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India's proposal to recognise cross border insolvency

By **Anush Raajan V.**

The Ministry of Corporate Affairs, Government of India has invited suggestions on a draft chapter on Cross Border Insolvency (Proposed Amendment) proposed to be included within the framework of Insolvency & Bankruptcy Code, 2016 (IBC) by a public notice dated 20-6-2018 (Notice).

The Proposed Amendment is based on the UNCITRAL Model on Cross Border Insolvency, 1997 (Model Law) which is an internationally recognised legal framework to deal with cross-border insolvency issues. It is noteworthy to mention that UK, USA, Japan, Canada and Australia are some of the countries that have substantially implemented the Model Law.

Need for Cross Border Insolvency Regulations

At present, the legal framework governing corporate insolvency i.e. IBC is silent on the position of a foreign creditors' right to approach National Company Law Tribunal (NCLT) to initiate corporate insolvency proceedings. However, the Hon'ble Supreme Court in *Macquarie Bank Limited* v. *Shilpi Cable Technologies Ltd*[1] set a precedent that foreign creditors shall have the same right as available to a domestic creditor to initiate and participate in corporate insolvency resolution process under IBC. The Hon'ble Supreme Court in the above case expanded the definition of 'person' to include persons residing outside India.

At present Sections 234 and 235 of IBC provide for cross border operation of directions and orders of NCLT. However, the above sections have not been notified, and therefore have no effect. Any orders passed in India as of now will not have effect outside, unless specifically taken up / followed up by the Indian government with the foreign state on a case on case basis. This remains untested till date.

Indian court's recognition of foreign proceedings and, or orders passed by the foreign courts are all governed under Code of Civil Procedure, 1908 (CPC). Only the final orders / awards passed by foreign courts are recognized. Insolvency orders, orders arising out of reorganization processes, administrative orders and interim orders are NOT recognised for the purpose of execution in India.

The practical implications of lack of regulation in cross border insolvency are several and varied. At present, upon admission of a corporate insolvency petition by NCLT moratorium is imposed by default restricting institution/continuation of suits or arbitration against the company; the assets of the company are prohibited from being transferred or being encumbered etc.; and enforcing security interest against the company is prohibited. However, this moratorium only operates within India or governs only those assets of the Company situated within India. The Indian lenders do not have access to foreign assets of the Company. Any foreign proceedings against the Company will continue to be contested in those jurisdiction, overseas assets of the Company and the security created

[1] *Civil Appeal No.15135 OF 2017*

over those assets will not be covered by the moratorium unless a mechanism is agreed upon by which the Indian proceedings are recognised in that jurisdiction.

In view of the above shortcomings a proper legal framework governing the operation of NCLTs' orders and directions outside India, and recognition of Foreign Court's orders and directions in a cross-border insolvency proceedings was required to be passed. This lacuna is sought to be remedied by the Government of India by including the present Chapter on Cross Border Insolvency.

Salient Features

The Proposed Amendment applies to all corporate debtors, unless specifically excluded by the Central Government, and will govern:

a. Assistance sought in India by a foreign court in respect of foreign proceedings;

b. Assistance sought by a foreign state in respect of proceedings under IBC;

c. Foreign proceedings and proceedings under IBC in respect of the same corporate debtor concurrently; and

d. Requests for commencement of, or participation in proceedings under IBC by a Foreign State through its representative.

The Proposed Amendment operates only in the jurisdictions where the States / countries have expressly adopted the Model Law with or without modification as to reciprocal recognition. However, there is an enabling provision contained in the Proposed Amendment whereby Government of India may expand the application of the chapter to jurisdictions where the Government of India may in the future enter into agreement with such countries.

Important Definitions

Certain new definitions have been included, set out below:

a. "*Centre of Main Interest*" will normally lie in a place where the registered office of the company is situated. However, in a given case NCLT has been given the discretion to arrive at an independent assessment to ascertain the "*centre of main interests*" of a corporate debtor.

b. "*Foreign Proceedings*" means insolvency proceedings initiated or pending in a foreign state in which the assets and the affairs of the company are subject to control and supervision by a foreign state;

c. "*Foreign Main Proceedings*" means proceedings taking place in a country where the Company has the centre of main interests, outside India;

d. "*Foreign non-main Proceedings*" means proceedings taking place in a country, outside India, where the Company has an establishment other than centre of main interests;

e. "*Foreign Representative*" means a person or institution authorized in foreign proceedings to administer the assets or affairs of the Company; and, or to act as a representative of the foreign proceedings in India.

Assistance to Foreign Representative and Creditors

A Foreign Representative or a Creditor are treated on par with domestic creditors in respect of commencement of, and participation in insolvency resolution proceedings. A foreign creditor or a foreign representative can now without a need for a separate recognition can directly approach the NCLT to initiate

proceedings against the company and exercise all the rights as a creditor.

The Proposed Amendment makes it mandatory that the NCLT and the Resolution Professional shall provide all notification that are required to be made available to the domestic creditors to the foreign creditors in such manner as will be separately notified.

