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SEBI revises regulatory framework around scheme of arrangements by listed entities

The Securities Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**LODR**) place obligations on listed entities and stock exchanges with respect to scheme of arrangements. On March 10, 2017, SEBI issued a circular revising the regulatory framework around scheme of arrangements and laid down requirements for listed entities seeing relaxations under rule 19(7) of the Securities Contracts (Regulation) Rules, 1957 (**Rules**) (**2017 Circular**).

Recently, on November 3, 2020, SEBI notified certain amendments to the 2017 Circular, thereby streamlining the processing of draft schemes filed with the stock exchanges by listed entities (**Amendment**). The Amendment will be applicable for all schemes of arrangements filed with the stock exchanges after November 17, 2020.

The changes brought about by the Amendment have been set out in brief, hereinbelow.

- **Audit Committee report:** Prior to the Amendment, listed entities were required to submit a report from their audit committee recommending the draft scheme, taking into consideration the valuation report, which was also required to be placed before the audit committee. The Amendment imposes an additional obligation on the audit committee, requiring it to ensure that its report shall include comments on the following aspects of the scheme:
  - Need for the merger/demerger/amalgamation/arrangement
  - Rationale of the scheme
  - Synergies of business of the entities involved in the scheme
  - Impact of the scheme on the shareholders.
  - Cost benefit analysis of the scheme.
- **Report by independent directors:** Pursuant to a new insertion by the Amendment, independent directors of listed entities have been imposed with an obligation to ensure that the scheme is not detrimental to the shareholders of the listed entity and are required to issue a report, recommending the draft scheme, to this effect. Such report is required to be submitted by listed entities to the stock exchanges.
- **Valuation report:** Under the 2017 Circular, all listed entities were required to submit a valuation report from an Independent Chartered Accountant. Pursuant to the Amendment, listed entities are now required to submit a valuation report from a Registered Valuer, who shall be a person registered as a valuer, having such qualifications and experience and being a member of an organization recognized, as specified in Section 247 of the Companies Act, 2013 read with the applicable rules issued thereunder.
- **Approval of shareholders to scheme through e-voting:** Under the 2017 Circular, the scheme involved the transfer of whole or substantially the whole of the undertaking of the listed entity and the consideration for such transfer is not in the form of listed equity shares. To determine what constitutes 'substantially the whole of the undertaking', the 2017 Circular referred to the explanation provided under Section 180 (1)(a)(i) of the Companies Act, 2013. The Amendment now refers to section 180(1)(a)(ii) of the Companies Act, 2013 for the purpose of determining 'substantially the whole of the undertaking'.
- **Stock exchange(s) to issue no-objection letters only:** Prior to the Amendment, stock exchanges having nationwide terminals or regional stock exchanges, as the case may be, had to provide either the 'observation letter' or 'no-objection Letter' to SEBI on the draft scheme submitted by listed entities, upon receipt of which SEBI issued a 'comment letter'. The Amendment now requires stock exchanges having nationwide terminals or regional stock exchanges, as the case may be, to issue only a 'no-objection letter' to SEBI, in co-ordination with each other, after which SEBI will issue its 'comment letter'. The Amendment removes the concept of 'observation letter' and accordingly stock exchanges re now required to issue 'no-objection certificates' only, in relation to the draft schemes.
- **Requirements to be fulfilled by listed entity for listing of equity shares:** Listed entities seeking relaxation from the Rules were required to fulfil certain conditions prescribed in the 2017 Circular. One such condition was that trading of securities shall commence within 45 days from the order of NCLT/High Court and prior to commencement of trading, the transferee entity was required to publish an advertisement in in one English and one Hindi newspaper providing certain specific details.

