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M&A by listed companies: SEBI's grip

By **Shikha Thakkar and Sudish Sharma**

Introduction

Mergers and acquisitions in India are primarily governed by Section 230 to Section 240 of the Companies Act, 2013 ('**Companies Act**') and rules prescribed thereunder. Although the term '*merger*' is not defined under the Companies Act, however, as a concept, merger refers to the transfer of an undertaking, properties and/or liabilities of one or more companies to another company. Before a scheme of merger, demerger, amalgamation or arrangement ('**Scheme**') is effectuated, the transferor and transferee company are required to knock the doors of governmental authorities and obtain various regulatory approvals from the Registrar of Companies, Regional Director, Official Liquidator, Income Tax Department, sectoral regulator, if any, National Company Law Tribunal, etc., depending on the type of entity and the business sector that the transferor and transferee company are engaged in.

In addition to aforementioned regulatory approvals, in case of a Scheme of a listed company, an additional layer of regulatory compliance is required to be complied with by such listed company under the Securities and Exchange Board of India Act, 1992 and the rules and regulations framed thereunder. A Scheme is unarguably a material event for the listed company and for the stakeholders who have deployed their investments in such listed company. In order to protect the interest of such stakeholders, various crucial factors such as enhanced transparency, timely disclosures by the listed company and stringent checks by the committees formulated by the company become important.

In the wake of achieving greater transparency with respect to Schemes, the capital market regulator, Securities Exchange Board of India ('**SEBI**') had earlier issued a circular dated 10 March 2017. However, owing to the market dynamics and to clear certain regulatory cobwebs, SEBI has further issued a circular number SEBI/HO/CFD/DIL1/CIR/P/2020/215 dated 3 November 2020 ('**2020 Circular**') that will be applicable for a Scheme filed with stock exchanges after 17 November 2020.

The key implications of the 2020 Circular are discussed hereunder:

(a) Empowering the audit committee:

Before proceeding with a Scheme, the audit committee of the company is required to assess the viability of such Scheme and red flag concerns, if any, in its report. In line with the stakeholder centric objective of the 2020 Circular, following additional factors have been introduced, which are to be analysed by the audit committee while considering the Scheme:

- Need for the merger/demerger/amalgamation/arrangement;
- Rationale of the Scheme;
- Synergies of business of the entities involved in the Scheme;

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- Impact of the Scheme on the shareholders; and
- Cost benefit analysis of the Scheme.

(b) Insight from the independent directors:

- A recommendation in the form of a report from the committee of independent directors of the listed company will now be required and, while giving such recommendation, the stakeholder interest will be the paramount factor to be considered by such independent directors.
- Although the independent directors may find it challenging to sign off a Scheme, however, from the stakeholder standpoint, the 2020 Circular has established an additional security net to ascertain that a Scheme will not be detrimental to their interests.

(c) Recognising registered valuers:

- Before the introduction of 2020 Circular, the listed entities were required to submit a valuation report received from an Independent Chartered Accountant. However, pursuant to the 2020 Circular, this valuation report is now required to be obtained from a registered valuer.
- In this regard, it be noted that a registered valuer will be a person, registered as a valuer, having such qualifications and experience and being a member of the Registered Valuer Organisation, as specified in Section 247 of the Companies Act read with the applicable rules issued thereunder.

(d) No-objection from the stock exchange:

- Unlike the '*observation letter*' that was previously required to be submitted on the draft Scheme by the Stock Exchanges to SEBI, a new concept of issuing '*no-objection letter*' has now been introduced. Stock Exchanges have to co-ordinate with each other while issuing this letter.
- Upon receipt of this '*no-objection letter*' from stock exchanges, SEBI will issue a '*comment letter*' on the draft Scheme. Hence, unless the draft Scheme is free from qualification(s) from the stock exchange, SEBI will not proceed further. In other words, SEBI shall issue '*comment letter*' upon receipt of the '*no-objection letter*' from the stock exchange.

(e) Listing timeline:

- SEBI has increased the timeline of listing of transferee entity pursuant to the Scheme from 45 to 60 days.
- Thus, the steps for listing of specified securities should be completed and trading in securities should commence within 60 days of receipt of the order of the National Company Law Tribunal, simultaneously on all the stock exchanges where the equity shares of the listed entity (or transfer entity) are/were listed.

(f) Additional disclosures:

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- In line with the objective of 2020 Circular, to protect the interest of stakeholders, SEBI has extended the list of information that is required to be disclosed by the transferee company in the newspaper advertisement such as internal risk factors, regulatory action, if any, disciplinary action taken by SEBI or Stock Exchanges against the promoters in preceding 5 financial years, brief details of outstanding criminal proceedings against the promoters, etc.
- The transferee company will also have to provide details of shareholding of promoter group, group companies, names of 10 largest shareholders and percentage of shares held by such shareholders.
- Additionally, the experience and educational qualification of the promoters is also required to be published in the advertisement.

Conclusion

The 2020 Circular primarily aims at streamlining the process of filing draft Schemes with the stock exchanges and ensuring that the stock exchanges further refer such draft Schemes to SEBI only upon being fully convinced that the listed entity is in compliance with the provisions of SEBI Act, 1992, rules, regulations and circulars issued thereunder.

