation 123 are not applicable subject to qualifying the eligibility conditions. Now the eligibility conditions under Regulation 155 are relaxed as provided below. It may be noted that the relaxations are not applicable for issuance of warrants.

Earlier Position	Relaxed Requirement
Average market capitalisation of public shareholding of the issuer is at least **one thousand crore rupees** in case of public issue *[Regulation 155(c)]*	Average market capitalisation of public shareholding of the issuer is at least **five hundred crore rupees** in case of public issue
No show-cause notice has been issued or prosecution proceedings have been initiated by SEBI and pending against the issuer or its promoters or whole-time directors as on the reference date. *[Regulation 155(h)]*	No show-cause notice, **excluding under adjudication proceedings**, have been issued by SEBI and pending against the issuer or its promoters or whole-time directors as on the reference date. **In cases where against the issuer or its promoters/ directors/ group companies,** **i) a show cause notice(s) has been issued by SEBI in an adjudication proceeding or** **ii) prosecution proceedings have been initiated by SEBI; necessary disclosures in respect of such action(s) along-with its potential adverse impact on the issuer shall be made in the offer documen**t.
The issuer or promoter or promoter group or director of	The issuer or promoter or promoter group or director of the issuer **has fulfilled**

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Earlier Position	Relaxed Requirement
the issuer has not settled any alleged violation of securities laws through the consent or settlement mechanism with SEBI during three years immediately preceding the reference date. *[Regulation 155(i)]*	**the settlement terms or adhered to directions of the settlement order(s) in cases where it has settled any alleged violation of securities laws through the consent or settlement mechanism with SEBI.**
Impact of audit qualifications, if any and where quantifiable, on the audited accounts of the issuer in respect of those financial years for which such accounts are disclosed in the letter of offer does not exceed five per cent. of the net profit or loss after tax of the issuer for the respective years. *[Regulation 155(l)]*	Impact of audit qualifications, if any and where quantifiable, on the audited accounts of the issuer in respect of those financial years for which such accounts are disclosed, **shall be appropriately disclosed and accounts accordingly restated, in the offer documents. Further, that for the qualifications wherein impact on the financials cannot be ascertained the same shall be disclosed appropriately in the offer documents**

Margin obligations to be given by way of Pledge/ Re-pledge in Depository System - Extension of Timeline: SEBI, *vide* Circular dated 25-02-2020, had issued guidelines with regard to margin obligations to be given by way of Pledge/ Repledge in the Depository System. The provisions of this circular were to come into effect from 01-06-2020. The Circular *inter alia* stated that in case, a client has given a power of attorney in favour of a trading member (TM) / clearing member (CM), such holding of power of attorney shall not be considered as equivalent to the collection of margin by the TM / CM in respect of securities held in the demat account of the client. However, in view of the situation arising due to COVID-19 pandemic, the implementation date of the aforesaid provision has now been extended to 01-08-2020, *vide* Circular dated 29-05-2020.

SEBI framework for regulatory sandbox to regulated entities: SEBI *vide* Circular dated 05-06-2020 has stipulated a regulatory sandbox framework for entities regulated by it. Earlier SEBI *vide* Circular dated 20-05-2019 announced a framework for an industry-wide innovation sandbox, whereby FinTech startups and entities not regulated by SEBI were permitted to use the innovation sandbox for offline testing of their proposed solution. Whereas, under the sandbox framework dated 05-06-2020, entities regulated by SEBI shall be granted certain facilities and flexibilities to experiment with FinTech solutions in a live environment and on limited set of real customers for a limited time frame. Exemptions/relaxations, if any, could be either in the form of a comprehensive exemption from certain regulatory requirements or selective exemptions on a case-by-case basis, depending on the FinTech solution to be tested. However, no exemptions would be granted by SEBI from the extant investor protection framework, Know Your-Customer (KYC) and Anti-Money Laundering (AML) rules.