Similarly, an authorized person or body duly authorized to represent the foreign proceedings in India shall also have the right to apply to NCLT and seek its assistance to carry out his / its functions as the Foreign Representative under the IBC. Essentially, the Proposed Amendment provides for recognition of Foreign Proceedings and paves way for a Foreign Representative secure the assets of the corporate debtor in foreign proceedings that are situated in India by simply moving the NCLT.

Recognition of Foreign Insolvency Proceedings

As provided in the definitions, Foreign proceedings are categorized into two broad heads viz. Foreign Main Proceedings and Foreign Non-Main Proceedings. Foreign Main Proceedings are those taking place in a State / Country where the corporate debtor has "*centre of main interests*" as opposed to Non-Main proceedings which take place in a country where the corporate debtor may just have an establishment or presence. The difference between the foreign proceedings shall influence the reliefs that may be granted by NCLT and the discretion that may be exercised by the NCLT while granting such reliefs.

NCLT may recognise the Foreign Proceedings on an application by a Foreign Representative on production of requisite documents as either a Foreign Main Proceedings or Foreign Non-Main Proceedings. Timelines for recognition of the proceedings are caped at a maximum 14 days from the date of filing the application.

Upon recognition of existence of a Foreign Main Proceedings, the NCLT shall be obliged to order and impose a moratorium prohibiting institution of suits or continuation of suits, transferring or encumbering any assets, any action to deal with or foreclose security interest etc. of the Company facing insolvency proceedings.

In the event the proceedings are recognised as Foreign Non-Main Proceedings, NCLT may exercise jurisdiction only to protect the assets of the company or the interests of the creditors in such foreign proceedings. To this end the NCLT may exercise its discretion to grant reliefs moratorium and such other reliefs to protect the assets of the corporate debtor, or the interests of the creditors.

The moratorium and, the prohibitions imposed by the NCLT under these provisions will be valid for the same duration and will terminate, as provided under Section 14 of IBC, either upon resolution of insolvency or upon liquidation.

Besides the above reliefs imposing moratorium, the NCLT in both the cases of Foreign Main Proceedings and Foreign Non-Main Proceedings has the discretion to pass orders entrusting the administration or realization of the assets situated in India to the Foreign Representatives. However, in the case of Foreign Non-Main Proceedings the above reliefs may be granted by NCLT only if its demonstrated that the reliefs relate to assets that are administered in the Foreign Non-Main Proceedings.

For example, if the NCLT recognises Foreign Non-Main proceedings against company X in country ABC, NCLT shall not grant reliefs to the Foreign Representative seeking administration of assets in India which are not administered (i.e. identified and controlled) in those foreign

proceedings. In the same example above, if the Foreign Proceedings are recognised as Foreign Main Proceedings then NCLT will have no choice but to impose a moratorium and hand over the administration of ABC's assets in India, whether administered or not under the said proceedings, to the Foreign Representative.

The Proposed Amendment also expressly provides that the NCLT before granting reliefs to the Foreign Representatives must first satisfy itself that the interests of all the creditors, interested persons including the corporate debtor are adequately protected. Clearly, the intention to afford a chance of representation to the concerned persons before passing an adverse order is explicit.

Cooperation with Foreign Courts and Concurrent Proceedings

Although the Model Law contemplates direct communication between the Courts across jurisdiction in cross border insolvency matter, the Proposed Amendment has modified the Model Law requiring the Central Government to frame rules as to how the communication between the NCLTs and the Foreign Court would happen.

The Proposed Amendment provides for cooperation between the NCLTs and any foreign court *inter alia* by enabling NCLT to conduct a joint hearing with the foreign court. Similarly, the Resolution Professional appointed under the IBC, subject to supervision by the appropriate NCLT, is empowered to communicate directly with foreign courts and foreign representatives in the discharge of his duties under the IBC.

As regards concurrent proceedings, it is provided that the commencement of insolvency proceedings against the same Corporate Debtor under IBC after recognition of a Foreign Main Proceedings against the same corporate debtor is permitted only if the corporate debtor has assets situated in India and the domestic proceedings concern only those assets.

The Proposed Amendment also provides powers to the NCLT to seek cooperation and coordination of foreign courts or Foreign Representatives in cross border insolvency proceedings. However, this will be further subject to such guidelines framed to oversee the channel of communication and the sort of cooperation that may be sought by the NCLT.

Conclusion

The Proposed Amendment is in the right direction as it recognises and tries to fill the gaps in IBC *re* operation of NCLT's orders outside India, and India's reciprocal obligation to Foreign Courts' / Creditors, and access to foreign assets to Indian creditors.