While the 2020 Circular will, undoubtedly, ensure higher levels of transparency and disclosures with respect to the proposed Scheme, a responsibility has now been imposed on audit and independent directors' committees of the listed company to assess the rationale and implications of the proposed Scheme and give their recommendation on the same.

[The authors are Associate and Executive Partner respectively in the Corporate and M&A practice at Lakshmikumaran & Sridharan Attorneys, Gurugram]

Writ jurisdiction over orders of Arbitral Tribunal: *Certa lege* but still agitated

By **Akshita Bohra and Aniruddha AS**

In a recent decision in *GTPL Hathway Limited* v. *Strategic Marketing Private Limited*[1], the Gujarat High Court dismissed a writ petition challenging an interim order passed by an arbitrator. The interim order had rejected preliminary objections as to the jurisdiction of the arbitrator. The decision itself does not set out new precedent. However, the copious references therein to existing case law, including the Supreme Court decision in *SBP and Co.* v. *Patel Engineering Limited*[2], presents a helpful reiteration of settled legal principles.

[1] Special Civil Application No. 4524 / 2019, decided on 20 April 2020.

[2] (2005) 8 SCC 618.

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Factual background in GTPL Hathway

There existed an agreement between the parties whereunder the Respondent provided customer call services to the Petitioner. The Petitioner made payments for these services against the invoices raised by the Respondent. Subsequently, disputes arose when the Petitioner alleged that the Respondent had manipulated the relevant software program to show exaggerated deliverables and thereby raised inflated invoices. Accordingly, the Petitioner stopped further payment against invoices and filed a criminal complaint against the Respondent alleging fraud.

Separately, the Respondent invoked arbitration. An arbitrator came to be appointed in proceedings under Section 11 of the Arbitration and Conciliation Act, 1996 ('**Act**') instituted by the Respondent. Before the arbitrator, the Petitioner raised preliminary objection to the jurisdiction of the arbitrator contending that the dispute was not arbitrable, as it involved allegations of fraud. The arbitrator dismissed these preliminary objections. Being aggrieved, the Petitioner approached the Gujarat High Court in writ proceedings under Articles 226 and 227 of the Constitution of India.

Analysis by the High Court

The singular question before the High Court was whether an order of the arbitral tribunal could be challenged in writ proceedings under Articles 226 and 227 of the Constitution of India. To answer this, the court first examined the provisions of Sections 2(e), 5, 11, 16, 34 and 37 of the Act dealing with the definitions of 'court', extent of judicial intervention, appointment of arbitrators, competence of arbitral tribunal to determine its jurisdiction, setting aside of arbitral award and appealable orders of arbitrators, respectively. The court noted that these provisions when read together provided a self-contained code under the Act which is an alternative to the regular procedure before the ordinary civil courts under the Code of Civil Procedure, 1908.

After setting out the statutory framework, the court extensively referred to plethora of decisions by various High Courts wherein it was held that the orders of arbitral tribunals could not be challenged in writ proceedings before the High Court. Many of these decisions, in holding so, had in turn followed *SBP and Co*. The High Court held that the Act, especially Section 5 thereof, had been enacted so as to minimize judicial interference in arbitral proceedings.

If an award has been passed by the arbitral tribunal, either final or interim the remedy to appeal against the same lies under section 34 of the Act. The proceedings for setting aside an arbitral award lie before the principal civil court of original jurisdiction and include the High Courts in exercise of their ordinary original civil jurisdiction.

However, wherever the legislature intended to provide a remedy against an *order* of the arbitral tribunal, passed during prior to passing of a final award, the same was expressly provided in Section 37 of the Act. The court noted that Section 37 provided a remedy of appeal, before the same forum as mentioned above, only when the plea of lack of jurisdiction was accepted by the arbitral tribunal. When the plea was rejected (as in the present case), such a finding/contention could only be agitated while filing an application seeking setting aside of the arbitral award as expressly provided in Section 34. In other cases, the aggrieved party has no option but to wait for the arbitral award to be passed before challenging such an order/finding in proceedings under Section 34 of the Act.

Therefore, the aggrieved party (the Petitioner herein) could only challenge such finding/ order after the award had been passed, not before.

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In this context, the High Court in *GTPL Hathway*, by way of reference to the decisions it cited, held that though Articles 226 and 227 were extraordinary powers conferred by the Constitution, the same ought to be exercised with extreme caution when a statute provided an alternative efficacious remedy, especially a statute which sought to limit judicial interference and was intended to be a self-contained code for arbitral proceedings. The High Court held that were it to hold otherwise, the legislative object of the Act would be defeated, as parties would be at liberty to challenge any and every order of the arbitral tribunal in writ proceedings. Doing so would disregard express statutory provisions of the Act that provided an alternate remedy.