Extension of timeline for compliance with various payment system requirements: The Reserve Bank of India *vide* notification dated 04-06-2020 has relaxed timelines for certain compliances by payment system operators, system participants and banks. The relaxations offered are as follows:

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Instruction / Circular	Present Timeline	Revised Timeline
All existing non-bank PPI issuers to comply with the minimum positive net-worth requirement of Rs. 15 crore for the financial position as on March 31, 2020 (audited balance sheet).	Financial position as on 30-06-2020	Financial position as on 30-09-2020
Authorised non-bank entities shall submit the System Audit Report, including cyber security audit conducted by CERT-IN empanelled auditors, within two months of the close of their financial year to the respective Regional Office of DPSS, RBI.	By 31-08-2020	By 31-10-2020
Implementing provisions of circular on "Enhancing Security of Card Transactions"	w.e.f. 16-06-2020	By 30-09-2020
"Harmonisation of Turn Around Time (TAT) and customer compensation for failed transactions using authorised Payment Systems", "calendar days" to be read as "working days".	w.e.f. 24-03-2020	Until 31-12-2020
Guidelines on Regulation of Payment Aggregators and Payment Gateways", the activities for which specific timelines are not mentioned and were supposed to come into effect from 01-04-2020	w.e.f. 01-06-2020	By 30-09-2020

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Ratio Decidendi

Arbitration Agreement has effect irrespective of invocation of proceedings under Section 18 of Micro and Small and Medium Enterprises Development Act, 2006

The Bombay High Court has held that an arbitration agreement between the parties shall not cease to have effect irrespective of the powers of the Micro and Small Enterprises Facilitation Council (MSEFC) under Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 ("MSMED Act") to act as an arbitrator or refer the dispute to arbitration.

Brief Facts:

The Applicant, a 'supplier' within the meaning of the MSMED Act, had various contracts awarded by the Respondent, in pursuance of tenders. Subsequently, disputes arose between the parties and the matter was referred for conciliation, and thereafter, for arbitration by the Applicant under Section 18(2) of the MSMED Act. Pending consideration of the said application, the Applicant moved petitions under Section 9 (for interim reliefs, before the District Court) and Section 11 (for appointment of an arbitrator, before the High Court) of the Arbitration and Conciliation Act, 1996. The High Court passed an order in 2016 appointing a Sole Arbitrator and the section 9 petition was subsequently withdrawn by the Applicant, to seek the same reliefs before the Sole Arbitrator. The final award was subsequently passed in favour of the Applicant and a petition under Section 34 of the Arbitration Act was preferred by the Respondent herein before the High Court. The Applicant filed a Notice of Motion seeking transfer of proceedings to be adjudicated upon by the District Court, Nashik, under Section 42 of the Arbitration Act. The present proceedings are for deciding upon the said Notice of Motion.

Submissions by Applicant:

a) Since Section 9 petition had been filed before the District Court, Nashik, in terms of Section 42 of the Arbitration Act, it is that court alone which has jurisdiction over the arbitral proceedings, including over any challenge to any award rendered in the proceedings.

b) The present arbitral proceedings have been initiated under Section 18 of the MSMED Act, to be adjudicated by the MSEFC and not under the governing contract.

Submissions by Respondent:

a) Since the Section 9 petition was withdrawn by the Applicant, the mandate of Section 42 cannot be attracted.

b) The District Court, Nashik is not even a Court of competent jurisdiction to have decided upon the Section 9 petition, since the same is not covered by the arbitration clause in the governing contract, which states the seat of arbitration as Mumbai.

Decision:

a) Reference for appointment of an arbitrator was made under Section 11(5) of the Arbitration Act by the Applicant itself and not by the MSEFC, under Section 18(3) of the MSMED Act. Therefore, the appointment cannot be said to be under the provisions of the MSMED Act.

b) Section 18(3) of the MSMED Act cannot be treated as an arbitration agreement by the Chief Justice or his designate to act upon

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under Section 11(6) of the Arbitration Act, upon failure of the MSEFC to take up the dispute or refer it to arbitration. The judgment of the High Court in *Steel Authority of India Ltd. v. The Micro, Small Enterprise Facilitation Council* [2010 SCC OnLine Bom 2208], was relied upon to affirm that the powers under the arbitration agreement as well as the MSEFC are not cancelled on account of the existence of either remedy. Accordingly, the Notice of Motion was dismissed.

[*Microvision Technologies Pvt. Ltd.* v. *Union of India* – Judgment dated 15-05-2020 in Commercial Notice of Motion No. 1826 of 2018 in Commercial Arbitration Petition No. 855 of 2018]

Interest rates higher than the prevailing banking interest rates awarded by an Arbitral Tribunal is perverse

The Delhi High Court has held that awarding a high rate of interest (18% per annum) by an arbitrator, against the prevailing banking interest rates, is illegal and perverse, especially in cases where specific performance of contract has been sought for as an alternative prayer to damages.