The Proposed Amendment is not free from doubts or limitations, especially regarding the discretion vested in the NCLT in recognition of the Foreign Proceedings. The entire jurisdiction of NCLT under the Proposed Amendment will depend on whether the action "would be manifestly contrary to the public policy of India" or not. The Proposed Amendment also makes provision for the Central Government to specify what will be manifestly contrary to public policy of India. There is no clarity on what constitutes Public Policy of India. This has been under a lot of debate in the arbitration realm especially in the recognition and enforcement of Foreign Arbitral award and is now likely to spill over to IBC. Secondly, the Proposed Amendment provides that the central government may notify classes of corporate debtor or entities to whom this amendment will not apply. There is no indication whether in the discussion part or otherwise, as to who will be excluded and reasons for providing such exclusions. Lastly, there is no clarity as to the parameters that will decide where the "centre of main interests" of a company lie. It is stipulated

that Registered Office will be an indicative centre of main interest, but discretion is vested with the NCLT to draw its own conclusion. Often companies are registered in jurisdictions depending on tax relaxation etc. but the actual business is centered in some other jurisdiction. Therefore, it is crucial to define the parameters to arrive at centre of main interests to avoid conflicting views and tests adopted by different NCLT which may also lead to long drawn litigation.

Another crucial aspect is the reciprocity obligation under the Model Law. The success of the Proposed Amendment will entirely depend upon the acceptance and recognition of foreign proceedings by India, which will in turn determine the validity of NCLT decisions, orders outside India. This will be clear only once the Proposed Amendment is notified and the reciprocal arrangement between the countries are agreed separately and notified by the Central Government.

We believe that the concerns will be answered by the Government in its final discussions and hope that the Proposed Amendment in its' final form, hopefully, without watering down the provisions, is brought into effect at the earliest.

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A comparative analysis of legal remedies available to home-buyers in India

By **Anurag Pareek, Samad Ali, and Meghmala Mukherjee**

Prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 ("**RERA**"), aggrieved home-buyers had the options of approaching the consumer courts[2] or the civil courts to address their grievances. However, with the enactment of RERA and subsequently, the amendment to the Insolvency and Bankruptcy Code, 2016 ("**IBC**") in 2018[3], aggrieved home-buyers in India now have access to even more fora for remedial actions.

The present article attempts to analyze the various provisions under these identified legislations and to show the best, or rather, the most accessible forum in such circumstances.

Consumer Protection Act, 1986 ("CPA")

CPA established consumer disputes redressal agencies at different levels, *viz.* district fora; State Commissions and the National Consumer Dispute Redressal Commission[4] ("NCDRC" and collectively such commissions, "Agencies"), with jurisdictions being defined in terms of territory and the value of goods and services, as well as the compensation claimed[5]. The Supreme Court in *M/s Amrapali Sapphire Developer Private Limited v M/s Amrapali Sapphire Flat Buyers Welfare Association*[6] had approved the jurisdiction in case of an aggrieved group to file its complaint directly before the

[2] 'Department of Consumer Affairs Ministry of Consumer Affairs, Food & Public Distribution Government of India <https://consumerhelpline.gov.in/> accessed 22 July 2018.
[3] Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, Ordinance No. 06 of 2018.
[4] Appeals from the NCDRC can be filed before the Supreme Court under Section 23 of the CPA.
[5] Consumer Protection Act 1986, Section 9.
[6] *M/s Amrapali Sapphire Developer Private Limited v M/s Amrapali Sapphire Flat Buyers Welfare Association,* Civil Appeal No. 10882 of 2016, 10954 of 2016, 10979 of 2016 and11094 of 2016.

NCDRC, if the claim exceeds the threshold of one crore rupees[7].

In terms of the relief granted to aggrieved home-buyers, the relevant Agency may pass an order directing the builder or developer to return the money paid to them along with compensation for any loss or damage caused to the concerned home-buyers due to the negligence of builders or developers. They also have the power to grant punitive damages if deemed fit. Penalties may also be imposed on such erring developers, and they may also be imprisoned for a maximum period of 3 years.[8] While dealing with these offences, the Agencies have been given *non-obstante* power to try the case and dispose them summarily[9].

Under the CPA, a complaint regarding goods or services may be filed by any consumer, or registered association or group of consumers having same interest[10]. The complaint filed by the home-buyers must be accompanied by fees prescribed by the Consumer Protection Rules, 1987[11]. Further, there is no specific form in which the complaint must be filed before the Agencies established under the CPA. Therefore, a plain paper application would suffice in this regard. This makes the filing of complaints easy and convenient for the consumers, and the Agencies more approachable than a civil court.

Real Estate (Regulation and Development) Act, 2016 ("RERA")

RERA mandates that promoters have to deposit 70% of the receivables into a separate bank account in a scheduled bank and the amounts from the separate account shall be withdrawn by the promoter after it is certified by an engineer, an architect, and a chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project[12]. This is ideal for home-buyers as such a provision limits the use of proceeds from the home-buyers and prevents the diversion of funds.

RERA envisages Real Estate Regulatory Authorities to be created in each State to not only promote the interest of all the stakeholders under RERA but also deal with their grievances. RERA affords the option to appeal against the decision of the concerned Real Estate Regulation Authority, to the Appellate Authority, and thereafter to the High Court and the Supreme Court, and all in a time-bound manner[13]. As the proceedings are to be concluded within a given time frame, the adjudication mechanism can be opined to be more expeditious as compared to the adjudication mechanism provided in the earlier grievance redressal mechanisms.

