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India Update

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Quarterly newsletter highlighting and analyzing legal, regulatory and policy developments

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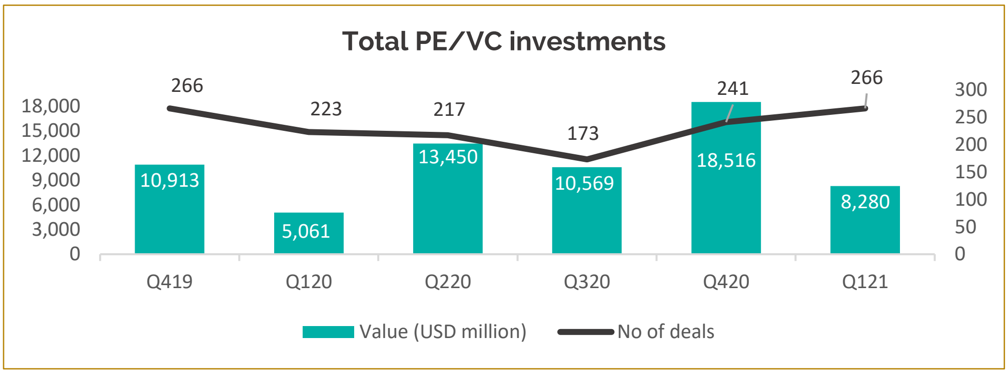
INVESTMENT AND DEAL ACTIVITY ANALYSIS

Q4 of FY 2020-21 witnessed a sequential month on month increase in PE/VC investment activity, from USD 1.6 billion in January 2021 to USD 4.6 billion in March 2021. On a year-on-year basis, investments grew by 64% in this quarter. There were 22 large deals aggregating to USD 4.8 billion, with pandemic resilient sectors like pharma, healthcare, edtech, online media, SaaS etc. continuing to see good traction in both value and volume of PE/VC deals.

PE/VC exits also picked up momentum in this timeframe with exits worth USD 4.2 billion, which is 70% of the total value recorded last year. The largest exit saw Alibaba, IFC and Abraaj sell their stake in Bigbasket for USD 1 billion to TATA group. The quarter also recorded 9 PE-backed IPOs, which is the highest quarterly number so far. Additionally, as of now, there are over 90 IPOs that have filed their DHRPs with SEBI of which more than 45 are PE-backed.

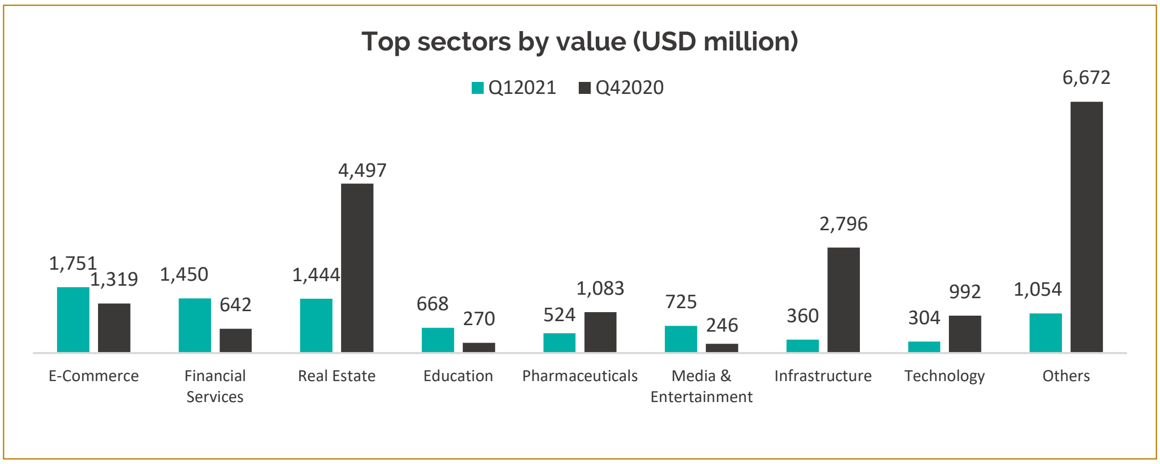
From a sectoral perspective, e-commerce was at the top (USD 1.8 billion across 45 deals), which represents the highest quarterly value of investments in this sector in the past five quarters, followed by real estate (USD 1.4 billion across 18 deals) and financial services sector (USD 1.4 billion across 50 deals).

E-commerce has emerged as new IPO intense sector wherein six companies have filed their DHRPs including Zomato, Nykaa and Grofers. If these companies see favorable investor interest, a significantly higher number of companies from the e-commerce sector could follow through.



Source: IVC Association and Ernst & Young Monthly PE/VC Roundup, April 2021

The encouraging build up in PE/VC investment and exit activity in this quarter saw some levelling-off towards the later part of March 2021 in light of the resurgence of the pandemic and fresh concerns regarding sustained economic recovery. which could endanger the recovery underwriting thesis. Investors could turn cautious till more clarity emerges on government response to the second wave.