Conclusion

In the light of its reasoning above, the High Court finally held that the order of the arbitral tribunal could not be challenged in writ proceedings under Articles 226 and 227 of the Constitution of India. Accordingly, the writ petition was dismissed. It is interesting to note that though the question of maintainability of writ proceedings against an order of the arbitral tribunal has been settled in a long line of decisions starting from *SBP and Co.* and by other High Courts, the same question continues to re-surface in recent decisions. The decision of the Karnataka High Court in *Tejavathamma* v. *M. Nataraj and others*[3] is another such instance. Here, the arbitral tribunal had dismissed an application seeking impounding of certain documents for payment of deficit stamp duty. Dismissing the writ petition, the Karnataka High Court held that no writ was maintainable against such orders of the arbitral tribunal. In holding so, it relied on the same reasoning as adopted by the Supreme Court in *SBP and Co.* and by the Gujarat High Court in *GTPL Hathway*.

The above discussion reveals the fact that even on a clear and well-settled point of law regarding writ jurisdiction over orders of arbitral tribunals, disputes continue to come before the courts requiring a re-iteration of the law. Such re-iteration of the law as in the present case, indirectly affects the cherished goal of 'minimal judicial interference' as contemplated by Section 5 of the Act. This is because even though these writ petitions may be eventually dismissed, the writ proceedings themselves represent time and opportunity costs that the parties to the arbitration will have to bear.

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Notifications and Circulars

Self-Regulatory Organisation for Payment Systems Operations – RBI notifies framework for recognition: The Reserve Bank of India ('**RBI**'), *vide* Notification No. RBI/2020/-21/58, dated 22 October 2020 issued a directive in the form of a framework for recognition of a 'self-regulatory organisation' ('**SRO**') for payment systems operations under Section 10(2) of the Payment and Settlements Systems Act, 2007.

[3] 2020 (5) Kar. L.J. 666, decided on 19 June 2020.

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The characteristics of an SRO, as per the said framework are as under:

(i) Authority derived from membership agreements;

(ii) Objective and well-defined processes in place to make rules and enforce them among members;

(iii) Standardized procedures in place;

(iv) Effective means of oversight over its members in place and ensuring that they adhere to the rules and regulations of the industry as also mutually accepted ethical and professional standards of behaviour; and

(v) Developed surveillance methods in place for effective monitoring.

The Framework further provides following things that are required for an organisation to be eligible to be recognised as SRO by RBI:

(i) Organisation be set-up as a not-for-profit company under the Companies Act, 2013;

(ii) Only regulated payment system entities, *viz.*, banks and non-bank PSOs can be members of an SRO;

(iii) Organisation should be professionally managed with clear bye-laws;

(iv) The memorandum / by-laws of the SRO should specify the criteria for admission of members and the functions it will discharge;

(v) RBI may, if it deems necessary, require that the appointment of important positions in the Board of Directors of the SRO be subject to its prior approval; and

(vi) The SRO should be financially viable to carry on the activities handled or assigned to it.

The Framework also extensively lays down the functions and responsibilities of a recognised SRO.

SEBI (Issue and Listing of Debt Securities) Regulations – Salient features of recent amendment: Securities and Exchange Board of India has amended the SEBI (Issue and Listing of Debt Securities) Regulations, 2008 *vide* Notification No. SEBI/LAD-NRO/GN/2020/35, dated 8 October 2020. Some salient features of the amendment are as follows:

(i) The definition of private placement in Regulation 2(h) has been amended to mean an offer or invitation to subscribe or issue of securities to a select group of persons by a company (other than by way of public offer) through private placement offer-cum-application, which satisfies the conditions specified in Section 42 of the Companies Act, 2013.

(ii) Under Regulation 18(2), the notice period to be given to debt security holders for proposed roll-over of debt securities by the issuer has been decreased to fifteen days.

(iii) New Regulation 21B has been inserted under which the issuer will give an undertaking in the Information Memorandum that the assets on which charge is created are free from encumbrances and where the assets have already been charged to secure a debt, consent from the earlier creditor has been obtained to create second charge on the assets.

Asset cover option to listed entities – SEBI (Listing Obligations and Disclosure Requirements) Regulations amended: SEBI has amended the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 *vide* Notification No. SEBI/LAD-NRO/GN/2020/33, dated 8 October 2020. Listed entities have been provided the option to either maintain hundred per cent asset cover or asset cover as per the terms of the offer document/ Information Memorandum/ Debenture Trust Deed, which is

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sufficient to discharge the principal amount for the non-convertible debt securities issued at all times.

Limited purpose clearing corporation – Securities Contracts (Regulations) (Stock Exchanges and Clearing Corporations) Regulations amended: SEBI has amended the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018 *vide* Notification No. SEBI/LAD-NRO/GN/2020/32, dated 8 October 2020. Some salient features of the amendment, relating to limited purpose clearing corporations are discussed below.

(i) The definition of clearing corporation under Regulation 2(d) has been amended to mean an entity that is established to undertake the activity of clearing and settlement of trades in securities or other instruments that are traded on a recognized stock exchange and includes a clearing house and a limited purpose clearing corporation.

(ii) Regulation 2(ja) has been inserted to define a limited purpose clearing corporation as an entity established to undertake the activity of clearing and settlement of repo transactions.