  The Amendment has modified certain aspects of the aforesaid condition and now allows 60 days for the listed entity to commence trading simultaneously on all stock exchanges (where its equity shares is/was listed). The Amendment also prescribes the following additional details to be disclosed by the transferee entity, in the form of an information document, on the website of the stock exchange and in the advertisement to be published in one English and one Hindi newspaper:
  - Name and details of Board of Directors (experience including current / past position held in other firms)
  - Business model/business overview and strategy
  - Details in respect of 'restated' audited financials, as opposed to 'audited financials' as was prescribed in the 2017 Circular

- Summary table of contingent liabilities as disclosed in the restated financial statements
- Summary table of related party transactions in last 3 years as disclosed in the restated financial statements
- Internal risk factors (minimum 5 and maximum 10)
- Regulatory actions, if any, including disciplinary action taken by SEBI or stock exchanges against the promoters in last 5 financial years
- Brief details of outstanding criminal proceedings against the promoters

Conclusion

The Amendment aims at empowering stock exchanges and ensuring that the recognized stock exchanges make an informed decision with respect to the draft schemes submitted by listed companies in a manner that they are fully compliant with the SEBI Act, rules, regulations and circulars framed thereunder and only then refer such draft schemes to SEBI. The Amendment ensures that, not only the audit committee, but also the independent directors of the listed entities recommend the draft scheme having regard to the interests of the stakeholders, from an unbiased perspective. The requirement for additional details to be disclosed on the website of the stock exchange and advertisements appear to have been introduced to enable the public and the stakeholders at large to gain a better perspective about the management, promoters, the business model and internal risks associated with listed entities. All in all, the Amendment protects the interests of investors and stakeholders and promotes the development of the securities market.

Introduction of 'Flexi-cap Fund' as a new equity MF category by SEBI

Background

Securities and Exchange Board of India (**SEBI**), the capital markets regulator in India, has been directing the categorization and rationalization of mutual fund schemes since 2017. This is being done with a view to promote uniformity and transparency across the industry in order to enable investors to make better informed investment decisions.

Recently in September 2020, SEBI had directed that all 'Multi Cap Funds' would be required to invest a minimum of 25% of their corpus each in equity or equity-related instruments of large-cap, mid-cap and small-cap stocks (aggregating to 75% of their corpus), leaving the remaining 25% to be invested as per the discretion of the fund investment manager. With this, SEBI's intent was to ensure that the allocation within multi-cap funds is henceforth maintained true-to-label instead of being skewed in favor of one set of companies.

However, this led to unrest within fund houses and investor circles since a majority of multi-cap funds were already invested heavily into large-cap companies. These investments would need to be pruned and directed into mid-cap and small-cap instruments, which may have proved to be a challenging task. A note on the subject released by CRISIL stated that most multi-cap funds will have to sell off their large-cap investments to meet the new investment limits for mid and small-cap stocks, which could result in INR 41,000 crore of net outflows from large caps and net inflows of INR 13,000 crore and INR 28,000 crore in mid-cap and small-cap segments, respectively. Finding that order of investments in lower caps could be uphill task for fund managers, especially given the illiquidity in the segment and the downbeat economic forecasts amid the Covid-19 pandemic.

Introduction of the 'Flexi-cap Fund' category

Based on the market feedback and the recommendations made by its Mutual Fund Advisory Committee (**MFAC**), SEBI issued a circular on November 06, 2020 introducing flexi-cap fund (**FCF Circular**) as a new category under equity schemes. This category has been introduced with the intent of providing flexibility to fund managers in carrying out investment allocations of mutual fund portfolios - fund managers, who either had to reshuffle the multi-cap portfolio or merge with other schemes, can now just rebrand their scheme as a flexi-cap fund. Accordingly, all existing multi-cap funds seeking to maintain absolute independence over portfolio allocation can opt for reclassification as flexi-cap funds in order to not be bound by the earlier portfolio allocation rules made applicable in respect of multi-cap funds.