Source: IVC Association and Ernst & Young Monthly PE/VC Roundup, April 2021

RELAXATIONS MADE TO THE **DEFINITION OF LISTED COMPANIES**

The Central Government has introduced multiple measures aimed at improving the ease of doing business in India. In line with this intention, a significant set of amendments were made to the Companies Act, 2013 (Companies Act) through the Companies (Amendment) Act, 2020[1] (**Amendment Act 2020**).

One such amendments aim to tweak the definition of a listed company. As result, a proviso has now been added under Section 2 (52) of the Companies Act which deals with definition of listed companies. As per the proviso, the Central Government may, in consultation with the Securities and Exchange Board of India (SEBI), exclude from the definition of listed companies, certain classes of companies which have listed or intend to list a prescribed class of securities on any recognized stock exchange. This amendment was also suggested by the Company Law Committee in November 2019.

Amendment Act 2020 and its implications

Earlier, as per Section 2(52) of the Companies Act, the definition of a listed company referred to any company which has its securities listed on a recognized stock exchange. The definition for securities is provided under the Securities Contract Regulation Act, 1956 (**SCRA 1956**). As per Section 2(h) of SCRA 1956, a security includes shares, scrips, stocks, bonds, debentures, debenture stock or any other marketable security.

As a result of the inclusive definition under the SCRA 1956 and Companies Act, private limited companies which had their debt securities listed on a stock exchange were compelled to follow the compliances applicable to the listed companies (viz., adhere to norms such as filing of returns, maintenance of records, appointment of auditors, appointment of independent director and women director, constitution of board committees, etc.), which are subject to more stringent requirements as compared to unlisted companies.

However, with effect from 1 April 2021, as per Section 2(52) the Companies Act read with the newly inserted Rule 2A of the Companies (Specification and Definition Details) Rules, 2014, following classes of companies will now be excluded from the definition of listed companies:

- Public companies which have not listed their equity shares on a recognized stock exchange but have listed non-convertible debt securities issued on private placement basis in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008, and/or non-convertible redeemable preference shares issued on private placement basis in terms of SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013
- Private companies which have listed their non-convertible debt securities on private placement basis on a recognized stock exchange in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008
- Public companies which have not listed their equity shares on a recognized stock exchange but whose equity shares are listed on a stock exchange in a foreign jurisdiction as specified in sub-section (3) of section 23 of the Companies Act

As a result of the Amendment Act 2020 and w.e.f. April 1, 2021 the above-mentioned companies will now benefit from a major compliance relief such as filing of returns, maintenance of records, appointment of auditors, appointment of independent director and women director, constitution of board committees etc. amongst other stringent requirements.

Another critical implication of the Amendment Act 2020 is amendment under Section 23(3) of Companies Act. The amendment now empowers the Central Government to allow certain class of public companies to list classes of securities on a permissible foreign jurisdiction without any simultaneous listing in India. While the amendment is not yet effective, it will provide relief to listed foreign companies from compliance requirements applicable to listed companies under the Companies Act 2013.

The move to include relaxations in the definition of listed companies will, to a large extent, make it easier for smaller companies to approach debt markets, in turn boosting the listing of debt securities. The move also lays out the road for domestic companies to tap foreign equity markets in a comparatively hassle-free manner. The impetus to growth is very welcome at this stage of the economy where an attempt at recovery is being made in the post-covid era.

ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2021

The Arbitration and Conciliation (Amendment) Bill, 2021 (**Bill**) was introduced in Lok Sabha on February 04, 2021. The Bill sought to amend the Arbitration and Conciliation Act, 1996 (Act) with a view to achieve the following:

- To grant unconditional stay of enforcement of arbitral awards, where the underlying arbitration agreement, contracts or arbitral award is induced by fraud or corruption
- To omit the Eighth Schedule of the Act which laid down the qualifications, experience, and norms for accreditation of arbitrators
- To specify by regulations, the qualifications, experience, and norms for accreditation of arbitrators

The Bill replaces an ordinance with same provisions passed on November 04, 2020.

Automatic stay on awards

The Act allowed a party to file an application, under Section 34 of the Act, to set aside an arbitral award. The Courts, generally, interpreted this provision to mean that an automatic stay was granted on an arbitral award under challenge, the moment an application for setting aside such arbitral award was made before a court.

However, in 2015, the Act was amended to state that an arbitral award would not be automatically stayed merely because an application is made to a court to set aside the arbitral award.

The Bill, introduced and passed in the Parliament, has specified that a stay may be granted on an arbitral award during the pendency of the setting aside application against the arbitral award, if the Court is satisfied of the following:

- The arbitration agreement was induced or effected by fraud or corruption; or
- The making of the award was induced or effected by fraud or corruption.

The Bill also specifies that the amendment will be effective retrospectively, i.e., from October 23, 2015.

Qualifications of arbitrators

Section 47 of the Act will be replaced by Section 43J, which provides that certain qualifications, experience, and accreditation norms for arbitrators will be specified by the Regulations as decided by Arbitration Council of India

As a consequence, the Bill has omitted the Eighth Schedule of the Act. It has been stated in the Bill that the qualifications, experience, and norms for accreditation of arbitrators will be specified through regulations.