(iii) Chapter IV-A has been inserted to apply only to limited purpose clearing corporations. It has regulations for the shareholding and composition of the governing board of a recognized limited purpose clearing corporation, amongst other regulations.

Duties of debenture trustees – SEBI (Debenture Trustees) Regulations amended: SEBI has amended the SEBI (Debenture Trustees) Regulations, 1993 *vide* Notification No. SEBI/LAD-NRO/GN/2020/34, dated 8 October 2020. Some salient features of the amendment made under Regulation 15 are:

(i) Regulation 15(1)(h) relating to duties of debenture trustees, previously read as '*ensure the implementation of the conditions regarding creation of security for the debentures, if any, and debenture redemption reserve*'. Clause (h) has now been substituted to read as '*ensure the implementation of the conditions regarding creation of security for the debentures, if any, debenture redemption reserve and recovery expense fund*'.

(ii) Sub-regulation (6) has been inserted under which the debenture trustee must exercise due diligence before creating a charge on the security for debentures to ensure that the security is free from encumbrances, or the debenture trustee must obtain necessary consent from other charge-holders if the security has an existing charge.

(iii) Sub-regulation (7) has been inserted under which the debenture trustee, on behalf of the debenture holders, may enter into inter-creditor agreements as per the framework provided by the RBI.

Rights issue of units by unlisted Infrastructure Investment Trust – Guidelines issued: SEBI *vide* Circular dated 4 November 2020 has provided for a mechanism for raising of funds by unlisted Infrastructure Investment Trust **('InvIT')** through rights issue of units. Chapter VIA of the SEBI (Infrastructure Investment Trusts) Regulations, 2014 ('**InvIT Regulations**') provides the framework for private placement of units by InvITs which are not eligible to be listed. In order to enable unlisted InvITs to raise further funds, the said guidelines have been issued. Some key highlights of the guidelines are as under:

(i) Rights maybe issued after a resolution of the board of director of the investment manager

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approving the rights issue of units and determining the record date.

(ii) Underwriters may be appointed as per the SEBI (Underwriters) Regulation, 2013.

(iii) The investment manager, on behalf of the InvIT shall:

- file a letter of offer with the Board at least 5 days prior to opening of the issue;
- prepare application form for the issue and make arrangement for its distribution; and
- determine issue price.

(iv) The rights issue shall open within three months from the record date and be kept open for at least three working days but not more than fifteen working days.

(v) The minimum allotment to any investor shall be INR 1 crore.

Ratio Decidendi

Terms of power purchase agreement cannot derogate from objective and intent of IBC

The National Company Law Appellate Tribunal ('**NCLAT**') has upheld that the terms and conditions of a Power Purchase Agreement ('**PPA**') cannot be allowed to derogate from the objective of the Insolvency and Bankruptcy Code, 2016 which is to maximise the value of assets of any corporate debtor and resolve insolvency. Further, a power project, if considered viable and ensuring long term income, has to be kept running akin to a 'going concern' and must be treated as an 'integrated economic asset' that cannot be liquidated, for the purpose of the liquidation proceedings under the Code.

Brief facts:

Corporate Debtor had availed a loan from Respondent No. 1 wherein loan agreement allowed for creating an exclusive charge by way of (i) hypothecation of movable fixed assets and current assets, including receivables (present and future), pertaining to a 5 MW solar photovoltaic power generating plant situated in Gujarat ('**Bhadrada Project**') and (ii) mortgage of land and immovable assets (present and future) pertaining to Bhadrada Project.

Thereafter, based on an application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('**IBC**'/ '**Code**') by IDBI Bank Limited against the Corporate Debtor, the Adjudicating Authority had initiated Corporate Insolvency Resolution Process ('**CIRP**'). Subsequently, liquidation proceedings were commenced and Liquidator ('**Respondent No. 2**') was appointed. Pursuant to the Liquidation order, Respondent No.1 informed the Liquidator for realisation of its secured assets under Section 52(1)(b) and Section 52(2) of the IBC, after which Respondent No. 1 also initiated the relevant proceedings under the Securitization and Reconstruction of Financial Assets and Security Interest Act, 2002 and took possession of the said secured asset.

It is the understanding of Respondent No. 1 that the solar power plant, which is its secured asset

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in the liquidation proceedings, has been functioning and supplying power to Gujarat Urja Vikas Nigam Ltd. ('**GUNVL**'/ '**Appellant**') in accordance with the PPA entered into between the Corporate Debtor and the Appellant, until recently. Due to the commencement of liquidation proceedings constituting a 'default' under the PPA, GUVNL had issued a default notice to the Corporate Debtor and thereafter, terminated the PPA, despite protest by Respondent No. 1. Aggrieved by the same, an interlocutory application was preferred by Respondent No. 1 before the Adjudicating Authority praying for restoring the PPA and to continue power supply by the Corporate Debtor to the Appellant, which was opposed by the Appellant stating lack of jurisdiction of NCLT in adjudicating upon their private contractual disputes, for which the relevant authority is the Gujarat Electricity Regulatory Commission ('**GERC**'). However, the said IA was allowed by NCLT. This led to the present appeal before the NCLAT.