Brief Facts:

The Applicant herein purchased property located in Dwarka, NCR, through an auction conducted by the Delhi Development Authority (DDA) ("Property"). The Applicant and the Respondent entered into Space Buyer Agreements, for purchase of units of space in the Property. Disputes arose subsequently between the parties, which were referred to arbitration and the Arbitral Tribunal decided in favour of the Respondent, awarding refund of purchase consideration, damages along with interest at the rate of 18% per annum, from date of payment till date of realization thereof. This Order was challenged before the High Court, Single Judge, and thereafter, the present appeal preferred under Section 37 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act"). It may be noted that, at the beginning of the arbitral proceedings, a petition under Section 9 of the Arbitration Act was also preferred by the Respondent before the High Court seeking for *status quo* against the usage of the disputed spaces of the Property, which had been granted and was in force until the final arbitral award was passed ("Status Quo Order").

Submissions by Appellants:

a) The Arbitral Tribunal/ Single Judge of the High Court failed to consider that the Respondent had also prayed for specific performance of the Space Buyer Agreements, in the alternative to seek refund of the amounts along with damages/ interest.

b) The interest rate was exorbitant, since the Appellant was not allowed to derive any benefits from the commercial spaces, in light of the Status Quo Order.

Submissions by Respondent:

Respondents had been unable to enjoy the commercial space, until the Status Quo Order or thereafter, inspite of making full payments towards purchase of the same. Therefore, the award of damages and interest is valid in law.

Decision:

a) The High Court observed that the award of compensation, in terms of the Specific Relief Act, 1963 ("SPR Act"), was linked to the claim for specific performance. In these circumstances, even if the Court was to hold that refund of the consideration amount is an exercise of discretionary power in proceedings pertaining to specific performance, yet the compensation/damages awarded would have to withstand the test laid down for

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grant of compensatory relief under Section 73 of the Indian Contract Act, 1872 ("Contract Act"). In money claims relating to refund of consideration, courts ordinarily do not grant status quo and entangle the property in dispute, because in such situations, there is no need to preserve the property in dispute.

b) The Court also observed that, while awarding the damages, the arbitrator has to be mindful of the fact that under the agreement in question, whether any rate of interest has been specified. Further, since the corresponding banking rate of interest as on date was much lower than the rate of interest awarded by the Arbitral Tribunal and, in absence of any evidence placed on record that could justify grant of interest at 18%, the High Court reduced the same to 9% for the same period as was awarded, keeping in mind the prevailing market rates.

[*V4 Infrastructure Private Limited* v. *Jindal Biochem Private Limited* – Judgment dated 5-5-2020 in FAO (OS) (COMM) 107-108/2018, Delhi High Court]

News Nuggets

Suspension of rent due to lockdown – Delhi High Court clarifies on *force majeure* and TPA

Observing that in agreements providing for a *force majeure* clause, the Court is to examine the same in the light of Section 32 of the Indian Contracts Act, 1872, the Delhi High Court, in the judgment dated 21-05-2020, in *Ramanand v. Dr. Girish Soni* [CM Appl. 10848/2020], has held that if the contract contains a clause providing for some sort of waiver or suspension of rent, the tenant could claim the same. The Court further observed that in the absence of a contract or a contractual term, which is a force majeure clause or a remission clause, the provisions of the Transfer of Property Act, 1882 would govern tenancies and leases but, temporary non-use of premises due to the lockdown announced due to the COVID-19 outbreak cannot be construed as rendering the lease *void* under Section 108(B)(e) of the Transfer of Property Act, 1882. The Court was also of the view that the tenant cannot also avoid payment of rent in view of Section 108(B)(l) of the TPA.

Every breach cannot be justified merely on invocation of COVID-19 as a *force majeure* condition

The Delhi High Court, in the judgment dated 29-05-2020, in *Halliburton Offshore Services v. Vedanta Limited* [O.M.P (I) (COMM.) No. 88/2020], has held that every breach or non-performance cannot be justified or excused merely on the invocation of COVID-19 as a *force majeure* condition. The Court in this regard was of the view that it would have to assess the conduct of the parties prior to the outbreak, the deadlines that were imposed in the contract, the steps that were to be taken, the various compliances that were required to

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be made and only then assess as to whether, genuinely, a party was prevented or is able to justify its non-performance due to the pandemic. Observing that the parties ought to be compelled to adhere to contractual terms and conditions and excusing non-performance would be only in exceptional situations, the Court reiterated that a *force majeure* clause is to be interpreted narrowly and not broadly. Vacating the *ad interim* Order, the Court declined to grant restraint against encashment of the Bank Guarantee.