As per the FCF Circular, the flexi-cap fund will be available with the following scheme characteristics:

- **Category of Scheme:** Flexi-cap fund
- **Scheme characteristics:** Minimum investment in equity & equity related instruments - 65% of total assets
- **Type of scheme (uniform description of scheme):** An open-ended dynamic equity scheme investing across large-cap, mid-cap and small-cap stocks

Further, the FCF Circular extends to mutual funds, an option of converting an existing scheme into a flexi-cap fund, subject to compliance with the requirement for change in fundamental attributes of the scheme in terms of Regulation 18(15A) of SEBI (Mutual Funds) Regulations, 1996 (**MF Regulations**). Section 18(15A) of the MF Regulations states that 'the trustees shall ensure that no change in the fundamental attributes of any scheme or the trust or fees and expenses payable or any other change which would modify the scheme and affects the interest of unitholders, shall be carried out unless, (i) a written communication about the proposed change is sent to each unitholder and an advertisement is given in one English daily newspaper having nationwide circulation as well as in a newspaper published in the language of region where the Head Office of the mutual fund is situated; and (ii) the unitholders are given an option to exit at the prevailing Net Asset Value without any exit load.'

This requirement essentially means that no fundamental attribute of any scheme can be modified unless the unit-holders have been informed in writing of such proposed modification in the manner prescribed (as stated hereinabove) and are given an option to exit at the prevailing Net Asset Value without any exit load.

Aside from introducing the flexi-cap fund, the FCF Circular also brings about an important change with regards to the practice of scheme nomenclature. In order to enhance ease of identification and to introduce uniformity in names of schemes for a particular category, every scheme name is now required to be the same as the scheme category. Historically, scheme names have not reflected the name of the scheme category to which they belonged, which resulted in confusion for the investor and was even sometimes the basis for maliciously misleading investors.

With the introduction of the flexi-cap fund, investors will stand to gain from the flexibility being provided. The scope of the fund manager's role too will be wider in case of flexi-cap funds. Portfolio allocation will now be open to be carried out by absolutely prioritizing risk appetite and stock performance depending on market capitalization. The same need no longer be restricted to within 25% of the fund portfolio. At the same time, the multi-cap funds category remains an option for fund managers to work within market capitalization ceilings as provided by SEBI. For investors, the multi-cap funds exists as an investment option which assures a diversified allocation strategy across market capitalization segments.

A note of caution to investors

Since multi-cap funds have historically been assumed to be funds where fund managers are free to decide portfolio allocation across various segments of market capitalization, investors must now be conscious of the differentiation between multi-cap and flexi-cap funds. While the former are truly diversified funds as per ceilings prescribed by SEBI, the latter provide absolute freedom to fund managers in terms of asset allocation across market capitalization segments.

SEBI has allowed all existing multi-cap funds a prescribed time limit (till one month after the Association of Mutual Funds in India publishes the next list of stocks in January 2021) to ensure compliance with the above mentioned market cap ceilings. Investors must keep track of any changes made to schemes invested in and any communications received from relevant fund houses. Some fund houses may opt to reclassify existing multi-cap funds as flexi-cap funds while some may opt to reshuffle the portfolio so as to adhere to prescribed ceilings. Accordingly, investors may choose to stay on or withdraw their investments.

IWG report on ownership guidelines and corporate structure for Indian private sector banks

The Reserve Bank of India (**RBI**), for the purpose of examining and reviewing the extant ownership guidelines and corporate structure for Indian private sector banks, constituted an internal working group (**IWG**) headed by PK Mohanty on June 12, 2020. The Terms of Reference provided to the IWG by the RBI inter alia included suggestion of norms for the licensing guidelines for ownership and control in the private sector banks, examination of the eligibility criteria for individuals or entities to apply for banking license, examination of preferred corporate structure for banks and harmonisation of norms in this regard and review of norms for long-term shareholding in banks by the promoters and other shareholders.

The principles that have traditionally been followed for the ownership and governance of private sector banks are: (i) variegated ownership and control of the private sector banks in order to avoid misuse of power; (ii) important shareholders or those holding 5% and above are 'fit and proper' as dictated under the guidelines issued by RBI on 5 February, 2004 on the acknowledgement of transfer/allotment of shares in private sector banks; (iii) Chairman and Board of Directors must be 'fit and proper' at all times for the purpose of safeguarding corporate governance; (iv) bar on RBI appointing any Director, in order to avoid conflicts of interest; (v) optimal operation of the capital structure as per RBI guidelines; and (vi) fair and transparent policies.