Submissions by Appellant:

a) In terms of the PPA, if the Corporate Debtor, being the power producer, becomes subject to any bankruptcy proceedings or liquidation, the same is to be considered a 'default' under the PPA giving the Appellant the right to terminate the said agreement. Therefore, all procedures laid down under the PPA have been followed.

b) The Liquidator is only liquidating the assets of the corporate debtor and is not taking action to continue the business of the corporate debtor and that the objective of maximisation of value of the assets of the corporate debtor does not imply that contracts entered into by the corporate debtor be necessarily continued.

c) Respondent No.1 is exercising right over the Bhadrada Project, by way of Section 52 of IBC and not under the PPA and therefore, it cannot proceed against the decision taken by the Appellant under the PPA, before the Adjudicating Authority. It can only seek for relief under Section 52(9) of the Code, which deals with inadequacy of secured assets to satisfy debt of secured creditor.

d) Under clauses 6.6 and 10.4 of the PPA, the GERC is the appropriate forum to adjudicate all issues under the PPA and the jurisdiction under IBC is limited to matters specified and covered under Section 14 of the IBC.

e) Since the solar power project is not a going concern it is not necessary to look at the power plant in conjunction with the PPA as one integrated asset and the judgment in *Astonfield Solar (Gujarat) Private Ltd v. Gujarat Urja Vikas Nigam Limited* cannot be applied to the facts of the present case.

Submissions by Respondent No.1:

a) The secured asset i.e., the Bhadrada Project's power generating plant is an independent, viable power generating asset and if PPA is allowed to be terminated, it will be an obstacle for the secured creditors in exercising their rights under Section 52(1)(b) of the IBC. Further, it is continuing to generate power and will be a viable asset, if the existence of PPA is ensured, which will help in maximizing the value of the asset which is a basic requirement in insolvency proceedings.

b) Clause 12.9 of the PPA mentions that in the event of any default by the power producer under financing document, the financing party can cause the power producer to assign to a third party the interests, rights and obligations of the power producer thereafter arising under this agreement. Therefore, interest rights and obligations of the power producers arising under the

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agreement shall, therefore, be tied with the Project, which is the plant generating solar power**.**

c) Section 14.1(b) of the IBC prohibits transferring, encumbering, alienating or disposing off by the corporate debtor of any of its assets or any legal right and beneficial interest therein. The action of terminating the PPA will have a direct bearing on the assets and their value of the Corporate Debtor.

d) There is no breach of contract on the part of Corporate Debtor in supply of solar power. In this case, the power producer i.e. Corporate Debtor (represented by the liquidator during liquidation proceedings) is in a position to sell solar power to GUVNL and therefore, it is undertaking to fulfil its obligations as enumerated in clause 4.1(iii) of the PPA.

Decision:

a) The NCLAT held that the PPA entered into between the power producer and the purchaser of power provides a long-term and steady stream of revenue accrual from the power project which forms the basis for repayment of any credit sourced by the power producer and provides necessary comfort to the financial creditor to give such credit. This is the economics behind such projects and this economic value of the project of the corporate debtor, the IBC seeks to maximize during the resolution process.

b) The solar power project, which generates and supplies solar power turns into an economic entity with the help of an instrument such as PPA, thereby converting the physical entity i.e. solar power plant into an economically useful entity for production of solar power. The physical entity of the power plant becomes an economic project when a financial creditor provides capital after deriving comfort and assurance from the steady flow of revenue by sale of solar power. The proposition that the solar power plant and the PPA related to the plant form one integrated economic asset, is rational. Therefore, this asset needs to be kept intact and preserved during the process of corporate resolution and liquidation so that the liabilities of creditors and other stakeholders can be taken care of.

c) The NCLAT also examined the order of NCLT, Delhi in *Astonfield Solar (Gujarat) Private Ltd* v. *Gujarat Urja Vikas Nigam Limited,* MANU/NC/5731/2019 which Respondent No. 1 relied upon wherein the Adjudicating Authority has concluded that a PPA is an 'instrument' for the purpose of Section 238 of IBC and consequently, any terms of the PPA in direct contravention of the IBC could not be enforced. Thus, the clauses of the PPA cannot be kept at a higher pedestal in comparison to the statutory provisions of IBC 2016, in context of drawing a timeline for completion of the CIRP. The steady and assured revenue stream resulting from the existence of the PPA is the *sine qua non* for the long-term economic and financial viability of the solar power project since it provides comfort and security to the financial creditors who feel encouraged to provide credit for the project. Thus, the appeal was dismissed.

[*Gujarat Urja Vikas Nigam Limited (GUVNL)* v. *Yes Bank Limited & Anr.* – Judgment dated 20 October 2020 in Company Appeal No. 601 of 2020, NCLAT]

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Application for appointment of arbitrator can only be entertained by High Court having territorial jurisdiction over place of arbitration as per arbitration agreement

The Orissa High Court has reiterated that where the parties have agreed upon a '*place'* of arbitration in the arbitration clause of the agreement in the dispute, the jurisdiction to determine an application for appointment of arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 ('**Act**') will fall upon the High Court under whose territorial jurisdiction the place of arbitration falls under.