Our view

The purpose of the Arbitration and Conciliation (Amendment) Act, 2015 (**2015 Amendment**) wherein the automatic stay on arbitral award was done away with was to prevent parties from misusing the provisions of the Act under Section 34 as stall tactics to comply with the arbitral award.

However, with the re-introduction of the unconditional automatic stay on arbitral award albeit in cases of fraud and corruption seems to defeat the purpose the 2015 Amendment was seeking to achieve. Such that the establishing that the award/arbitration agreement was induced by fraud or corruption cannot be summarily decided.

The use of the concept of ‘fraud’ or ‘corruption’ widens the gambit of interpretation by the Courts. The Courts will have to be extremely cautious in formulating a test for proving ‘fraud’ or ‘corruption’ for granting an unconditional stay on the arbitral award. This amendment may lead to excessive litigation by parties to stall the execution of the award and in turn end up wasting precious time of the Court and defeat the purpose of quick resolution via arbitration. Further, the retrospective application of the Bill may open floodgates of litigation.

REVISED REGULATORY **FRAMEWORK FOR NBFCS**

The Reserve Bank of India (**RBI**) on January 22, 2021, issued a discussion paper on 'Revised Regulatory Framework for NBFCs – A Scale-Based Approach' (**Discussion Paper**). RBI, through the Discussion Paper, has introduced a scale-based approach to the regulation of non-banking financial companies (**NBFCs**). NBFCs are growing at rate seen never before and are directly linked with the banking and capital markets sectors, and thus, considering the complex nature of the mechanism, the Discussion Paper proposes a new regulatory structure for NBFCs, based on asset size of the NBFCs.

As of now, the present scenario of classifying NBFC's is based on different criteria such as (i) Systemically important NBFCs having an asset size of INR 500 Crore or more, which are regulated in a rigorous manner and are under constant supervision; (ii) Deposit taking NBFCs; (iii) Based on nature of business undertaken, i.e., Investment and Credit (**ICC**), Micro Finance Institutions (**MFI**), Peer to Peer Lending (**P2Ps**), Infrastructure Finance, etc and (iv) Type I NBFCs that are not accepting public funds and not intending to have customer interface in future and Type II NBFCs that are accepting public funds and intending to have customer interface in future

The Discussion Paper seeks to simplify and consolidate the classification of NBFCs into four categories, based on size, risk perception, complexity, and nature of activity of the NBFCs, as follows - Base Layer (**NBFC-BL**); Middle Layer (**NBFC-ML**); Upper Layer (**NBFC-UL**) and Top Layer (**NBFC-TL**).

Overview of the proposed changes

The proposed changes to regulatory framework of NBFCs shall be based on a four-layered structure as follows:

- **NBFC-BL:** NBFC-BL will consist of the NBFCs that are presently classified as NBFC-ND (besides Type I NBFCs), P2Ps, Non-Operative Financial Holding Company (**NOFHC**), and Account Aggregators (**NBFC-AA**). The Discussion Paper views these as NBFCs involving low risk, based on their activity, and consolidating them in one category as the Base Layer seems to be a thoughtful approach in streamlining the classification. However, the classification pertains to certain important changes such as:
  - The threshold for NBFC-SI is INR 500 crore and the same has been raised to INR 1,000 crore in the proposed classification, bringing more NBFCs within the NBFC-BL category;
  - Stern entry norms have been introduced by raising the minimum net-owned fund (**NOF**) from INR 2 crore to INR 20 crore taking in consideration, a general increase in price levels and real GDP; and
  - Reduction from 180 days to 90 days, in the threshold for non-performing asset classification.
- **NBFC-ML:** All non-deposit taking NBFCs classified currently as being systemically important i.e., 'NBFC-ND-SI' and all deposit taking NBFCs that do not meet the criteria of NBFC-UL, would be placed within this category.
- Apart from the above, housing finance companies (**NBFC-HFCs**), infrastructure debt funds (**NBFC-IDF**), standalone primary dealers (**SPD**) and core investment companies (**CICs**), irrespective of their asset size shall also frame part of this category. Thus, this classification is entirely based on the nature of the NBFCs and not the asset size.
- The proposed changes in NBFC-ML category are as follows:
  - The lending and investment limits are proposed to be merged into a single exposure limit of 25% and a group exposure of 40%, which is computed based on Tier 1 capital rather than net owned funds.
  - Financing regulation will become stricter with the imposition of an INR 1 crore cap per individual per NBFC, restrictions on buy-back of shares or on loans to directors, etc.
  - The introduction of a remuneration committee, and additional disclosures, and rotation of statutory auditors, and
  - Requirement to have a Board-approved policy on Internal Capital Adequacy Assessment Process (**ICAAP**), similar to that of banks.
- **NBFC-UL:** The NBFCs in the Upper Layer will be based quantitative as well as qualitative measures as follows:
  - Qualitative parameters such as size (35%), inter-connectedness (25%), complexity (10%).
  - Qualitative parameters like supervisory inputs (30%, which includes type of liabilities, group structure and segment penetration).