IWG released its report (**Report**) on 26 October, 2020 which refers to licensing regimes being integral elements of the country's prudential regulatory framework. It highlights the lack of uniformity in the previous licensing rounds, which occurred specifically in 1993, 2001 and 2013, as a consequence of the then-existing prudential norms. Due to the immense structural changes that the economy and prudential regulations have witnessed (as seen by the inclination towards Pillar III of the Basel guidelines) and the expanding footprint of the Indian banking system, the Report opines that there is a dire need for rethinking of the current regulatory stance.

A brief overview of the recommendations enshrined in the Report are as follows:

- **Entry of Corporates into banking space:** Due to the poor track record on governance and credit disbursement, RBI has historically opposed corporate houses to set up or run commercial banks. Thus, only after required and necessary amendments to the Banking Regulation Act, 1949, can large corporates and industrial houses be permitted as promoters of banks. This is with the aim of avoiding connected lending and exposures between the banks and other financial and non-financial group entities.
- **Conversion of NBFCs into banks:** Subject to completion of 10 years' of operation, fulfilment of due diligence criteria and compliance with additional conditions in this regard, well-run large NBFCs with an asset size of INR 50,000 crore and above, including those which are owned by a corporate house, may be considered for conversion into banks.
- **Hike in promoters' stake:** The panel suggested a rise in the cap on promoter shareholding in the long run (15 years) from the current level of 15% to 26% of the paid-up voting equity share capital of the bank. Similarly, for non-promoter shareholding, a uniform cap of 15% of the paid-up voting equity share capital of the bank for all types of shareholders has been suggested.
- **Hike in minimum capital for new banks:** The panel suggested a hike in the minimum initial capital requirement for licensing new banks from INR 500 crore to INR 1,000 crore for universal banks, and from INR 200 crore to INR 300 crore for small finance banks.
- **Payments Banks conversion into small finance bank:** 3 yearss of experience was opined to be sufficient for payments banks intending to convert to a small finance bank.
- **Harmonisation and uniformity in different licensing guidelines:** The panel recommended that steps for the implementation of harmony and uniformity in different licensing guidelines must be undertaken by RBI to the extent possible. Therefore, on enactment of new licensing guidelines, benefit should be given to existing banks if the new rules are more relaxed; similarly, if they are tougher, legacy banks should also be made to conform.
- **Non-operative Financial Holding Company (NOFHC):** NOFHC should continue to be the preferred structure for all new licenses to be issued for universal banks. However, only in cases where the individual promoters, promoting entities and converting entities have other group entities, should it be mandatory.

The Report aims to strike a balance between the increasing relevance of private sector in banking space and the historical considerations of social sentiments associated with this sector. While the Report has generally been well received, a few notes of caution have been sounded on the topic of ownership of banks by corporate houses. While addressing IWG's proposal in this regard, the former RBI Governor Raghuram Rajan and ex-Deputy Governor Viral Acharya highlighted governance related concerns as well as the risk of intensified concentration of economic (and political) power in certain business houses while arguing for sticking to tried and tested limits on involvement of business houses in the banking sector. In sum, many of the technical rationalizations proposed by the IWG are worth adopting, while its main recommendation – allowing Indian corporate houses into banking sector – needs to be further evaluated, especially in light of recent developments at IL&FS and Yes Bank.

Clarification on FDI in digital media

The erstwhile provisions of the FDI policy permitted 26% and 48% foreign investment in print media and news broadcast channels, respectively. Thereafter, last year in August 2019, the Ministry of Commerce and Industry, Department for Promotion of Industry and Internal Trade (**DPIIT**) issued a Press Note allowing foreign investment in Indian entities involved in uploading or streaming of news and current affairs through digital media, up to 26% through the Government Approval route (**2019 Press Note**), on similar lines as that of print media.

The 2019 Press Note, however, did not define the scope of 'digital media' thereby creating ambiguity on whether digital news aggregators, who have direct relationships with online news publishers and 'stream' news and current affairs will be covered within the ambit of the term 'digital media' or whether online intermediaries as well as applications that technically 'upload' and 'stream' news and current affairs only by providing links to other news websites will be covered under 'digital media'.