Brief facts:

Petitioner entered into a dealership agreement with the Opposite Party for heavy construction equipment, in the State of Orissa, for a period of one year. After disputes on payment of dues, the Petitioner invoked the arbitration clause of the agreement and requested the Opposite Party to appoint an arbitrator. When the Opposite Party failed to appoint an arbitrator within a period of 30 days, the Petitioner filed the present petition under Section 11(6) of the Act in the Orissa High Court requesting the Court to appoint an arbitrator. It is relevant to note that the arbitration clause contained in the dealership agreement stated Pune, Maharashtra as the place of arbitration.

Submissions by the Petitioner:

a) Even when the parties agreed as per the arbitration clause of the agreement that the place of arbitration will be at Pune, the jurisdiction of the Orissa High Court would not be excluded as the cause of action had partly arisen in the territory of the State of Odisha.

b) Under Section 20(1) of the Act, parties are free to choose the place of arbitration and the word 'place' here is used in the sense of the word 'venue'. The place of arbitration as agreed upon by the parties being Pune, merely denotes the venue of arbitration proceedings, which can take place anywhere.

c) The agreement provides that all disputes arising out of the agreement would be subject to the jurisdiction of the Courts having territorial jurisdiction. Further, the agreement indicates that for the purpose of the agreement, the geographical areas of territory would be the entire State of Odisha.

Submissions by the Other Party:

a) The Other Party has already appointed Hon'ble Justice (Retd.) S.R. Sathe of the Bombay High Court who is residing at Pune as the sole arbitrator. The present application by the Petitioner for appointment of arbitrator should be dismissed as infructuous.

b) As per Section 20 of the Act, parties have been given the freedom to decide the place of arbitration. Where the parties in the agreement have chosen a particular place as the place of arbitration, only the High Court having territorial jurisdiction over that place would be competent to entertain applications under Section 11 for appointment of arbitrator.

Decision:

a) The High Court relied on various decisions by the Supreme Court including *Bharat Aluminium Company (BALCO)* v. *Kaiser Aluminium Technical Services Inc.,* [(2012) 9 SCC 552] and *Indus Mobile Distribution Pvt Ltd* v. *Datawind Innovations Pvt. Ltd.,* [(2017) 7 SCC 678] which noted that, under the laws of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in Courts, a reference to 'seat' is a concept by

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which a neutral venue can be chosen by the parties to an arbitration clause.

b) The Supreme Court decision in the case of *Brahmani River Pellets Limited* v. *Kamachi Industries Ltd.,* [(2002) 5 SCC 462] was relied. The Apex Court had rejected the contention that the mere expression that 'venue of arbitration shall be Bhubaneswar' would not confer exclusive jurisdiction upon the Orissa High Court. The Supreme Court had held that when the parties agreed to have Bhubaneswar as the venue of arbitration, the intention of the parties was to exclude all other Courts.

[*SJ Biz Solution Pvt. Ltd* v. *Sany Heavy Industry India Pvt. Ltd.* – Judgement dated 1 October 2020 in ARBP No. 56 of 2018, High Court of Orissa]

Debt payable under a 'leave and license agreement' for commercial property is an operational debt

The NCLAT, hearing an appeal from NCLT's order, has held that any dues arising from the terms of a Leave and Licence Agreement for use and occupation of an immovable property, which is for commercial purpose, will be an 'Operational Debt.' It was also held that if an operational debt exists and there is no pre-existing dispute with respect to the same, then such dues and claims shall be payable by the debtor to the creditor in case of such commercial property.

Brief Facts:

The Operational Creditor/ Petitioner, in the instant case, and the Corporate Debtor/ Respondent, had entered into a Leave and Licence Agreement for the usage of cold storage facilities for a period of three years ('**Agreement**'). Subsequently, the Debtor defaulted in his payments and further failed to comply with the payment of interest on delayed payments, even after repeated intimation by the Creditor.

Submissions by the appellant:

a) The debt under the given leave and license agreement is not an 'operational debt' and hence not immediately payable to the respondent as held in *M. Ravindranath Reddy* v. *G Kishan,* [Company Appeal (AT) (Ins) No. 331 of 2019].

b) The service debt as is being claimed by the creditor had commenced only after the termination of the existing leave and license agreement and hence the dues are not payable due to absence of any contractual liability.

c) There was a pre-existing dispute when the creditor asked for the dues, or addressed the demand notice under Section 8 of the Code/ filed the Petition, and the law does not allow to admit the Petition when they are pre-existing disputes.

Submissions by respondent:

a) The debt in case is an operational debt as held in *Sarla Tantia* v. *Nadia Healthcare Pvt. Ltd.,* [Company Appeal (AT) (Ins) No. 513 of 2018] and also *in Jindal Steel and Power Pvt. Ltd.* v. *DCM International Ltd.,* [Company Appeal (AT) (Ins) 288 of 2017]. In the said judgments, it was held by the NCLAT that a consideration by way of rent, leave and licence, while letting out premises would fall within the ambit of Section 5(21) of the Code and hence will be an 'operational debt.'

b) There is no valid evidence presented by the appellant for any pre-existing dispute at the time the creditor asked for the outstanding dues.