  According to the Discussion Paper, ten largest NBFCs (as per their asset size) will automatically be placed under this category. Further, it aims to level regulatory framework for NBFC-ULs to be on similar lines as that of banks, including:
  - Maintaining a minimum common equity tier 1 (**CET 1**) capital of 9%.
  - Subjecting NBFC-ULs to the differential standard asset provisioning norms applicable to banks
  - Placing a mandatory listing requirement as is applicable to private banks.
- **NBFC-TL:** The top layer is proposed to remain empty as per the Discussion Paper. In case any unsustainable systemic risk is perceived from a specific entity in the NBFC-UL category, it may be shifted to this layer, subject to scrutiny by RBI. Basically, a miscellaneous category, which shall consist of any NBFC, that cannot be categorized in the category of NBFC-Ul and bear incalculable risks.

Conclusion

The proposed mechanism in the Discussion Paper aims to significantly revise the governance framework based on various parameters. It is pertinent to note that the regulatory framework for NBFCs needs to be re-oriented to keep pace with changing realities in financial sector and the proposed changes and classification seems to be a right step in moving forward, considering the ease and improved classification measures and a systematic approach towards the same.

BALANCE SHEETS CAN AMOUNT TO **ACKNOWLEDGEMENT OF DEBT**

Background facts

Asset Reconstruction Company (India) Ltd (**ARCIL/Appellant**) filed an Application under Section 7 of the IBC for initiation of Corporate Insolvency Resolution Process (**CIRP**) against Corporate Power Ltd. This Application was admitted by the National Company Law Tribunal, Kolkata Bench (**NCLT**) *inter* alia after observing that the Corporate Debtor had acknowledged its liability in the Balance Sheets before the expiry of limitation period of 3 years from the date of default and thus, the Section 7 Application was not barred by limitation.

An Appeal was filed against the abovementioned order of admission before NCLAT by Bishal Jaiswal, a suspended director of Corporate Power Ltd. He relied upon the majority opinion in judgment passed by NCLAT in the matter of *V. Padmakumar v. Stressed Assets Stabilization Fund (SASF) & Anr*[1], wherein it was held that the entries in a Balance Sheet do not amount to an acknowledgment of debt in terms of Section 18 of Limitation Act. Basis the same, the suspended director contended that Section 7 Application filed by ARCIL was barred by limitation.

The minority opinion in V. Padmakumar was passed after considering various judgments of the Supreme Court (**SC**) and High Courts and consequently, held that entries in a Balance Sheet would amount to an acknowledgment of debt in terms of Section 18 of the Limitation Act.

The Appeal filed by the suspended director was heard by a three-member bench of the NCLAT. ARCIL contended before the three-member bench that the majority opinion in V. Padmakumar was per incuriam since it did not consider the catena of judgments passed by the Supreme Court and the various High Courts which state that entries in a Balance Sheet would amount to an acknowledge of debt in terms of Section 18 of the Limitation Act.

Vide order dated September 25, 2020, the three-member bench of NCLAT doubted the correctness of the judgment passed by five-member bench of NCLAT in matter of V. Padmakumar and in view of the same, observed that V. Padmakumar warrants reconsideration for holding that entries in a Balance Sheet do not amount to an acknowledge of debt in terms of Section 18 of the Limitation Act. Accordingly, three-member bench passed a reference order for a five-member bench to be constituted to reconsider majority decision in V. Padmakumar.

SC vide judgment dated April 15, 2021 in the matter of *Asset Reconstruction Company (India) Ltd v. Bishal Jaiswal & Anr*. decided a crucial question of law pertaining to whether entries in the Balance Sheet would amount to an acknowledgment of debt for purpose of extending the period of limitation as provided under Section 18 of Limitation Act, 1963 (**Limitation Act**).

In this landmark judgment which is undoubtedly significant to all stakeholders under the Insolvency and Bankruptcy Code, 2016 (**IBC**), the Apex Court took cognizance of the fact that although the filing of a Balance Sheet is a statutory requirement as per the provisions of the Companies Act, 2013, however, doing the same can amount to an acknowledgment of debt depending on the facts of the particular case. This judgment also set aside the majority decision of the National Company Law Appellate Tribunal (NCLAT) in the matter of *V. Padmakumar v. Stressed Assets Stabilisation Fund* wherein the majority opinion of the five-member bench was that entries in Balance Sheets would not amount to an acknowledgment of debt to extend limitation under Section 18 of the Limitation Act.

HSA Advocates represented ARCIL in this matter before SC and got a favorable order. The team comprised of Abhirup Dasgupta, Partner and Ishaan Duggal, Senior Associate.

Consequently, the reference was listed and heard by the five-member bench. Thereafter, vide judgment dated December 22, 2020 (**Impugned Order**), the five-member bench observed that Section 18 of the Limitation Act would have no application to proceedings under the IBC. It was further observed that the majority opinion of the NCLAT in V. Padmakumar was good law.

Aggrieved by the Impugned Order passed by the NCLAT, Appellant filed the captioned Appeal before SC. It is pertinent to note that along with the said Appeal, SC also heard other Appeals including an Appeal against the NCLAT's judgment in V. Padmakumar and decided the said matters by applying the law laid down in *Asset Reconstruction Company (India) Limited v. Bishal Jaiswal & Anr*[2]

Issues at hand

- Whether Section 18 of the Limitation Act is applicable to proceedings under the IBC?
- Whether entries in Balance Sheets amount to an acknowledgment of debt to extend limitation under Section 18 of Limitation Act and, whether the majority opinion of the NCLAT in V. Padmakumar was *per incuriam*, as it was passed in ignorance of binding precedents and settled law?