Various stakeholders submitted representations seeking clarifications pertaining to the scope and applicability of the 2019 Press Note, which finally resulted in the DPIIT issuing a notification on October 16, 2020 (**Notification**) clarifying what constitutes 'digital media', among other issues, as set out hereinbelow.

- **Scope and applicability of 'digital media':** Vide the Notification, it is has been clarified that the FDI limit of 26% as per the 2019 Press Note is applicable to certain categories of Indian entities registered or located in India such as the following:

- Digital media entity streaming or uploading news and current affairs on websites, apps or other platforms
- News agencies that gather, write and distribute news directly or indirectly to digital media entities and news aggregators
- News aggregators being an entity which, using software or web application, aggregates new content from various sources such as websites, blogs, podcasts, video blogs, user-submitted links in one location

- **Grace period for existing entities:** The aforesaid categories of Indian entities have been given a grace period of 1 year to make sure their existing foreign ownership does not exceed the statutory limit of 26%. This would mean that Indian entities (such as apps and social media platforms) that have managed to raise significant funding from foreign investors will now effectively have to reduce their foreign investors' aggregate stake to 26%.
- **Obligation cast on the Indian investee entity**
  - The Notification casts an obligation on the Indian investee entities (as detailed above) to comply with the provisions of the FDI Policy, FEMA (Non-Debt Instrument) Rules, 2019 and all notifications issued by the DPIIT thereunder.
  - The Indian entities are required to ensure that the majority of directors on their board comprise of Indian citizens. Further, the Chief Execution Officer of Indian entities covered by this Notification is also required to be an Indian citizen.
  - Indian entities are required to ensure that any foreign personnel, expected to be deployed in India for more than 60 days in year (either by way of appointment, contract, consultancy or in any other capacity) have obtained security clearance from the Indian government prior to such deployment. If the security clearance is withdrawn or denied by the Indian government for any reason whatsoever, the Indian entity is required to terminate the services of such foreign personnel immediately or ensure that such personnel resigns from the Indian entity.

Simultaneous with the Notification, the Ministry of Information and Broadcasting vide a press release notified its intention to consider extending the benefits of PIB accreditations (such as CGHS, concessional rail fare, eligibility for digital advertisement through Bureau of Outreach and Communication, etc.) awarded to its reporters, cameraman and other personnel, to the entities covered under the Notification. However, these benefits are currently available to only traditional media i.e. print and television.

Conclusion

Clarifications issued by way of this Notification have made the FDI policy for digital media more restrictive and seek to prohibit easy availability of foreign funding for Indian news outlets (apart from traditional print media). The definition of 'news aggregators' appears to be an all-encompassing definition and includes within its ambit even social media companies such as YouTube where users and content creators post links for various and trending news articles and issues around the world, which is explicitly covered in the definition of news aggregators. Furthermore, it will be relevant to note that the clarification states that entities not only 'registered' in India but also 'located' in India would be included in the ambit of this Notification, which means that international broadcasting/news agencies who have their bureaus or some form of nominal presence in India would also be subject to these restrictions.

Additionally, it is interesting to note that this Notification requires security clearance for all foreign nationals being deployed in India and does not target individuals from specific countries, and also covers any and all forms of employment (including consultancy, appointment, contract, etc.). Any foreign national expected to be working at the company in India is required to get a security clearance, failing which companies will be forced to terminate their services. Arbitrary power has also been placed in the hands of the Indian government to reject, deny or withdraw the security clearance granted to a foreign national, for any reason whatsoever and Indian companies are left with no option but to terminate the services of a foreign national.

Given the widespread presence of fake news in the country, it is not surprising that the Government desires to exercise control on all forms of digital media that 'stream' or 'upload' current affairs and news items, arbitrary power in the hands of the Government and inclusion of social media platforms can definitely be reconsidered.

New guidelines for cab aggregators

On November 27, 2020, the Ministry of Road Transport and Highways issued the Motor Vehicle Aggregator Guidelines 2020 (**Guidelines**). These guidelines intend to regulate cab aggregators like Uber and Ola in an attempt to increase ease of doing business, ensure compliance with applicable requirements, prioritize customer safety and driver welfare.