Relaxation for employers in relation to mandatory requirement of Aarogya Setu app

Ministry of Home Affairs ("**MHA**") *vide* its Order dated 01-05-2020 had provided that it is mandatory for employees of both public and private sector enterprises to install Aarogya Setu on their mobile phones. The burden of ensuring 100% compliance by employees was placed on the head of respective organisation. However, the MHA *vide* its subsequent Order dated 17-05-2020 has now relaxed the requirement and provided that employers, on a best effort basis, ensure that Aargoya Setu is installed by all employees having compatible mobile phones.

Contribution to PM CARES Fund eligible as CSR activity

The Ministry of Corporate Affairs has amended Schedule VII to the Companies Act, 2013 to include contribution to Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PM CARES Fund) as one of the eligible CSR activities. Notification dated 26-05-2020 issued for this purpose is effective from 28-03-2020.

Rights issue opening up to 31-07-2020 – Non-dispatch of notice by specified means under Section 62(2) of Companies Act, 2013 condonable

The MCA *vide* General Circular 21/2020 has clarified that inability to send notices by listed companies through registered post or speed post or courier would not be seen as non-compliance of Section 62(2) of Companies Act, 2013. It may be noted that under Section 62(1)(a)(i) of Companies Act, 2013 read with Section 62(2), companies are required to send notices to shareholders by registered post or speed post or through electronic mode or courier or any other mode having proof of delivery to all the existing shareholders at least three days before the opening of the rights issue. However, in the backdrop of COVID-19 situation representations were made on inability to send notices by registered post, speed post, or courier by the listed companies. Interestingly, the said Circular does not refer to dispatch of notices through electronic mode.

Tests to determine whether an instrument can be considered as a release/relinquishment deed

The Delhi High Court *vide* judgement dated 20-05-2020, in *Tripta Kaushik v. Sub Registrar VI-A, Delhi & Anr,* WP No. 9193/2019, has laid down tests to determine whether an instrument can be considered as a release/relinquishment deed or a gift deed as follows:

a) The nomenclature used to describe the document or the language which the party may choose to employ in framing the document, is not a decisive factor. What is decisive is the actual character of the transaction intended by the executants;

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b) Determination of the nature of the document is not a pure question of law;

c) Where a co-owner renounced his right in a property in favour of the other co-owner, mere use of word like 'consideration' and 'transfer' would not affect the true character of the transaction;

d) What is intended by a release deed is the relinquishment of the right of the co-owner;

e) Co-ownership need not be only through inheritance, but can also be through purchase; and

f) Where the relinquishment of the right by the co-owner(s) is only in favour of one of the co-owners and not in favour of all other co-owners (other than the releasing co-owners), the document would be 'Gift' and not 'Release'.

Further extension of payment of EMIs moratorium

RBI *vide* Circular dated 23-05-2020 has permitted all commercial banks (including regional rural banks, small finance banks and local area banks), cooperative banks, All-India Financial Institutions, and Non-banking Financial Companies (including housing finance companies) ("lending institutions") to extend the moratorium by another three months i.e. from 01-06-2020 to 31-08-2020 on payment of all instalments in respect of term loans (including agricultural term loans, retail and crop loans). Initially the moratorium was announced from 01-03-2020 to 31-05-2020. The moratorium is extended till 31-08-2020 in respect of working capital facilities sanctioned in the form of cash credit/overdraft ("CC/OD"), on recovery of interest applied in respect of all such facilities. Lending institutions are permitted, at their discretion, to convert the accumulated interest in relation to CC/OD facilities for the deferment period up to 31-08-2020, into a funded interest term loan (FITL) which shall be repayable not later than 31-03-2021.

Arbitration - Section 19 of Micro, Small and Medium Enterprises Development Act, 2006 not applicable to an award by arbitrator appointed otherwise than in accordance with Section 18

The Delhi High Court *vide* judgement dated 08-05-2020, in *AVR Enterprises Vs. Union of India*, CM(M)769/2018 has held that Section 19 (application for setting aside decree, award or order) of the MSMED Act would apply only to proceedings initiated under Section 18 (reference to Micro and Small Enterprises Facilitation Council) of the MSMED Act and would not apply to an award published by an Arbitrator appointed by the parties otherwise than in accordance with Section 18 of the MSMED Act. In terms of Section 18, any party to a dispute with regard to any amount due under Section 17 of the MSMED Act can make a reference to the Micro and Small Enterprises Facilitation Council (**"Council")**. The petitioner, in the present case had invoked arbitration under the Arbitration and Conciliation Act, 1996 and requested respondent to appoint an arbitrator without any reference made to the Council for any amount due to the Petitioner under Section 17 of the MSMED Act.