[1] Company Appeal (AT) (Insolvency) No. 57 of 2020 (decided on March 12, 2020)
[2] Civil Appeal No. 323 of 2021

Findings of the Court

SC placed reliance on a plethora of judgments passed by the Court including but not limited to *Mahabir Cold Storage v. CIT*[3], *Jignesh Shah v. Union of India*[4], *AV Murthy v. BS Nagabasavanna*[5] and judgments passed by various High Courts which observed that entries in a Balance Sheet would amount to an acknowledge of debt in terms of Section 18 of the Limitation Act. Further, the Apex Court also referred to the judgment of the Calcutta High Court in *Bengal Silk Mills Co v. Ismail Golam Hossain Ariff*[6] and consequently, the Court held that there is no doubt that the filing of a Balance Sheet in accordance with the provisions of the Companies Act, 2013 is mandatory, any transgression of the same being punishable by law. However, there is no compulsion to make any particular admission. Hence, to determine if an acknowledgment of debt is made or not would depend on the facts of each case as to whether an entry made in a Balance Sheet qua any particular creditor is unequivocal or has been entered into with caveats. These caveats could be in the form of notes to accounts or other qualifications made in the Balance Sheets.

SC also observed that the minority judgment of Justice (Retd.) A.I.S. Cheema, Member (Judicial) in V. Padmakumar has reached the correct conclusion. Accordingly, the Supreme Court set aside the majority view in the V. Padmakumar judgment which held that that entries in a Balance Sheet could not be considered an acknowledgment of debt for the purposes of extending limitation under Section 18 of Limitation Act.

In addition to the above, SC relied upon its recent decisions in *Sesh Nath Singh & Anr v. Baidyabati Sheoraphuli Co-operative Bank Ltd & Anr*[7] and *Laxmi Pat Surana v. Union Bank of India & Anr*[8] and observed that it is not possible to accede to the arguments that Section 18 of the Limitation Act cannot be made applicable to proceedings under the IBC.

Our viewpoint

With this judgment, SC has clarified a simple and straightforward proposition that entries in a Balance Sheet can amount to an acknowledgement of debt for the purpose of extending the limitation period under Section 18 of the Limitation Act.

This proposition had been unnecessarily convoluted by contradictory judgments of the NCLAT and the Apex Court has now clarified the factors that need to be taken into account while ascertaining whether an entry in a Balance Sheet would be considered to be an acknowledgment for the purpose of Section 18 of the Limitation Act. One such factor is whether such entries are accompanied by a caveat regarding it being an acknowledgment of debt. This would entail a factual analysis which would have to be undertaken by the Court/Tribunal to finally arrive at a conclusion regarding the application of Section 18 of the Limitation Act. In our opinion, this places the creditors and the debtors on a level playing field and would give the debtors a reasonable opportunity of being heard.

However, the judgment has not addressed a few pertinent aspects:

- The judgment does not deal with the situation wherein the debtor, who has made an entry in its Balance Sheet, also makes a counter claim against the creditor. Though academically speaking, the said situation is clearly dealt with by the explanation of Section 18 of the Limitation Act which provides that the acknowledgment may even be accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off. In other words, a counter claim may be relevant for the purpose of considering the overall liability of the debtor, however, it would not be relevant for the purpose of determining whether an entry in a Balance Sheet would be considered to be an acknowledgment for the purpose of Section 18 of the Limitation Act.
- Similarly, this judgment does not answer whether an entry in the "contingent liability" column would amount to an acknowledgement of debt for the purposes of extending the limitation period.
- While this judgment examined the entries in the Balance Sheets only for the purposes of analysing their effect on limitation, the judgment does not consider the effect of the various entries for other purposes such as passing decrees on admission.

While this is a noteworthy judgment that impacts all stakeholders in the IBC ecosystem, especially the Financial Creditors, the pertinent factors would have to be taken into account on a case-to-case basis to determine whether an entry in a Balance Sheet would be considered to be an acknowledgment for the purpose of Section 18 of the Limitation Act.

[3] 1991 Supp (1) SCC 402
[4] (2019) 10 SCC 750
[5] (2002) 2 SCC 642
[6] 1961 SCC OnLine Cal 128
[7] Civil Appeal No. 9198 of 2019
[8] Civil Appeal No. 2734 of 2020

ICC
ARBITRATION RULES, 2021

The Revised Rules of Arbitration (**2021 Rules**), which were proposed in December 2020 by the International Chamber of Commerce (**ICC**), prospectively come into force on January 1, 2021. The ICC Arbitration Rules 2017 (**2017 Rules**) will continue to apply to cases registered prior to January 1, 2021. The ICC Court President Alexis Mourre highlighted that the amendments in the 2021 ICC Rules are a step towards greater efficiency, flexibility and transparency in ICC arbitrations.