Significantly, RERA entitles the aggrieved allottee to claim the refund amount which has been paid in consideration of a plot, apartment etc. along with interest as may be prescribed by the States or Union Territories in case builders or developers default in delivery of possession in accordance with the terms of agreement for sale or due to discontinuance of business or suspension/revocation of registration[14]. Section 61 provides that if any promoter contravenes any other provisions of RERA, other than that provided under Section 3 or Section 4, or the rules or regulations made thereunder, he shall be liable to a penalty which may extend up to 5% of the estimated cost of the real estate project as determined by the concerned Real Estate Regulation Authority. Imposition of penalty in case of contravention to the orders or directions of the Real Estate Appellate Tribunal has been made stricter as it can extend to 10% of the estimated

[7] Consumer Protection Act 1986, Section 21.
[8] Ibid, Section 27.
[9] Ibid, Section 27.
[10] Ibid, Section 12 (1).
[11] Consumer Protection Rules, 1987, Rule 9A.
[12] RERA, Section 4.
[13] RERA, Sections 29 (4); 44 (2), 44 (5) and 58.
[14] Ibid, Sections 19 (4).

cost or three years of imprisonment or both[15]. However, the Rules and Regulations under RERA are yet to be notified by some states[16]. Section 71 also envisages compensation to the home-buyers.

Home-buyers have the choice of filing a complaint with the concerned Real Estate Regulation Authority or the adjudicating officer in case the developer(s) defaults the delivery of possession or for that matter contravenes any provisions of the RERA or the Rules or Regulations made thereunder.[17] A complaint may be filed by an association of home-buyers/allottees or any voluntary consumer association registered under any law for the time being in force.[18]

Insolvency and Bankruptcy Code, 2016 ("IBC")

As per the initially envisaged IBC, home-buyers were not considered to be in a definite class of creditors and they were clubbed with unsecured creditors. In *Col. Vinod Awasthy v AMR Infrastructure Ltd*.[19], home-buyers had approached the NCLT for being allowed to participate as creditors in the corporate insolvency resolution process of AMR Infrastructure Limited. However, they were not considered as creditors[20]. The NCLAT however reversed the order of the NCLT and recognized home-buyers as financial creditors considering the factual matrix of the case.[21]

The legislature took these events into account and now has provided recognition to home-buyers as financial creditors[22] and amended the IBC vide the IBC (Amendment) Ordinance, 2018 to provide for the same.

Therefore, presently home-buyers are recognized as financial creditors under the IBC and are entitled to the receipt of a portion of the sale of the assets under the liquidation process. Secondly, being financial creditors, home-buyers are permitted to initiate the insolvency resolution process under Section 7. As financial creditors, home-buyers are also accorded the opportunity of being a part of committee of creditors under Section 24 and may vote during the corporate insolvency resolution process.

Conclusion

The protection provided by the IBC is limited in nature and is only relevant when a company becomes insolvent or bankrupt. Therefore, it is not a suitable forum to claim relief in most cases and can only be used by home-buyers as and when the concerned real estate company is in a bad financial position and unable to continue and/or finish the concerned real estate project.

Hence, till the adjudicating mechanism under RERA is established by each State Government, home-buyers and potential home-buyers are best served by seeking relief from the Agencies under the CPA.

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[15] Ibid, Section 64.

[16] Vandana Ramnani, 'RERA report card: 23 states notify the rules: permanent regulatory authority set up only in four' (*Moneycontrol*, 31 Jul, 2017) <https://www.moneycontrol.com/news/business/real-estate/rera-report-card-23-states-notify-rules-permanent-regulatory-authority-set-up-only-in-four-2340829.html> accessed 17 July 2018.

[17] Ibid, Section 31 (1).

[18] Ibid, Section 31 (explanation).

[19] *Col. Vinod Awasthy v AMR Infrastructure Ltd*., CP No. (IB)-10(PB)/2017, (NCLT Principal Bench Delhi, 20 February 2017).

[20] Ibid.

[21] *Nikhil Mehta and Sons v. AMR Infrastructure*, Company Appeal (AT) (Insolvency) No. 07/2017, (NCLAT, New Delhi, 21 July 2017).

[22] Press Note 40: *Available at*, <http://pib.nic.in/PressReleseDetail.aspx?PRID=1534497> accessed 22 July 2018.

Notifications and Circulars

IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 amended: The IBBI has now introduced amendments to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, to bring the Regulations in line with the June amendment. Notably, the amended Regulations provide a model timeline for a corporate insolvency resolution process.

The present amendment reinforces the idea of timely resolution of the Bankruptcy of Corporates. However, whether this model timeline sets an achievable target or not, is something that only time will tell. The amended Regulations also addresses the lack of clarity in terms of criteria and a general lack of standardization, which was prevalent in terms of an Invitation for Expression of Interest and a Resolution Plan. To that end, Form G has been revised, for the purposes of inviting an expression of interest, which must now be mandatorily published in newspapers apart from being uploaded on the website of the corporate debtor, by the 75th day from the insolvency commencement date. A minimum of 30 days must be provided for submission of a resolution plan once prospective resolution applicants have been identified. Additionally, it is now mandatory for a resolution plan to provide for details in each step in the process, and the manner and purposes of interaction between the resolution professional and the resolution applicant, along with corresponding timelines.