The following are the salient features of the Guidelines:

- **Definition of 'Aggregator':** The definition of the term 'Aggregator' has now been included in the Motor Vehicles Act, 1988 through an amendment by the Motor Vehicles Amendment Act, 2019. Licenses will now be issued by the State government to aggregators for a fee of INR 5 lakh, which will be valid for 5 years.
- **Driver welfare**
  - Each driver must be given health insurance of minimum INR 5 lakh and a term insurance of INR 10 lakh with 2020-21 as the base year and with an increase of 5% each year
  - An annual refresher training program must also be conducted
  - A driver cannot be logged in for more than 12 hours in a day, including all aggregators applications (App) they have joined; a break of 10 hours is compulsory if they are logged in for 12 hours
  - An Aggregators' app should have an option for riders to rate the driver's etiquette – in case the driver has a rating below 2 percentiles; they should undergo a mandatory 'Remedial Training Programme'
- **Language requirement for the app:** The aggregator's app must be available in English, Hindi, and an official language of the State.
- **Vehicle compliances**
  - Aggregators must have each vehicles' RC, pollution certificate, chassis and engine numbers, insurance papers, and permits
  - Each vehicle must have a fire extinguisher and the child lock has to be mandatorily disabled
  - The vehicle permit and the driving license should be clearly displayed in the vehicle for the rider
- **Data Protection**
  - The data generated by the app must be stored in an Indian server for a duration of 3 – 24 months and should be available to the state government
  - Customer related data can only be disclosed with their consent
  - Details pertaining to a journey (origin, destination etc) should be available in the app for the rider and driver for atleast 3 months
  - The safety of the app must be certified by a recognized security firm
- **Time duration for complaints**
  - A rider should file a complaint within 24 hours from when the ride was availed
  - In the event of a criminal offence, the time limit is extended to 72 hours
  - To ensure safety, each vehicle should have a GPS installed and drivers must take only the route that has been assigned on app
- **Guidelines for pooling of passengers in private vehicles**
  - The guidelines allow for carpooling vehicles; however, only those riders whose information and KYC are available will be allowed pooling
  - Aggregators are permitted to offer pooling services for private vehicles; however, only two inter-city rides per week and four-intra city rides per week are permitted
  - Private carpooling vehicles have to obtain an insurance of at least INR 5 lakh for the ride-sharers along with the owner & driver
  - Female riders must be able to choose to pool with only other female passengers
- **Surge Pricing capped at 1.5 times the base fare**
  - The base fare chargeable to riders will be the city taxi fare indexed by Wholesale Price Index (**WPI**) for the current year published by the Economic Adviser in the Ministry of Commerce
  - The minimum chargeable fare is for 3 kms. In cities which do not have a base taxi fare stipulated, the base fare will be INR 25/30
  - Aggregators are allowed to charge 50% lower than base fare and the maximum surge pricing is restricted to 1.5 times the base fare
  - The share of fare that the aggregator can receive is capped at 20% and the driver will receive at least 80% of the fare
  - If a booking is cancelled by a driver without a valid reason, a fine of 10% of fare, up to INR 100, will be imposed
  - If the rider cancels the booking, similar penalty is imposed which would be shared between the aggregator and driver as 20% and 80%

This is a laudable initiative taken by the Central Government, as there was a definite need for a policy to govern cab aggregators. While some provisions of the guidelines are already implemented by the aggregators, for instance sharing of live location, one can only wait to observe the implementation processes of the Guidelines.

Sector focus: Real Estate

RERA v. NCDRC: Which forum should you approach?

The Parliament enacted the Real Estate (Regulation and Development) Act (**RERA**) in 2016, with the aim of protecting the rights and interests of consumers, along with the attainment of uniformity and standardization of business practices and transactions in the real estate sector. It seeks to establish a symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism. However, despite the initial fanfare, the impact and effect of the legislation appeared to be ephemeral and twisted into mediocracy, sluggishness and ineffectiveness. The situation was further amplified by rampant delays by states in setting up the relevant Authorities under the Act, lackadaisical functioning of the institutional mechanism and creation of rules in deviation from the Act.