The following are the prominent revisions that will be incorporated vide the 2021 ICC Rules:

- **Article 1 – Reporting to the Court**

  The 2021 Rules mandate strict reporting of the decisions of the following authorities in the next session of ICC Court (unlike the 2017 Rules which provided a liberal approach of reporting in any of the future sessions):

  - President of the ICC Court
  - Committee appointed by the Court
  - Secretary General with respect to the impartiality of the Arbitrator

- **Article 5 – Time to respond to the request of Arbitration**

  A party is now given one day more to respond to the request of Arbitration, since the words '*within 30 days from the receipt*' have been replaced by '*within 30 days from the following day of the receipt of the request'*.

- **Article 7(5) – Joinder of parties' post-constitution of Arbitral Tribunal**

  This article empowers an Arbitral Tribunal to decide on any request made by a party for adding further parties to the arbitration, subject to additional party(s) consent to the constitution of the Tribunal. The discretion would be in the hands of the Arbitral Tribunal, which will have to consider various factors as mentioned in the said provision, including ruling on its jurisdiction over the proposed additional party, timing of the request made, possible conflict of interests and the impact on the arbitration proceedings, if any.

- **Article 10 – Consolidation of arbitration proceedings**

  Article 10(b) has been amended and now provides much needed clarity with respect to consolidation being allowed in the following cases:

  - Where all parties agree to consolidation
  - Where all claims are made under the same arbitration agreement or agreements between different parties
  - Claims involving different parties which may not be under same arbitration agreement, provided that the dispute arises in connection with the same legal relationship and the arbitration agreements are compatible

Thus, the 2021 Rules now clarify that claims that are made under same arbitration agreement(s) can now be consolidated into a single arbitration proceeding.

POOLED INVESTMENT VEHICLES AND **AMENDMENTS TO THE SCRA 1956**

Pursuant to the Finance Act, 2021, the Securities Contracts (Regulation) Act, 1956 (**SCRA 1956**) underwent certain amendments recently. These pertain to changes brought about by the inclusion of 'pooled investment vehicles' within the ambit of the SCRA's governance. The key changes are provided herein below:

Revised Definitions

New Section 2(da) has been inserted in the SCRA, which defines a 'pooled investment vehicle' as a fund established in India in the form of a trust or otherwise (for example, mutual fund, alternative investment fund, collective investment scheme or a business trust as understood under Section 2(13A) of the Income Tax Act, 1961 and registered with the SEBI) or such other fund, which raises or collects monies from investors and invests the same in accordance with SEBI regulations in this regard.

Consequent thereto, the definition of 'securities' has been amended, whereby:

- In Section 2(h)(i) of the inclusive definition, 'pooled investment vehicle' has been inserted. It may be noted that Section 2(h)(i) of the SCRA pertains to forms of marketable securities.
- New Section 2(h)(ida) has been inserted to include units or any other instrument issued by any pooled investment vehicle.

New Section 30B

Section 30B has been inserted into the SCRA in relation to debt fund raising by pooled investment vehicles. It states that a pooled investment vehicle (whether constituted as a trust or otherwise) that is registered with SEBI would be allowed to borrow and issue debt securities in line with regulations that SEBI may prescribe. Interestingly, this allowance is stated to override not just the Indian Trust Act, 1882 (the foundation legislation for private trust law in the country) and any other law being in force at the time, but also any judgment, decree or order by any court, tribunal or authority.

In addition, the pooled investment vehicle would also be allowed to create security interest in favor of a lender, whereby such lender could enforce such security interest against the trust property in case of a default by the pooled investment vehicle.

Observations

With these changes coming in, there are a few aspects to further consider:

- The most obvious consequence in relation to the amendments to Section 2(h) of the SCRA is that units or instruments issued by pooled investment vehicles would now fall within the purview of 'Security' under stamp laws, whereby making their transfers exigible to stamp duty payment. In particular, for Section 2(h)(i) of the SCRA, which pertains to marketable securities in an incorporated company, body corporate or pooled investment vehicle, it should be considered whether with private placement memoranda for alternate investment funds that typically contain conditions and restrictions around transfer, they could at all fall within the purview of 'marketable security'. While the SCRA itself may not have a definition for this, the Indian Stamp Act, 1899, does. This definition, inserted last year in the legislation, states that a marketable security is one that can be traded on any stock exchange in India.
- For Section 30B, the overriding of existing judgment, decree or order is an interesting position, as does the overriding of any other legislations in force at the time. Whether this has an effect on an entity that is in an insolvency process may have to be explored further. Whether further SEBI regulations and prescriptions would address this remains to be seen.

Conclusion

Both the changes were expected – bringing the units by pooled investment vehicles within the ambit of stamp duty regime, as well as clear recognition of debt fund raising by vehicles (including INVITs and REITs) in the manner explained. Clarity on the potential inconsistencies shall, of course, be welcome.

PRE-PACKAGED
INSOLVENCY RESOLUTION PROCESS

The President of India has promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 (**The Ordinance**) on April 04, 2021, to allow pre-packaged insolvency resolution process for Corporate Debtors classified as micro, small or medium enterprises (**MSME**) under the Micro, Small and Medium Enterprises Development Act, 2006.