The amendment Regulations now provide that the Resolution Professional has to issue a request for resolution plan along with the information memorandum and the evaluation matrix, once eligible prospective resolution professionals have been identified. The request for resolution plan must detail each step in the process, and the manner in and purposes of the interaction between the resolution professional and the prospective resolution applicant along with corresponding timelines.

The Regulations also mandates that a Resolution Plan has to demonstrate that: (i) it addresses the cause of default ii) it is feasible and viable ii) it has provisions for its effective implementation iii) it has provisions for approvals required and the timeline for the same iv) the resolution applicant has the capacity to implement the resolution plan. The Resolution Plans will have to be tested by the COC strictly on the evaluation matrix.

The amendment provides for streamlining procedure for prospective resolution applicants to submit an expression of interest and further a resolution plan, ensures that there is certain standardization in the CIRP as a whole. This is a welcome step as, these amendments are aimed at ensuring maximum compliance with the Code and effectively resolving bankruptcy of a corporate debtor, which is the essence of the Code. In its essence, the recent amendment intends to aid the everyday smooth functioning of the Code. Amendments to the Regulations have been made, keeping in view the June amendment to the Code. While, the amendment has its heart in the right place and reinforces the idea of timely and effective resolution of bankruptcy of corporates, it is yet to be seen how the courts, which have been very generous in granting extensions of timelines, adhere to the new model timeline.

Companies (Registration of Charges) Amendment Rules, 2018: Section 20 of the Companies (Amendment) Act, 2017, pertaining to

amendments made to Section 82 of Companies Act, 2013 which deals with the reporting of payment or satisfaction of a charge, has come into effect on July 5, 2018, vide Circulars dated July 5, 2018 issued by the Ministry of Corporate Affairs. Previously, a company was required to give intimation to the Registrar of Companies for payment or satisfaction in full of any registered charge within the prescribed timeline of 30 days from the date of payment or satisfaction of such charge.

The Ministry of Corporate Affairs has now enabled companies to report satisfaction of charge within an extended timeframe beyond the 30-day period, by submission of an application along with payment of additional fees to the Registrar of Companies. On receipt of such application, the Registrar of Companies may allow an applicant-company to report the payment or satisfaction of a charge within 300 days from date of payment or satisfaction of such charge.

Companies (Appointment and Qualification of Directors) Amendment Rules, 2018: The Ministry of Corporate Affairs ('MCA') has mandated annual Know Your Customer ('KYC') checks for all directors (including of disqualified directors) of all companies and has provided a new e-form DIR-3 KYC for this purpose vide an amendment to the (Appointment and Qualification of Directors) Amendment Rules, 2018.

Every director who has been allotted a director identification number ('DIN') on or before March 31, 2018 and whose DIN is in 'Approved' status, is mandatorily required to file this before the deadline of August 31, 2018. After expiry of this deadline, all approved DINs against which form DIR-3 KYC have not been filed will be marked by MCA's system as 'deactivated' with the reason 'Non-filing of DIR-3 KYC'. Filing of form DIR-3 KYC after this deadline in respect of such deactivated DINs is proposed to be allowed by payment of a specified fee. Henceforth, Form DIR-3 KYC will also be required to be filed on an annual basis by April 30 of every year.

Companies (Acceptance of Deposits) Amendment Rules, 2018: MCA has recently amended the Companies (Acceptance of Deposits) Amendment Rules, 2018 ('Deposit Rules'), vide its Circular dated July 5, 2018. As per the Deposit Rules, an eligible company intending to invite deposits from its members is required to issue a circular to all its members in the prescribed Form DPT-1. Henceforth, an eligible company intending to invite deposits shall also be required to provide a certificate of statutory auditor of the company in Form DPT-1, stating that the company has not defaulted on repayment of deposits or payment of interest on such deposits accepted either before or after payment of interest on such deposits accepted either before or after the commencement of Companies Act, 2013 ('**Act'**). In case a company has previously defaulted on repayment of deposits or payment of interest on such deposits, a certificate of the statutory auditor of the company shall still be required to be filed along with Form DPT-1 stating that the company had made good such default and that a period of five years has lapsed since the date of making good such default, as the case may be.

MCA has also done away with the onerous mandate of requiring eligible companies inviting deposits, to enter into a contract for providing deposit insurance in respect of both the principal amount and interest due thereon.

Overseas Investment Limits for Alternative Investment Funds/ Venture Capital Funds: The Securities and Exchange Board of India ('SEBI') has significantly enhanced the overseas investment limit for alternative investment funds ('AIF') and venture capital funds ('VCF') from the previous limit of $500 million to $750 million, vide

its Circular dated July 3, 2018. With a view to monitor the utilization of investment limits, SEBI has mandated AIFs and VCFs to mandatorily disclose within five working days of utilization. In case an AIF/ VCF has not utilized such overseas investment limit or has not utilized a part of this limit within the validity period of six months from the date of SEBI's approval, the concerned AIF/ VCF is now required to report the same to SEBI within 2 working days after expiry of the validity period.