The question whether RERA regime was the solitary panacea to the anathema that had afflicted the real estate sector through exclusive jurisdiction of regulation and control has been considered and dwelt upon. Supreme Court ruled in *Pioneer Urban Land and Infrastructure Limited and another Vs the Union of India* that the remedies that are provided to allottees of flats are concurrent remedies, and such allottees of flats were in a position of availing the remedies under the Consumer Protection Act, 1986, (**CP Act**) along with the triggering the Insolvency and Bankruptcy Code, 2016.

Coming as a welcome delight to the real estate consumer, the Supreme Court in the matter of *Imperia Structures Ltd. v. Anil Patni & Anr* held that Section 79 of the RERA Act does not in any way verboten the Commission or Forum under the provisions of the Consumer Protection Act to entertain any complaint. The Supreme Court further interpreted the provisions of the RERA Act, as reproduced hereinbelow:

'*….28. Proviso to Section 71(1) of the RERA Act entitles a complainant who had initiated proceedings under the CP Act before the RERA Act came into force, to withdraw the proceedings under the CP Act with the permission of the Forum or Commission and file an appropriate application before the adjudicating officer under the RERA Act. The proviso thus gives a right or an option to the concerned complainant but does not statutorily force him to withdraw such complaint nor do the provisions of the RERA Act create any mechanism for transfer of such pending proceedings to authorities under the RERA Act.*

Again, insofar as cases where such proceedings under the CP Act are initiated after the provisions of the RERA Act came into force, there is nothing in the RERA Act which bars such initiation. The absence of bar under Section 79 to the initiation of proceedings before a fora which cannot be called a Civil Court and express saving under Section 88 of the RERA Act, make the position quite clear. Thus, the parliamentary intent is clear that a choice or discretion is given to the allottee whether he wishes to initiate appropriate proceedings under the CP Act or file an application under the RERA Act.'

Hence from the afore-mentioned rulings, it can be inferred that those allottees that squarely fall within the ambit of the expression 'Consumer' can approach the Consumer Forum in order to avail remedy available therein, and whilst it provides with a relatively expeditious remedy as compared to RERA on account of greater appellate provisions, it reduces the efficacy of RERA. However, availing any remedy available under the Consumer Protection Act, 1986 cannot be said to be in violation of the statutory scheme prescribed under the Real Estate (Regulation and Development) Act, 2016.

The inference is manifest, through the crystallized and conjoint interpretation of the statutory provisions and conspectus of judicial precedents that the legislature provided multiple fora for redressal of grievances of the stake holders going beyond the RERA Regime. In consequence and in fairness, the Consumer Disputes Redressal fora would have the propensity of drawing significant number of disputes for obvious reasons that it is commonly perceived that adjudication here would be more expeditious and further propelled by the fact that the appellate layers are fewer.

Whilst, the efficacy of the RERA regime may appear to be challenged, it may largely be illusory. Existentially, there are concurrent jurisdiction as well as exclusive jurisdiction vesting in the RERA regime and the litigant has to make choice of the preferred forum depending upon the jurisdiction and cause of action. In overlapping of jurisdiction scenario, the litigant will have a choice within the four walls of the legislation and judicial precedents. The Litigant is essentially required to:

- Evaluate the respective legislations to ensure that they have invoked the correct jurisdiction lest their action may be nullified due to incorrect jurisdictions and issues of maintainability.
- In domains of concurrent jurisdiction, choose the forum of a proven track record.

If a view is taken from a symbiotic prism, the RERA regime continues to be a force to reckon with and promises to deliver stellar services in the real estate space and in its domain and jurisdiction, in close coordination with other laws such as the Competition Act, 2002, the various state wise Apartment Ownership Acts and other plethora of legislations and provisions. Whether this is to happen, only history will vindicate and tell.