In the aftermath of the Covid-19 pandemic, the Central Government via the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 introduced Section 10A into the Insolvency and Bankruptcy Code, 2016 (**IBC**), which suspended the operation of Section 7, 9 and 10 of the IBC for initiation of fresh insolvency proceedings against the defaults incurred on and after March 24, 2020, for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf.

The Ordinance alters the IBC by introducing the Ordinance as a part of Chapter IIIA of Part II of the Code. Further Section 4 of the Code has been amended to enable the Central Government to notify a pre-packaged procedure for defaults not more than INR 1 Crore.

A pre-packaged settlement entails a corporation working out a restructuring agreement with its creditors before applying for bankruptcy protection. This helps to reduce the overall time and expense of the process and also ensures a quicker, cost-effective and value maximizing outcome for all the stakeholders. An application for initiating a pre-packaged insolvency resolution process may be made in respect of a Corporate Debtor, subject to the following conditions, that:

- It has not undergone pre-packaged insolvency resolution process or completed corporate insolvency resolution process, as the case may be, during the period of three years preceding the initiation date
- It is not undergoing a corporate insolvency resolution process
- No order requiring it to be liquidated is passed under section 33
- It is eligible to submit a resolution plan under section 29A
- The financial creditors of the Corporate Debtor, not being its related parties, representing such number and such manner as may be specified, have proposed the name of the insolvency professional to be appointed as the resolution professional for conducting the pre-packaged insolvency resolution process of the Corporate Debtor, and the financial creditors of the Corporate Debtor, not being its related parties, representing not less than 66%
- The majority of the directors or partners of the Corporate Debtor, as the case may be, have made a declaration, in a form that may be specified, as to the limitation period along with a declaration of no intent to commit fraud
- The members of the Corporate Debtor have passed a special resolution, or at least 3/4th of the total number of partners, as the case may be, of the Corporate Debtor has passed a resolution, approving the filing of an application for initiating pre-packaged insolvency resolution process

The Corporate Debtor must obtain approval from its Financial Creditors, who are not connected to it, for the filing of an application to initiate a pre-packaged insolvency resolution procedure, in such form as may be stated, representing not less than 66% in value of the financial debt due to such creditors.

The pre-packaged insolvency resolution phase must be completed within 120 days of the pre-packaged insolvency start date. The moratorium will be in place from the pre-packaged start date until the process is completed, whether by resolution plan approval or otherwise.

During the pre-pack period, the Corporate Debtor will remain under the current promoters' and management's control and custody. On the grounds set out in Section 61(3) of the Code, the Ordinance appeals against an order authorizing the pre-packaged resolution plan.

By introducing a new facet of insolvency, the Government appears to be attempting to provide an alternative and efficient resolution mechanism. This is a positive development, but it was hoped that a similar platform would apply to non-MSME businesses. Prepacks will assist Corporate Debtors in reaching an agreement with lenders and handling the company's entire liability. A proper implementation of the Pre-Packaged Insolvency regime would benefit both the Debtor (MSME's) and the Creditors as higher resolution values could be achieved due to the quick process involved as compared to the steps involved in the Resolution Process under the IBC. Overall, it is expected that with the pursuit of the proposed Draft framework, a positive impact will be seen on the financial health of the debt market. However, a concrete conclusion can only be arrived at after this framework is approved and comes into effect. In addition to this The Government needs to further enhance the NCLT's infrastructure for proper utilization of the aimed benefits to introduce pre-packs.

TIGHTENED INVESTMENT RULES IN **NBFC FROM FATF NON-COMPLIANT JURISDICTIONS**

RBI issued guidelines for investors seeking foreign investment directly or indirectly in existing Non-Banking Financial Companies (**NBFCs**) or in companies seeking Certification of Registration (**CoR**) through non-compliant Financial Action Task Force (**FATF**) member Countries.

FATF periodically identifies jurisdictions having low measures to combat money laundering and terrorist financing (**AML/CFT**) referred in High-Risk Jurisdictions subject to a Call for Action and Jurisdictions under Increased Monitoring. A jurisdiction whose name does not appear in the prescribed FATF compliant list is referred to as a FATF compliant jurisdiction.

Further, being part of FATF member country, the investor shall not be a resident in the country identified in the public statement of FATF as a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply or that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the FATF to address the deficiencies (‘non-compliant’ jurisdiction).

Investment in NBFCs from FATF non-compliant jurisdictions

Presently, foreign investment guidelines in India permits investment in the NBFC segment under the automatic route.

Investors in the existing NBFCs having investments prior to the classification of the source or intermediate jurisdiction/s as FATF non-compliant, may continue with the investments or bring in additional investments as per extant regulations to support continuity of business in India.

Investments in NBFCs from FATF non-compliant jurisdictions shall not be treated at par with that from the compliant jurisdictions. Hence, new investors from or through non-compliant FATF jurisdictions, whether in existing NBFCs or in entities seeking COR, are restricted to acquire directly or indirectly ‘significant influence’ in the investee, as defined in the applicable accounting standards and also specified in. Effectively, new investors (directly or indirectly) from such FATF non-compliant jurisdictions in aggregate should be less than the threshold of 20 per cent of the voting power (including potential voting power) of the NBFC.