Filing of Term Sheet by Angel Funds: With a view to ease the regulatory framework governing angel funds, SEBI had (vide its Circular dated May 31, 2018) increased angel funds' maximum investment limit in venture capital undertakings to INR 10 Cr from the previous limit of INR 5 Cr, as well as had replaced the requirement of filing of a scheme memorandum by angel funds with the requirement of filing a term sheet containing material information of the scheme within 10 days of launching such scheme. SEBI has now, vide another Circular dated June 29, 2018, also provided a standard format of term sheets to be adopted by angel funds.

Henceforth, angel funds are required to disclose details related to investments as well as any material changes to these investments. Angel funds may launch a scheme subject to filing a term sheet with SEBI outlining the material information pertinent to such scheme (within this prescribed window. In addition to details of total capital commitment by investors, per share/unit price and valuation of investee entity, the term sheet format also requires an angel fund to furnish details such as the distribution waterfall to investors, exit/transfer rights of investors and exit strategy of the angel fund, to name a few.

MCA committee to review penal provisions of Companies Act, 2013: In a move to promote ease of doing business in India, the Ministry of Corporate Affairs has constituted a 10-member committee to review the current regulatory framework dealing with compoundable and non-compoundable offences under Companies Act, 2013, with a view to suggest changes that may potentially ease penal consequences for companies and their officers.

The Committee has been given the mandate to examine whether acts of a company and its officers in default which are currently categorized as compoundable offences (i.e. offences that are punishable with fine only or punishable with fine or imprisonment or both) can be re-categorized as acts which would only attract civil liabilities of payment of penalty. Likewise, the Committee will also examine whether acts of a company and its officers in default which have currently been categorized as non-compoundable in nature can be re-categorized as offences of a less serious nature, i.e. as compoundable offences. Further, the Committee is to also lay out a broad framework of an adjudicatory mechanism for levy of penalty in a manner that minimizes discretion across cases.

Airport Economic Regulatory Authority of India (Amendment) Bill, 2018 introduced: Till the year 2008, the Airport Authority of India in the Ministry of Civil Aviation was the sole authority controlling most of the civil airports. This meant that the Airport Authority was performing the role of airport operator as well as the airport regulator which resulted in a grave conflict of interest. The Airport Economic Regulatory Authority of India Act, 2008 (AERA Act) was primarily enacted with the intent of establishing an independent regulatory authority (i.e. AERA) to regulate and manage tariff and other charges for aeronautical services rendered at the airports. In addition, the AERA is to monitor the performance standards of airports. The Act also established an Appellate Tribunal to adjudicate disputes and dispose of appeals arising out of/in relation of service providers, or service providers and consumers, or

any direction/decision/order of the AERA, thereby securing the interests of airports, airlines, and passengers alike.

Recently the captioned bill has been introduced before the Parliament. It proposes to modify the definition of what constitutes a 'major airport'. The AERA Act presently defines a "major airport" as, "*any airport which has, or is designated to have, annual passenger throughout in excess of one and a half million or any other airport as the Central Government may, by notification, specify as such*[1]". The Indian Aviation Industry has seen a spectacular growth in the past ten years owing to which the number of major airports in India has grown from 12 to 27, in the past ten years. The present Bill seeks to amend this definition by increasing the annual passenger threshold for major airports from one and half million to three and a half million. The proposed amendment, if accepted, will allow the AERA to focus on such airports which handle considerable passenger traffic. This bill has been introduced in the light of increased air traffic, and the inevitable pressure being faced by the AERA in determining the tariffs and monitoring the service standards of all the major airports with only limited resources available at its disposal.

An intent to promote/ engage private partners in infrastructure projects is also evident from how the Bill seeks to alleviate AERA and allow them to focus on functions involving determining the tariff, tariff structures, or the amount of development fees for major airports, only. A parallel may be drawn with the Airport Improvement Programs in the United States of America wherein grants are provided to private entities for the planning and development of public-use airports. The amendments in the proposed Bill will result in other airports taking decisions on incorporation of tariff, tariff structures, or the amount of development fees, rather than AERA determining the same. The Bill endeavours to make regulation more efficient by introducing provisions for different tariff models for airports, including pre-determined tariff indexed to inflation wherein the market itself will determine the charges thereby supposedly reducing the administrative burden on AERA for fixing charges.

Ratio Decidendi

Director's right to participate in board meeting through video-conferencing or other audio-visual means - Section 173(2) of Companies Act, 2013

Key Points:

1) Section 173(2) of the Companies Act, 2013 read with the Companies (Meetings of Board and its Powers) Rules, 2014 is a progressive step.
2) Following Section 173(2) of the Companies Act, 2013 would be in the interest of the companies as well as the directors. It would not be appropriate to shut-out these provisions on mere apprehensions.
3) The mandate of Section 173(2) read with Rules mentioned above cannot be avoided by the companies.