Hot topic

Increased integrity diligence needed in joint ventures

Joint venture partnerships (**JVP**) have evolved over the years and while these have been successful in a majority of instances in India, many instances of adverse outcomes present a cautionary tale. For instance, there is a well-known example of a foreign JV partner who had to exit the JV at miniscule price to avoid global ramifications when it was unearthed that the Indian JV partner was under an investigation by the agencies in connection with payment of 'unaccounted money' to certain government officials in order to secure benefits for its other businesses. In another case, once the JV was formed none of the banks and financial institutions were ready to provide financial assistance as the Indian JV partner was on the list of defaulters. Such instances underscore the vital need for informed decision making while selecting the JV partner.

In this context, integrity due diligence (**IDD**) has emerged as a powerful tool to unearth additional information and risks that can have a material bearing on the decision to proceed with the JV. Consequently, this has gained increasing importance for companies – especially international investors and corporates operating in a multi-jurisdictional context – keen on establishing partnerships with individuals and companies of high repute and rectitude.

Key aspects of an integrity diligence

While it is routine for JV partners to undertake a rigorous diligence of the other party, the core focus of such diligence centres around operational, financial, governance and compliance aspects to ensure that they are in line with applicable laws and standards of territories in which it operates. IDD, often undertaken independent of the routine diligence, examines an entity's operations in minute detail and conducts an in-depth analysis of reputation and risks associated with corruption. Such diligences are usually undertaken by gathering of independent information, as against the typical corporate or financial diligence where target entities provide relevant information and are aware of the processes being undertaken. As such, IDD can provide useful and actionable intelligence on a range of parameters.

- **Who is the ultimate owner?:** IDD can help unearth the ultimate ownership of the target company. Hidden beneficial ownership is a major problem in JVs and M&As, and authorities have increasingly regulated and restricted multiple layers of investments, as well as distinguishing between legal and beneficial ownership. Countries such as India have gone further and imposed restrictions on beneficial ownership depending on the country to which the owner belongs.
- **Instances of money laundering and bribery:** IDD can help mitigate the risk emanating from inadvertent lapses by, or an oversight on, the part of local partners, who are often entrusted to deal with government officials while setting up industries or factories, obtaining regulatory approvals, liaising with government officials and agencies, etc. These can expose international partners to reputational damage, regulatory inquiries and allegations of money laundering, bribery and corruption. Problems may be red flagged by any reluctance by companies to agree to broad conditions requiring compliance with laws regulating bribery, corruption and money laundering. Integrity due diligence of a JV partner can bring to light prior instances of such situations and allow the investor to take appropriate measures.
- **KYC and identity checks:** A thorough KYC and identity/background check conducted as part of IDD may help identify prior instances of wilful default, criminal allegations, adverse media and market reputation, retired officials being paid to act as directors, etc., which may escape scrutiny during the traditional diligence exercise. Many companies appear to have robust compliance mechanisms in place and do not have, on record, any allegations of malfeasance, fraud, bribery or money laundering. IDD can be especially effective in discovering prior red flags pertaining to the company and its key management personnel.
- **De-facto control:** IDD can aid in unearthing issues pertaining to any potential de facto control leveraged by key officials, organized crime groups or political patronage and also trace the sources of funds which the JV partner is utilizing to operate businesses.
- **Protective covenants:** If not complete deal breakers, adverse findings following a comprehensive IDD exercise will allow prospective partners to put in place adequate protection in contractual arrangements. Common protective covenants include unlimited indemnity for any acts of money laundering, bribery or fraud and a comprehensive exit clause that allows the exercise of put options or compulsory IPOs. However, prospective partners should consider whether reputational loss and damage can ever be recovered.

Conclusion

Findings of an integrity due diligence allow investors and business partners to unearth the existence of any connections between companies and its senior management with political figures, government agencies and regulators, the extent and nature of such connections leveraged by the company for its own benefit or worse yet, key individuals of a company for their personal benefit, practices involving bribery, corruption, money laundering or an extensive tax evasion, unacceptable labour practices and financial crimes.

Integrity due diligence conducted before forming any association will save an investor from reputational loss, diminished market value, potential litigation, adverse impact on revenue and profitability, and financial loss. It can significantly increase the chances of an investor becoming associated with a reliable business partner, which is often critical to the long-term success of a JV partner.

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