Conclusion

In effect, such investment from the foreign jurisdictions that are FATF non-compliant seeking investment may be obligated to acquire substantial holdings only after seeking prior RBI approval. This seems to be in line with other FPI regulations, that does not permit non-FATF compliant jurisdiction to participate in the Indian capital markets. The tightening of the rules comes effectively with the renewed interest in the Indian NBFC sector that might be exposed to investment flow from prohibited countries from the FATF.

FRESH GUIDELINES FOR
SOCIAL MEDIA INTERMEDIARIES AND OTT

Amid growing concerns around the lack of transparency, accountability and rights of users related to digital media, the Government has introduced the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 (**Rules**). These Rules have been framed in exercise of powers under Section 87(2) of the Information Technology Act, 2000. The Rules aim at empowering social media users and ensure that Social Media Intermediaries (**Intermediaries**) and Over-the-Top (**OTT**) platforms create a safe environment digitally.

Social Media Intermediaries will fall into two categories – an Intermediary and a Significant Social Media Intermediary. This distinction is based on the number of users on the social media platform, and the government will soon notify the threshold of the user base that will distinguish the two.

Key guidelines for Intermediaries

- **Applicability of 'safe harbor' provisions:** Intermediaries have to follow the prescribed diligence protocols to ensure applicability of 'safe harbor' provisions. In case these are not followed, the safe harbor provisions (defined under Section 79 of the IT Act, 2000) providing immunity from legal prosecution for any content posted on their platforms, will not apply to them.
- **Mandatory grievance redressal mechanism:** The Intermediaries shall appoint a Grievance Officer to deal with complaints and will share the name and contact details of such officers, who shall acknowledge the complaint within twenty four hours and resolve it within fifteen days from receipt.
- **Ensuring online safety and dignity of users:** Intermediaries shall remove or disable access within 24 hours of receipt of complaints of content that exposes the private areas of individuals, show such individuals in full or partial nudity or in sexual act or is in the nature of impersonation including morphed images etc. Such a complaint can be filed either by the individual or by any other person on his/her behalf.
- **Additional Due Diligences for the Significant Social Media Intermediaries:**
  - **Appointments:** The Significant Social Media Intermediaries need to appoint a Chief Compliance Officer, a Nodal Contact Person and a Resident Grievance Officer, all of whom should be residents of India.
  - **Compliance Report:** The Intermediaries need to publish a monthly compliance report mentioning the details of complaints received, action taken on the complaints as well as details of content removed proactively.
  - **Enabling identity of the Originator:** As per the guidelines, social media intermediaries providing services primarily in the nature of messaging shall enable identification of the first originator of the information. However, this is required only for the purposes of prevention, detection, investigation, prosecution or punishment of an offence related to sovereignty and integrity of India, the security of the State, friendly relations with foreign States, or public order as well as incitement to an offence relating to the above or in relation with rape, sexually explicit material or child sexual abuse material punishable with imprisonment for a term of not less than five years.
  - **Removal of unlawful information:** An Intermediary upon receiving actual knowledge in the form of an order by a court or being notified by the Government or its agencies through authorized officer should not host or publish any information which is prohibited under any law in relation to the interest of the sovereignty and integrity of India, public order, friendly relations with foreign countries etc.

Key guidelines for OTT platforms

- **Self-classification of content:** The OTT platforms shall self-classify the content into five age based categories- U (Universal), U/A 7+, U/A 13+, U/A 16+, and A (Adult).
- **Parental lock:** Platforms would be required to implement parental locks for content classified as U/A 13+ or higher, and reliable age verification mechanisms for content classified as 'A'.
- **Display rating:** The OTTs shall prominently display the classification rating specific to each content or programme together with a content descriptor informing the user about the nature of the content, and advising on viewer description (if applicable) at the beginning of every programme enabling the user to make an informed decision, prior to watching the programme.

Key guidelines for news publishers and digital media

- News publishers will be required to observe Norms of Journalistic Conduct of the Press Council of India and the Programme Code under the Cable Television Networks Regulation Act 1995, to ensure a level playing field between offline (Print, TV) and digital media
- **Grievance Redressal Mechanism:** A three-level grievance redressal mechanism has been established under the rules with different levels of self-regulation i.e **Level-I** (Self-regulation by the publishers); **Level-II** (Self-regulation by the self-regulating bodies of the publishers); and **Level-III** (Oversight mechanism).
- **Self-regulation by the publisher:** The publisher shall appoint a Grievance Redressal Officer based in India who shall be responsible for the redressal of grievances received within 15 days.
- **Self-regulatory body:** There may be one or more self-regulatory bodies of publishers, which shall be headed by a retired judge of the Supreme Court, a High Court or an independent eminent person and have not more than six members; such a body will have to register with the Ministry of Information and Broadcasting and will oversee the adherence by the publisher to the Code of Ethics and address grievances that have not been resolved by the publisher within 15 days.
- **Oversight mechanism:** The Ministry of Information and Broadcasting shall formulate an oversight mechanism and publish a charter for self-regulating bodies, including Codes of Practices, in addition to establish an Inter-Departmental Committee for hearing grievances.

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