Brief Facts:

In this case, director of a company, moved an application before the National Company Law Tribunal, Guwahati Bench, Guwahati ("NCLT") in 2017 seeking facility of attending the board meetings through videoconferencing. The NCLT noted that the Company had all the necessary infrastructure available and that the Company had no reason not to provide the videoconferencing facility. On behalf of the company, 1st and 3rd Appellants filed an appeal against the order of the NCLT at the National Company Law Appellate Tribunal ("NCLAT").

Section 173(2) of the Companies Act, 2013 states that participation of Directors in meetings of the board "may" be either in person or through video conferencing or through other audio-visual means. While considering Section 173(2) of the Act, the NCLT held that the said Section is mandatory and that Companies cannot be permitted to make any deviations from the provision.

In this appeal, the Appellants submitted that Section 173(2) of the Act is not a mandatory provision. Additionally, the Appellants submitted that secretarial standards have prescribed that the option of videoconferencing should be resorted to only when the facilities are provided by the company to its directors.

Further, the Appellants also contended that they are apprehensive of the Respondent participating in meetings through videoconferencing, as it would not be possible for the Chairperson of the meeting to ensure that the Director is participating alone from the place of videoconference call as per Rule 3(2)(e) of the Companies (Meetings of Board and its Powers) Rules, 2014.

Points for Consideration:

(1) Whether Section 173(2) is mandatory or not?
(2) Whether it is a right of the Director to participate in board meetings through videoconferencing?

Held:

The NCLAT, while going through the judgment of the NCLT at the first instance found that following the provisions for videoconferencing under the Act and the Rules is in the interest of the company as well as the directors and that it would not be appropriate to shut-out these provisions on mere apprehensions. The Appellate Tribunal held the following:

Firstly, the use of the word "may" in Section 173(2) of the Act, only gives an option to the director to choose whether he would be participating in person or, the other option which he can choose, participating through video-conferencing or other audio-visual means. The NCLAT clarified that the word "may" does not give option to a company to deny this right given to the directors.

Secondly, the NCLAT found Section 173(2) of the Act read with the Rules to be a progressive step and confirmed that the Section does give the right to a director of a company to participate in the meeting through video-conferencing or other audio-visual means and that the Central Government has notified Rules to enforce this right and it would be in the interest of the companies to comply with the provisions in public interest.

Additionally, the NCLAT held that secretarial standards cannot override the provisions under the Rules which state that Company "shall" comply with the procedure prescribed for convening and conducting the Board meetings through videoconferencing or other audio-visual means.

Order:

The admission of appeal is denied and the appeal is disposed of. [*Achintya Kumar Barua and Ors.* v. *Ranjit Barthkur* - [2018] 143 CLA 233]

High Court stays NCLT Order in a revision petition filed under Article 227

The High Court in Hyderabad has suspended an order passed by the National Company Law Tribunal (NCLT) Hyderabad Bench under a revision petition filed under Article 227 of the Constitution.

Previously, the NCLT vide order dated 13.07.2018, had admitted a petition to initiate insolvency proceedings against Ramky Infrastructure Limited by an operational creditor under the Insolvency and Bankruptcy Code, 2016 (referred to as the IBC). The Hyderabad High Court, suspending the order of the NCLT, has held that the supervisory and corrective jurisdiction under Article 227 of the Constitution of India, forms part of the inviolable structure of the Constitution. The High Court, further stated that in such circumstances the provisions of the IBC cannot prevail over the constitutional power vested in the High Court under Article 227 of the Constitution, and therefore has chosen to suspend the order passed by NCLT.

It may be noted that generally, an appeal against an order passed by the NCLT lies before the National Company Law Appellate Tribunal (NCLAT). Such a position has been endorsed by High Court of Punjab and Haryana especially of order issues by the NCLT in relation to the IBC. In such cases, the High Court of Punjab and Haryana had held that the IBC provides a remedy in the form of an appeal before the NCLAT. [*Ramky Infrastructure Limited* v. *Todi Minerals Private Limited* - CRP No. 4077 of 2018, Order dated 17-7-2018, High Court in Hyderabad]

Insolvency - 'Promoter' cannot challenge rejection of Resolution Plan

NCLAT has held that a 'Promoter' cannot challenge the rejection of a Resolution Plan. The Tribunal restricted any Promoter from knowing whether the 'resolution plan' is in accordance with Section 30(2) which provides for the parameters for examination of a resolution plan by the resolution professional.

In the present case, a sole resolution plan was submitted and examined by the resolution professional. Based on the examination, the resolution professional had presented the same for approval by the Committee of Creditors. The Committee of Creditors, however, rejected the resolution plan, following which the Adjudicating Authority passed an order directing liquidation. The Appellant-promoter filed an appeal before the NCLAT challenging the order of liquidation passed by the Adjudicating Authority. The NCLAT noted that the resolution applicant, whose application had been rejected by the Committee of Creditors, had not challenged the rejection. The NCLAT while relying on section 30(2) of the IBC, held that the Appellant was not in a position to challenge the rejection of the resolution plan thus submitted. It reasoned that since the resolution applicant was ineligible under Section 29A of the IBC to submit a resolution plan, an assessment whether the plan under contention was rightly rejected is not even required.