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Decision:

a) With respect to whether a debt was an 'operational debt', the NCLAT laid down the following criteria that needs to be met:

   (i) Claim in respect of provisions for goods and services.;

   (ii) Employment or debt in respect of dues; and

   (iii) Such repayment of dues which should arise under any law in force at that time.

b) The Tribunal referred to the definitions of- 'claim', 'default', 'debt', 'operational debt', 'operational creditor', etc., as given in the IBC and ruled that the debt in the case is actually an operational debt as given in Section 5(21) of IBC.

c) Relying on Supreme Court decision in the *Mobilox* [(2018) 1 SCC 353], the Tribunal held that the subject lease rentals arising out of use and occupation of a cold storage unit which was for commercial purpose was an 'Operational Debt' as envisaged under Section 5(21) of the Code.

[*Anup Sushil Dubey* v. *National Agriculture Co-operative Marketing Federation of India Ltd.* – Order dated 7 October 2020 in Company Appeal (AT) (Insolvency) No. 229 of 2020, NCLAT]

Registration with ROC mandatory to claim as secured creditor under Section 52 of IBC, even if vehicle hypothecation registered under the Motor Vehicles Act

The NCLAT has held that that when the 'Charge' is not registered as per the provisions of Section 77(1) of the Companies Act 2013 and as envisaged under the Insolvency and Bankruptcy Code, 2016 , the Creditor cannot be treated as a 'Secured Creditor'.

Brief facts:

The Appellant, being the Financial Creditor, and the Corporate Debtor executed a Loan and Hypothecation Agreement for purchase of motor vehicle. The subject property i.e. the car had been hypothecated by the Corporate Debtor and entry of the agreement had been made in the Certificate of Registration with the Regional Transport Office ('**RTO**') as per Section 51 of the Motor Vehicles Act, 1988 ('**MV Act**'). On default of payment by the debtor Corporate Insolvency Resolution Process was initiated and thereafter the Applicant filed its claim for the consideration of the Liquidator.

It was the Appellant's case that there was no requirement of registration of 'charge' with the ROC and that the Liquidator, without examining the certificate issued by the Registration Authority under the MV Act, had dismissed the claim made by the Applicant. However, the NCLT dismissed the application filed by the Appellant. Aggrieved by the same, the present appeal has been preferred before NCLAT.

Submissions by the Appellant:

a) Adjudicating Authority failed to take into consideration that the 'charge' of the Appellant was duly registered by way of hypothecation under Registration Certificate with the RTO in terms of Section 51 of the MV Act and that hypothecation is a method of creation of security of movable property.

b) Section 77(1), 77(2) of the Companies Act, 2013 require that 'charge' is to be registered, but nowhere categorises on what items the 'charge' is to be registered by a company or a financial institution. Section 77(3) states that unless 'charge' is registered, the claim would not be considered and read with Section 77(4) and Section 79, it is made clear that non-registration of 'charge' does

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not impact the original contract and 'security' so created.

c) The Adjudicating Authority failed to adopt a harmonious construction of the MV Act and the IB Code.

Submissions by the Respondent:

a) Respondent relied on the judgment of the Supreme Court in *Kerala State Financial Enterprises Ltd.* v. *Official Liquidator, High Court of Kerala,* [(2006) 10 SCC 709] in which the Apex Court, confirming the Order of the High Court of Kerala, observed that ordinarily a 'charge' should be registered in terms of Section 125 of the Companies Act, 1956 and if the charges are not registered the same would be void against the Liquidator or Creditors.

Decision:

a) The Tribunal noted that it was the Appellant's case that 'charge' registered under Section 51 of the MV Act, was duly recognised under Section 125 of the Companies Act, 1956. However, the distinction became irrelevant considering Section 77 of the Companies Act, 2013. Section 77 of the Companies Act, 2013 which came into force on 1 April 2014, changed the wordings and the company creating 'charge' on its property or assets 'tangible or otherwise', is required to register the same.

b) Material on record did not show evidence that on failure of the Corporate Debtor under Section 77, Appellant had exercised their choice of registering the 'charge' under Section 78.

c) Words of the statute are precise and unambiguous and not in conflict with any other provisions of the Code or any other Act.

d) No 'charge' was registered under the provisions of Section 77(1) of the Companies Act 2013, in relation to the subject property. This makes him an unsecured creditor and not a secured one. Hence, NCLAT held that the Liquidator was correct in his interpretation. The appeal was dismissed.