Retirement of one partner amounts to dissolution of partnership firm consisting of only two partners

The Supreme Court *vide* its judgment dated 26-05-2020, in *Guru Nanak Industries, Faridabad & Anr. v. Amar Singh, Through Lrs.*, Civil Appeal No. 6659-6660 of 2010, has held that when there are only two partners in a firm, and one agrees to retire, the retirement amounts

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to dissolution of the firm, in terms of Section 48 read with Section 37 of the Partnership Act, 1932. The Court distinguished between 'retirement of a partner' and 'dissolution of a partnership firm' and held that the procedure of transferring only the capital standing in the name of the retiring partner would not hold true in case of two-partner, since the partnership firm could not have continued to carry on business as the firm after the retirement. The judgments of the Apex Court in *Pamuru Vishnu Vinodh Reddy v. Chillakuru Chandrasekhara Reddy and Others* [(2003) 3 SCC 445] and *Erach F.D. Mehta v. Minoo F.D. Mehta* [(1970) 2 SCC 724] were relied upon.

Relationship between clients and foreign law firms is "commercial" for Sections 44 and 45 of Arbitration and Conciliation Act, 1996

The Delhi High Court *vide* its judgment dated 12-05-2020 in the case of *Spentex Industries Limited v. Quinn Emanuel Urquhart & Sullivan LLP,* CS (OS) 568/ 2017, has held that the contractual relationship between a client and a foreign law firm can be treated as 'commercial', especially when consisting of transactions relating to services for valuable consideration. The contract for legal services executed between the Indian-incorporated client and the foreign law firm, located in the United States, contained an arbitration clause referring the arbitration for adjudication by the Judicial Arbitration and Mediation Services, Inc. United Stated (JAMS). The contract by itself, including the arbitration clause, was later challenged by the client before a civil court, for declaration as *non-est.,* which was challenged by the law firm before the High Court, under Section 45 of the Arbitration Act. The High Court observed that, while advocates in India are governed by a statutory regime, namely, The Advocates Act, 1961 and the rules and regulations framed thereunder, the defendant is a foreign law firm not governed by the statutory regime prevailing in India relating to advocates. Further, it noted that the dispute was solely with respect to recovery of money, and not professional issues. The judgments of the Apex Court in *R.D. Saxena v. Balram Prasad Sharma* [(2000) 7 SCC 264] and of the Allahabad High Court in *Aditya Narayan Singh v. State Election Commission*, *Uttar Pradesh & Anr.* [2003 SCC OnLine All. 1118] were relied upon.

Electricity dues when can be recovered from the auction-purchaser of unit

The Supreme Court *vide* the judgment dated 01-06-2020, in *Telangana State Southern Power Distribution Company Limited & Anr. v. M/s. Srigdhaa Beverages* [Civil Appeal No. 1815 of 2020], has held that liability towards previous electricity dues of last owner can be recovered from auction-purchaser of unit if sale is on "as is where is, whatever there is and without recourse basis" and where the existence of electricity dues, whether quantified or not, has been specifically mentioned as a liability of the purchaser. Allowing the appeal of Telangana State Southern Power Distribution Company Ltd., the Court noted that the liability to pay electricity dues existed on the purchaser. The Court also observed that electricity dues are statutory in character under the Electricity Act and as per the terms and conditions of supply, it cannot be waived.

Insolvency – Workers gratuity not payable if same not part of liquidation estate

The NCLAT *vide* Order in *Savan Godiwala. Liquidator v. Apalla Siva Kumar,* [CA(AT)(Ins) No. 1229/2019] has held that a Liquidator cannot be compelled to make provision for payment of gratuity to workers on the highest

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priority if sums due to any employees from the Provident, Pension or Gratuity Fund, do not form part of the liquidation estate of the Corporate Debtor. Setting aside the direction of NCLT to the Liquidator to make provision for payment of gratuity, without their being a separate fund in that regard, the Appellate Tribunal observed that a Liquidator has no domain to deal with the properties of the Corporate Debtor, which are not part of the liquidation estate. The NCLAT was of the view that since it has already been decided that Gratuity Fund does not form the part of the liquidation estate, the question of distribution of the Gratuity Fund in order of priority, provided under Section 53(1) of the Insolvency and Bankruptcy Code does not arise. NCLAT's earlier decision in the case of *State Bank of India v. Moser Baer Karamchari Union*, [CA(AT)(Ins) No. 396/2019] was relied upon.

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