NCLAT gave its finding that the Appellant being a 'Promoter', 'Director', 'Shareholder', and also a 'Guarantor' of the 'Corporate Debtor' too fell within the scope of section 29A of the IBC, and hence cannot be regarded as a “resolution applicant”, and hence, cannot deliberate on the issue whether the 'resolution plan' was rightly rejected or not.

The NCLAT has held that entities such as 'Promoter', 'Director', 'Shareholder', and also a 'Guarantor' of the 'Corporate Debtor' (i.e., entities covered under section 29A of the IBC), cannot interfere with the findings of the Committee of Creditors, with regards to the assessment of plans submitted by resolution applicant. [*Deepak Singhania* v. *LML Ltd.* - Company Appeal (AT) (Insolvency) Nos.121,122,131, and 154 of 2018, decided on 12-7-2018, NCLAT]

Refusal to register transfer of shares can be permitted on the ground of violation of law or any other sufficient cause including conflict of interest in a given situation

Key Points:

1) The refusal to register transfer of shares can be permitted on the ground of violation of law or any other sufficient cause.
2) Conflict of interest in a given situation can also be a cause to refuse to register transfer of shares.
3) Section 58(4) of the Companies Act, 1956 ("the Act") (*Refusal of registration and appeal against refusal*) –

"*If a public company without* ***sufficient cause*** *refuses to register the transfer of securities within a period of thirty days from the date on which the instrument of transfer or the intimation of transmission, as the case may be, is delivered to the company, the transferee may, within a period of sixty days of such refusal or where no intimation has been received from the company, within ninety days of the delivery of the instrument of transfer or intimation of transmission, appeal to the Tribunal.*"

Brief Facts:

Mackintosh Burn Ltd. **("Appellant")** is a public company, with majority of shares held by the Government of West Bengal. Sarkar and Chowdhury Enterprises Pvt. Ltd. **("Respondent")**, which is a holder of shares of the Appellant company, purchased 100 shares and sought registration of shares. Since no order was passed on the registration, the Respondent approached the Company Law Board. The Appellant contended that the Respondent Company was controlled by a competitor in business and therefore, there would be a conflict of interest to permit such a transfer. The Company Law Board rejected the contention and directed its registration. This order was challenged by the Appellant before the High Court of Calcutta under Section 10F of the Act. The appeal was dismissed, as the High Court held that since the appeal filed by the Respondent before the Company Law Board under Section 58/59 of the Act was liable to be admitted and considered even beyond the period of limitation, hence, there was no other question of law taken in the appeal. The order of the High Court was challenged in Special Leave Petition before the Supreme Court by the Appellant which was permitted to be withdrawn with liberty to approach the High Court. Based on the Supreme Court judgement, the Appellant filed an application to recall the judgement which was dismissed, as the High Court took the view that the Appellant was granted the liberty to file a proper review and not seek a fresh hearing by recalling the previous judgement of the High Court. Subsequent to various rounds of litigation, the review petition was filed before the High Court, which was dismissed on the ground that there was no mistake capable of correction in review and that the correction could be done only by a superior forum. Hence, the present appeal was preferred.

Points for Consideration:

Whether the refusal to register transfer of shares on the ground of conflict of interest can be considered as a 'sufficient cause' under Section 58(4) of the Act?

Held:

The Supreme Court observed that since the Appellant had preferred specific grounds on which the statutory appeal under Section 10F of the Act was filed, such as the period of limitation for filing an appeal before the Company Law Board under Section 58 of the Act and having raised questions regarding its right to refuse registration of transfer on sufficient ground, the High Court should have considered the other

questions of law regarding the refusal to register the transfer that were raised by the Appellant. The Supreme Court further observed that the Company Law Board was of the view that the refusal to register the transfer of shares can be permitted only if the transfer is otherwise illegal or impermissible under any law. However, it was held that considering the expression "without sufficient cause" under Section 58(4), it is difficult to appreciate that view. The judgement emphasized that refusal can be on the ground of violation of law or any other sufficient cause including conflict of interest in a given situation. The Court held that the given case for refusal of registration on the ground of conflict of interest is to be considered by the Company Law Board as the aggrieved party is given the right to appeal and the contention of the Appellant that the whole transfer is deceptive and mala fide in the background of the Respondent Company should have been considered by the Company Law Board.

Order:

The Appeal was disposed, and the matter was remitted to the Company Law Board, now the National Company Law Tribunal (NCLT) for consideration of the appeal filed under Section 58 of the Act. [*Mackintosh Burn Limited* v. *Sarkar and Chowdhury Enterprises Private Limited* - Civil Appeal No. 3322-3323 of 2018 (Arising out of S.L.P. (Civil) Nos. 8204-8205 of 2018)]

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