[*Volkswagen Finance Private Limited* v. *Shree Balaji Printopack Pvt. Ltd.*– Judgment dated 19 October 2020 in Company Appeal (AT) (Insolvency) No. 02 of 2020, NCLAT]

News Nuggets

Unconditional stay of arbitral awards and accreditation of arbitrators – Ordinance promulgated to amend Arbitration and Conciliation Act

The President of India has on 4 November 2020 promulgated Arbitration and Conciliation (Amendment) Ordinance, 2020 to amend the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**'). The parties in the dispute will now get an opportunity to seek an unconditional stay of enforcement of arbitral awards where the arbitration agreement or

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contract or the making of the award is induced or effected by fraud or corruption. As per the second proviso inserted with effect from 23 October 2015 by the Ordinance in Section 36, the Court, if satisfied that a *prima facie* case has been made out, shall stay the award unconditionally pending disposal of the challenge under Section 34 to the award. It may be noted that a *prima facie* case that the arbitration agreement or contract, which is the basis of the award or the making of the award, was induced or effected by fraud or corruption, must be made out for this purpose. An Explanation has also been inserted to clarify that the said proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015. Further, Section 43J has been substituted to state that the qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations. Consequentially, the Eighth Schedule of the Arbitration Act, relating to qualifications and experience of Arbitrator, has been omitted.

Consolidated FDI Policy 2020 issued

On 29 October 2020, the Department for Promotion of Industry and Internal Trade (DPIIT) has issued the Consolidated FDI Policy, 2020 effective from 15 October 2020. The said policy has consolidated all the restrictions and changes that had been notified in the past three years, including the increased restrictions that were introduced earlier this year, owing to the pandemic. These include respective press notes issued by the DPIIT and RBI regulations over the last three years.

COVID-19 – MCA relaxes residency requirements of 182 days in a year

The Ministry of Corporate Affairs, in continuation of its various COVID-19 related circulars, has provided a relaxation with respect to the residency requirement as prescribed under Section 149 of the Companies Act, 2013. According to a Circular dated 20 October 2020, non-compliance of minimum residency in India for a period of at least 182 days in a year, by at least one director in every company, under Section 149 of the Companies Act, 2013, shall not be treated as non-compliance for the Financial Year 2020-2021.

FDI Policy for uploading/streaming of news and current affairs through digital media clarified

The DPIIT, in the Ministry of Commerce and Industry has on 16 October 2020, issued a clarification to Press Note 4 of 2019 on FDI in the digital media sector which allowed up to 26 per cent FDI under the Government approval route, in entities engaged in the uploading and streaming of news and current affairs through digital media platforms. According to the latest clarification, 26 per cent FDI though Government route would apply to the following types of entities registered or located in India:

- Digital media entities streaming or uploading news and current affairs on websites, apps or other platforms;
- News agencies which gather, write, distribute or transmit news, either directly or indirectly, to digital media entities or news aggregators; and
- News aggregators, who use software or web applications, which aggregate news content from various sources such as blogs, podcasts, news websites, etc., in one location.

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IBC Notification dated 24 March 2020, increasing minimum threshold of 'default', is effective prospectively

The NCLAT has upheld the order of the NCLT, Kolkata Bench as per which the Notification dated 24 March 2020 of the Central Government, enhancing the minimum amount of default limit, under Section 4 of the IBC, 2016, from one lakh to one crore for initiating CIRP was held to have a prospective effect from the date of the said notification. It was held that the said threshold was not applicable to the applications already filed and pending admission on the date of the Notification. The NCLAT, in *Madhusudan Tantia* v. *Amit Choraria* held that just because a 'Notification' substitutes something in an earlier notification, the substitution cannot have an automatic retrospective operation. Noting that the date of default was much prior to 24 March 2020, the demand notice was issued prior to that date (which amounts were not disputed till date), and the arguments were also completed prior to 24 March 2020, it held that since all procedures were complied with, as per the provisions of the IBC, 2016, the power of the Central Government to fix the threshold will not deprive / deny the right which had already accrued to the concerned stakeholders, at the time of petition before the adjudicating authority.

International commercial arbitration – Application of Arbitration Section 9 to be expressly excluded to exclude jurisdiction of Indian Courts

The Delhi High Court has held that the clause in an arbitration agreement stipulating that 'the parties shall submit to the exclusive jurisdiction of the courts of Singapore', does not constitutes 'agreement to the contrary', within the meaning of the proviso to Section 2(2) of the Arbitration and Conciliation Act, 1996. According to the proviso, Section 9 of the 1996 Act would also apply to international commercial arbitration, where the place of arbitration is outside India, unless there is an agreement to the contrary. The Court in the case *Big Charter Pvt. Ltd. v. Ezen Aviation Pty Ltd. and Ors.* [Judgement dated 23 October 2020] was of the view that as the proviso makes Section 9 applicable even in the case of foreign seated arbitrations, any 'agreement to the contrary' would, have to expressly stipulate that Section 9 would not apply in that particular case. It held that absent such a specific stipulation, the beneficial dispensation, contained in the proviso, cannot stand excluded.

the substitution cannot have an automatic retrospective operation. Noting that the date of default was much prior to 24 March 2020, the demand notice was issued prior to that date (which amounts were not disputed till date), and the arguments were also completed prior to 24 March 2020, it held that since all procedures were complied with, as per the provisions of the IBC, 2016, the power of the Central Government to fix the threshold will not deprive / deny the right which had already accrued to the concerned stakeholders, at the time of petition before the adjudicating authority.

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